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# 1 ARTICLE 6

## 1.1 Text of Article 6

***Article 6***

*Establishment of Panels*

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

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

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

## 1.2 Article 6.1

### 1.2.1 Multiple panels

#### 1.2.1.1 Two panels established, same parties and same claims

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 In the later request for the establishment of a panel, the United States asked that its earlier request be withdrawn.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

> "The establishment of a panel is the task of the DSB. It is by no means clear that, once the DSB has established a panel, as it did in this case at its meeting of 22 June 1998, the panel so established has the authority to rule on the propriety of its own establishment. Nothing in our terms of reference expressly authorizes us to consider whether the DSB acted correctly in establishing this Panel.
>
> …
>
> In our view, Australia is asking this Panel to read into the DSU an implicit prohibition on multiple panels between the same parties regarding the same matter that does not exist in the text of the DSU. Australia's arguments in support of its position arise out of policy considerations and address the object and purpose of the DSU. In light of the fundamental importance in the WTO dispute settlement system of the right to have a panel established to examine a matter, in the absence of a consensus not to do so, we do not consider it appropriate in this dispute to read such an implicit prohibition into the DSU. This is particularly true given that the policy concerns expressed by Australia are purely theoretical and do not arise in this case. Specifically, this is not a case where a complainant is actively pursuing two proceedings with respect to the same matter -- the United States has made it very clear that it is not pursuing the first dispute. To the contrary, the United States has sought to terminate the first dispute, and it is Australia which has sought to prevent that result. Nor is this a case where a complainant has sought a second panel before a first panel has completed its work with respect to the same matter because it was dissatisfied with developments in the first panel. Although the first panel in this case was established, it was never composed and thus never began its work.
>
> For the foregoing reasons, we deny Australia's request to terminate this Panel, and will continue our work in accordance with our terms of reference."[1]

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

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

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

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

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

### 1.2.2 Relationship with other provisions of the DSU

#### 1.2.2.1 Article 12.12

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

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

#### 1.2.2.2 Article 22.6

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

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

## 1.3 Article 6.2

### 1.3.1 General

#### 1.3.1.1 Duty of panel to examine request for establishment

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

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

---

[3] Panel Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 7.1-7.2.
[4] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.226.
[5] Decision of the Arbitrators, *US – COOL (Article 22.6 – United States)*, para. 2.14.
[6] Appellate Body Report, *EC – Bananas III,* para. 142.

> "Interpreting the term 'measure at issue' in Article 6.2 of the DSU in the light of the substance of the specific WTO obligation that is allegedly being violated would generate uncertainty and complexity in WTO dispute settlement proceedings. When drafting a request for the establishment of a panel, the complainant would have to foresee the possible restrictions that the substance of the legal provisions might impose on the type of measure that could be challenged. The identification of the measures at issue in the panel request might prove to be even more complex where the challenge concerns a plurality of provisions of the covered agreements. Moreover, the existence, nature, and scope of possible restrictions would depend on the panel's interpretation of the substance of those legal provisions. The respondent might also be placed in an uncertain situation in presenting its defence because it would have to guess what the panel would identify as the measure at issue on the basis of the panel's interpretation of the substance of the alleged violation. This could lead to unnecessary litigation on a panel's terms of reference, as the responding party may choose to contend at a preliminary stage that, in the light of the substance of the legal provision on which a specific claim is based, the measure identified in the panel request does not fall within the panel's terms of reference."[7]

#### 1.3.1.2 The distinct elements of Article 6.2

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

> "The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."[8]

8. In *US – Carbon Steel,* the Appellate Body summarized its previous jurisprudence on the requirements of Article 6.2. The Appellate Body noted the importance of the two distinct requirements, namely, identification of the specific measures at issue, and the provision of a brief summary of the claims. Referring to *Guatemala – Cement I*, it concluded that both requirements "together, they comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU":

> "There are, therefore, two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.
>
> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.'
>
> *As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel.* Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the

[7] Appellate Body Report, *EC – Selected Customs Matters*, para. 136.
[8] Appellate Body Report, *Korea – Dairy*, para. 120. See also Panel Report, *China – Intellectual Property Rights,* para. 7.4

> complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[9]

9. In *China – Publications and Audiovisual Products,* the Panel examined what is required of a party to satisfy the obligations to (i) identify the specific measure at issue; (ii) provide a brief summary of the legal basis of the complaint; (iii) sufficient to present the problem clearly; and (iv) relationship between the panel request and the Panel's term of reference.[10]

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

> "The 'specific measure' to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement. In other words, the measure at issue is *what* is being challenged by the complaining Member. In contrast, the legal basis of the complaint, namely the 'claim' pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly. Taken together, these different aspects of a panel request serve not only to define the scope of a dispute, but also to meet the due process requirements."[11]

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

> "[T]he panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings. The question of whether a measure falls within a panel's terms of reference is a threshold issue, distinct from the question of whether a measure is consistent or not with the legal provision(s) of the covered agreement(s) to which the panel request refers. Therefore, questions pertaining to the identification of the 'measures at issue' and the 'claims' relating to alleged violations of WTO obligations, set out in a panel request, should be analyzed separately."[12]

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

> "[T]he two requirements in Article 6.2 of the DSU are distinct and 'should not be confused'. In *Guatemala – Cement I*, the Appellate Body indicated that, because the panel read the word 'measure' in Article 6.2 of the DSU 'as synonymous with

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

[10] Panel Report, China – Publications and Audiovisual Products, paras. 7.17-7-32.

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

[12] Appellate Body Report, *EC – Selected Customs Matters*, para. 131.

allegations of *violations*' of the covered agreements, the panel in that dispute had 'blur[red] the distinction between a 'measure' and 'claims' of nullification or impairment of benefits'. Similarly, in *EC – Selected Customs Matters*, the Appellate Body determined that the panel – by reading the term 'measure at issue' in Article 6.2 in the light of the obligation allegedly violated – had blurred the distinction between measures and claims. Accordingly, the measure at issue and the claim are two distinct elements that a complainant must identify in order to bring a matter properly within the terms of reference of a panel. In checking that a complainant has complied 'with both the letter and the spirit of Article 6.2 of the DSU', a panel must satisfy itself that both of these elements have been properly identified in the panel request."[13]

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

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

As previously noted, *measures* and *claims* are distinct, and Article 6.2 sets out separate requirements that must each be satisfied in a panel request in order for a matter to form part of a panel's terms of reference. The Panel failed to take proper account of this key distinction between *measures* and *claims* by, on the one hand, undertaking an analysis as to whether New Zealand had identified the specific *measure at issue* in its panel request and, on the other hand, finding that it was New Zealand's *claims*, not the *measure*, that were outside the Panel's terms of reference."[14]

14. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, Morocco argued that Tunisia's panel request was inconsistent with the requirements of Article 6.2 of the DSU because it "contain[ed] several obligations and therefore d[id] not set out an 'obligation that is distinct and well defined'".[15] The Panel rejected this argument:

"Given these factors and the standard of review recalled above, it is clear to us that this panel request, as drafted, is consistent with Article 6.2 of the DSU, since:

a. it clearly establishes which specific aspect of the measure at issue is being addressed (the construction of normal value); and

b. it clearly sets out the provisions of the Anti-Dumping Agreement that are alleged to have been violated: as such, although Articles 2.1 and 2.2 of the Anti-Dumping Agreement contain multi-layered obligations in relation to the establishment of normal value, Articles 2.2.1.1 and 2.2.2 refer, '[f]or the purpose of paragraph 2' (i.e. for the purposes of constructing normal value), to the amount of 'costs' that the investigating authority must use in its calculation.

[13] Appellate Body Report, *Australia – Apples*, para. 417.
[14] Appellate Body Report, *Australia – Apples*, paras. 420-421.
[15] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.24.

> Tunisia also explicitly connected the measure at issue with the obligation that is alleged to have been violated, by stating that the investigating authority committed errors leading to the calculation of an artificially high normal value."[16]

15. The Panel also explained the distinction between the claim that a provision had been violated, and the demonstration of the way in which the provision had been violated, with the latter being required to be developed in the submissions. Further, the Panel could have regard to the submissions to confirm the meaning of the words used in the Panel request:

> "The exact manner in which the investigating authority violated the provisions in question, i.e. the demonstration that the measure does indeed infringe the identified treaty provisions, comes under *arguments*, which Tunisia must develop in its submissions. In particular, in our opinion, Tunisia did not have to indicate which element in the calculation led to 'the calculation of an artificially high normal value'.
>
> Furthermore, in its preliminary ruling, the Panel recalled that 'in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced'.
>
> In this particular case, the Panel's review of Tunisia's first written submission allowed it to 'confirm the meaning of the words used', in particular, which aspect of the calculation Tunisia is challenging and the distinction it made between its claims and its arguments."[17]

16. The Appellate Body in *Korea – Pneumatic Valves (Japan)* examined whether Japan's panel request "provide[d] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. Firstly, the Appellate Body stated that while the summary of the legal basis may be "brief", the degree of brevity that is permissible under Article 6.2 is a function of its clarity in presenting the problem. Moreover, "in light of the requirement to consider the sufficiency of a panel request on its face and on a case-by-case basis, what is sufficient to 'plainly connect' the measure with the provision of the covered agreements claimed to have been infringed will also depend on the circumstances of each case. Such circumstances may include the nature of the measure at issue and the way it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached. In addition, a panel request need only provide the 'legal basis of the complaint', that is, the *claims* underlying this complaint and not the *arguments* in support thereof."[18] Finally, the Appellate Body recalled the use of the phrase "how or why" in previous cases and concluded that it does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU and did not suggest that complainants are required to include more details beyond the legal basis of their complaint in their panel requests.[19] Rather, "the applicable legal standard, which requires a 'brief summary of the legal basis … sufficient to present the problem clearly', entails the consideration of whether the panel request plainly connects the measure with the provision of the covered agreements claimed to have been infringed. The sufficiency of a panel request under this standard is to be assessed on a case-by-case basis."[20] Turning to the specifics of the case at hand, the Appellate Body found that "the fact that the narrative of Japan's claims, as set out in its panel request, paraphrases the language of Article 3.1, in and of itself, is not dispositive of whether the panel request complies with Article 6.2 of the DSU"[21], contrary to the Panel's observations.

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[16] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.27-7.28.
[17] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia),* paras. 7.29-7.31.
[18] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6.
[19] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.77. See also Panel Report, *Panama – Import Measures (Costa Rica)*, Annex D-1, Preliminary Ruling by the Panel, para. 2.18.
[20] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.7. See also ibid. paras. 5.12 and 5.33.
[21] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.15.

#### 1.3.1.3 Objective determination of conformity

17. The Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* pointed out that the determination of conformity with Article 6.2 "must be done on an objective basis, such that any circumstances taken into account may not contemplate those that are relevant only to a party to the panel proceedings."[22]

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

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

> "The Panel further asked '*what* does New Zealand challenge under Annex C(1)(a)? *What*, according to New Zealand, causes the violation of Annex C(1)(a)?' The Panel, therefore, seems to have understood that the question of whether the 17 measures identified in the panel request *can violate*, or *cause the violation of*, the obligation in Annex C(1)(a) and Article 8 of the *SPS Agreement* was a jurisdictional question. We disagree with this approach by the Panel. For a matter to be within a panel's terms of reference—in the sense of Articles 6.2 and 7.1 of the DSU—a complainant must identify 'the specific measures at issue' and the 'legal basis of the complaint sufficient to present the problem clearly'. Moreover, 'a complaining Member enjoys certain discretion in the identification of the specific measure at issue' and '[a]s long as the specificity requirements of Article 6.2 are met, [there is] no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue'. Article 6.2 of the DSU does not impose any additional requirement, as the Panel's analysis implies, that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue *causes the violation of*, or *can violate*, the relevant obligation.
>
> In this dispute, the Panel's analysis under Article 6.2 should have been confined to determining what New Zealand had identified as the specific measures at issue and, separately, what New Zealand had identified as the legal basis for its complaint (its claims). The Panel had already found in its preliminary ruling that New Zealand's panel request identified the 17 measures, and Annex C(1)(a) and Article 8 of the *SPS Agreement* as the basis for New Zealand's claims, and that, therefore, this matter was within the Panel's terms of reference.
>
> By contrast, the question of whether the measures identified in the panel request can violate, or cause the violation of, the obligation in Annex C(1)(a) and Article 8 is a substantive issue to be addressed and resolved on the merits."[23]

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

> "[T]he specificity requirement under Article 6.2 is intended to ensure the sufficiency of a panel request in 'present[ing] the problem clearly'. The identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction and allows parties to engage in the subsequent panel proceedings. Thus, the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request. The Panel, however, appeared to attribute a more substantive meaning to the specificity requirement, whereby the existence and precise content of a measure must be demonstrated for a panel request to fulfil this requirement.

[22] Appellate Body Report, US – Countervailing and Anti-Dumping Measures (China), para. 4.9.
[23] Appellate Body Report, *Australia – Apples*, paras. 423-425.

> Yet, the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure."[24]

20. In *EU – PET (Pakistan)*, the Panel rejected the European Union's argument that by omitting provisions in the SCM Agreement directly addressing the issue of the calculation of benefit or the amount of subsidisation (such as Articles 14 or 19.4), Pakistan failed to present the problem clearly as required by Article 6.2 of the DSU. The Panel held that "the panel request presents the problem clearly, and the issue of whether the conduct described by Pakistan violates the provisions it cites goes to the merits of the case and not to the issue of whether we have jurisdiction to reach the merits."[25] The Panel further explained:

> "If respondents are allowed to convert arguments that complainants' claims cannot succeed under a given provision into an objection under Article 6.2 of the DSU in this manner, it is difficult to see what argument could not be readily converted into an objection under Article 6.2 of the DSU, and thus become subject to a request for a preliminary ruling.We further emphasize that even if we were to construe this objection as one properly raised under Article 6.2 of the DSU, we would reject it for reasons discussed further below when we discuss the substance of Pakistan's MBS claims (i.e. the panel request presents the problem clearly under Article 1.1(a)(1)(ii))."[26]

21. Similarly, the Panel in *Russia – Traffic in Transit* considered that the existence of the measure identified in the complainant's panel request concerned the merits of the case and the Panel's terms of reference.[27]

22. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines I)*, the parties disagreed on whether a challenged measure (certain criminal Charges) fell within the scope of the compliance panel proceedings, in part because they disagreed on whether it involved a "customs valuation" determination within the meaning of Article 15.1(a) of the Customs Valuation Agreement (CVA). The Panel considered that this was a legal element of the Philippines' claims under the CVA in this dispute, and that to rule on this issue in the context of its analysis of whether there is a sufficiently "close nexus" between the Charges and the DSB's recommendations and rulings arising from the customs valuation determination previously made by Thailand would thus require the Panel to make findings that would encroach on the merits, as they relate to one or more legal elements that must be established to uphold the claims at issue. The Panel stated:

> "[W]e consider that a panel must take care to ensure that it does not make findings on disputed questions of fact or law encroaching on the *merits* of a claim for the purpose of determining whether it has *jurisdiction* over that same claim. Otherwise, a panel runs the risk of turning a jurisdictional analysis on its head, insofar as it would result in a panel making findings on the merits of a claim to determine the threshold

[24] Appellate Body Report, *US – Continued Zeroing*, paras. 168-169.
[25] Panel Report, *EU – PET (Pakistan)*, para. 7.24.
[26] Panel Report, *EU – PET (Pakistan)*, fn 68
[27] Panel Report, *Russia – Traffic in Transit*, paras. 7.331-7.339.

> question of whether an assessment of that claim falls within the scope of its jurisdiction. For these and other reasons, the necessity of maintaining a 'firewall' between questions of jurisdiction and questions of merits has been recognized.
>
> In principle, disputed questions of fact or law raised at the jurisdictional phase will encroach upon the merits of a claim insofar as they would require a panel to make findings relating to one or more legal elements that must be established to uphold the claim at issue. What those issues are will therefore depend on the particular claims at issue. For example, in a case involving claims of either prohibited or actionable subsidies under the SCM Agreement, one of the legal elements that must be established is that the challenged measure involves a 'subsidy' within the meaning of Article 1 of the SCM Agreement. Thus, a dispute as to whether a challenged measure constitutes a subsidy in a case involving prohibited or actionable subsidy claims under the SCM Agreement is an issue that goes to the merits of the claims, and therefore would not be resolved by a panel for the purpose of determining whether or not there is a sufficiently 'close nexus' between the nature of the challenged measure and the DSB's recommendations and rulings arising from subsidies previously granted by the respondent. Likewise, in a case involving a claim under Article 10 of the CVA, one of the elements that must be established to uphold the claim is that the respondent disclosed information which is by nature confidential. Thus, where there is a dispute as to whether officials have disclosed information which is by nature confidential, that is an issue that goes to the merits of the claims and would not be resolved by a panel for the purpose of determining whether or not there is a sufficiently close nexus between the alleged disclosure and the DSB's recommendations and rulings arising from prior disclosures of confidential information by the respondent."[28]

### 1.3.2 First requirement: The request must be in writing

#### 1.3.2.1 Relevance of the text of the panel request

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

> "We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda. As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with the bother the letter and the spirit of Article 6.2 of the DSU."[29]

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

> "We agree with the approach adopted by the Appellate Body in *US – Carbon Steel*, as subsequently applied by the panel in *Canada – Wheat Exports and Grain Imports*. In our view, the due process objective of the second sentence of Article 6.2 of the *DSU* may only properly be upheld if panels apply that provision on the basis of the text of the Request for Establishment. We believe that consideration of an actual prejudice suffered during the panel process undermines that due process objective, since it allows a Member to correct any lack of clarity in its request during the panel proceedings, even though the request may not have been sufficiently clear for the respondent to being preparing its defence at the beginning of the panel process."[30]

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

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[28] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines I)*, paras. 7.528-7.529.
[29] Appellate Body Report, *EC – Bananas III*, para. 142.
[30] Panel Report, *Japan – DRAMS (Korea)*, paras. 7.8 and 7.9.

> "It is also well established that compliance with the requirements of Article 6.2 must be determined on the face of the request for the establishment of the panel and that ' [d]efects [therein] cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings'. Such submissions may be used only to confirm the meaning of the *words used* in the panel request and in assessing whether there has been prejudice to the responding Member's ability to prepare its defence."[31]

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

> "[A] party's submissions during panel proceedings cannot cure a defect in a panel request. We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing."[32]

### 1.3.3 Second requirement: The request must indicate whether consultations were held

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

> "The Philippines' request for establishment of a panel clearly fulfils the first requirement of Article 6.2, by indicating the Philippines' view that consultations were not held because Brazil refused to consult. … However, there is nothing in the request for establishment of a panel that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult. … We therefore conclude that the Philippines' claim regarding Brazil's failure to consult is not within our terms of reference."[33]

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

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

[31] Appellate Body Report, *Australia – Apples*, para. 418.
[32] Appellate Body Report, *EC– Large Civil Aircraft*, para. 642.
[33] Panel Report, *Brazil – Desiccated Coconut*, para. 290. See also Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 28.

> matter with respect to which consultations were held and that with respect to which establishment of a panel was requested."[34]

29. In *Mexico – Corn Syrup (Article 21.5 US)*, the Appellate Body addressed the requirement to indicate in a panel request "whether consultations were held" in a situation where this procedural step was not executed. Drawing from the fact that the failure to hold consultations does not deprive the panel of its authority to rule on the case before it, the Appellate Body stated:

> "Article 4.7 … relates the conduct of the responding party concerning consultations to the complaining party's right to request the establishment of a panel. This provision states that the responding party may agree with the complaining party to forgo the potential benefits that continued pursuit of consultations might bring. Thus, Article 4.7 contemplates that a panel may be validly established notwithstanding the shortened period for consultations, as long as the parties agree. Article 4.7 does not, however, specify any particular form that the agreement between the parties must take.
>
> In addition … pursuant to Article 6.2 of the DSU, one of the requirements for requests for establishment of a panel is that such requests must 'indicate whether consultations were held'. The phrase '*whether* consultations were held' shows that this requirement in Article 6.2 may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations.
>
> Thus, the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB. In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had."[35]

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

> "In assessing the importance of the obligation 'to indicate whether consultations were held', we observe that the requirement will be satisfied by the inclusion, in the request for establishment of a panel, of a statement as to whether consultations occurred *or not*. The purpose of the requirement seems to be primarily informational – to inform the DSB and Members as to whether consultations took place. We also recall that the DSU expressly contemplates that, in certain circumstances, a panel can deal with and dispose of the matter referred to it even if no consultations took place. Similarly, the authority of the panel cannot be invalidated by the absence, in the request for establishment of the panel, of an indication 'whether consultations were held'. Indeed, it would be curious if the requirement in Article 6.2 to inform the DSB whether consultations were held was accorded more importance in the dispute settlement process than the requirement actually to hold those consultations."[36]

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

#### 1.3.4.1 General

31. The Appellate Body has found that the degree of specificity required in identifying the measure at issue must be assessed on a case-by-case basis.[37] Whether the specific measure at

[34] Panel Report, *Brazil – Aircraft,* para. 7.10.
[35] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 61-63.
[36] Appellate Body Report, Mexico – Corn Syrup (Article 21.5 – US), para. 70.
[37] Appellate Body Report, *US – Carbon Steel*, para. 127.

issue has been sufficiently identified in the request for establishment will depend upon the ability of the respondent to defend itself given the description of the measure in the request.[38]

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

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

> "In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 'depends … upon whether they satisfy the purposes of [those] requirements'. We also find relevant the statement by the Appellate Body that 'compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances'.
>
> …
>
> We consider that in the absence of an explicit identification of a measure of general application by name, … sufficient information must be provided in the request for establishment of a panel itself that effectively identifies the precise measures at issue. Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue."[40]

34. In *Colombia – Ports of Entry*, Colombia argued that "Panama's request for establishment fails to identify the specific measures at issue as required in Article 6.2 of the DSU, in respect of the use of indicative prices by Colombia's customs authorities".[41] Panama, on the other hand, argued that "its request for establishment makes clear that the measure at issue is the use of 'indicative prices', which 'apply to specific goods from all countries except those with which Colombia has signed free trade agreements' for the purpose of determining the value of those goods to be used as the basis for levying (a) import duties and (b) sales tax."[42] The Panel noted that "Colombia's ability to defend itself does not appear to have been impaired by Panama's definition of the measures at issue".[43] On this basis, the Panel found that "Panama's request for establishment complies with the requirements of Article 6.2 of the DSU as far as the definition of the measures at issue regulating Colombia's use of indicative prices is concerned."[44]

35. In *China – Publications and Audiovisual Products*, the Panel concluded that it was "reasonable for China to reasonably infer that the exclusion of the Film Distribution and Exhibition Rule from Part I of the panel request was deliberate in view of its explicit inclusion in Part III"; therefore "China could infer in good faith that the omission of reference to the Film Distribution and Exhibition Rule in Part I meant that the United States was not challenging the Film Distribution and Exhibition Rule under this claim". The Panel further concluded that the Film Distribution and Exhibition Rule was "outside its terms of reference in the context of the U.S. claims regarding China's trading rights commitments under the Accession Protocol."[45]

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[38] Appellate Body Report, *EC – Computer Equipment*, para. 70.
[39] Panel Report, *Canada –Wheat Exports and Grain Imports*, para. 6.10, sub-para. 14.
[40] Panel Report, *Canada – Wheat Exports and Grain Imports,* para. 6.10, sub-paras. 17 and 20.
[41] Panel Report, *Colombia – Ports of Entry*, para. 7.24.
[42] Panel Report, *Colombia – Ports of Entry*, para. 7.24.
[43] Panel Report, *Colombia – Ports of Entry*, para. 7.35.
[44] Panel Report, *Colombia – Ports of Entry*, para. 7.36.
[45] Panel Report, China - Publications and Audiovisual Products, para. 7.17-7.60.

### 1.3.4.2 "identify"

#### 1.3.4.2.1 Identification of measure

36. In *EC – Bananas III*, the "basic EC regulation at issue" was identified in the request for establishment of the Panel. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend [the EC banana] regime". The Panel found that for purposes of Article 6.2 this reference was sufficient to cover all European Communities legislation dealing with the importation, sale and distribution of bananas because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.[46] The Appellate Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".[47]

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

> "The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that 'the specific measures at issue' be identified in the panel request, can be met if a 'measure' is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified 'measure'. In our view, the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing 'measures' is specified in a panel request, implementing 'measures' might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing 'measures'."[48]

38. 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". The Panel stated:

> "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."[49]

39. The Panel in *Argentina – Footwear (EC)* distinguished the identification of the substance of measures from certain aspect of legal form (the numbers of the resolutions and the places of their promulgation in the Official Journal):

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[46] Panel Report, *EC – Bananas III*, para. 7.27.
[47] Appellate Body Report, *European Communities – Bananas III*, para. 140.
[48] Panel Report, *Japan – Film*, para. 10.8.
[49] Panel Report, *Turkey – Textiles*, para. 9.3.

> "[W]e consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. In our view, this is consistent with the Appellate Body's findings in the *Guatemala – Cement* case."[50]

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

> "The United States explains that, upon automatic initiation by the DOC of a sunset review within five years of the date of publication of a CVD order, a review can follow one of three basic paths: (i) revocation of the order; (ii) an expedited sunset review; and (iii) a full sunset review. We do not consider that the European Communities' general discussion of the automatic initiation of sunset reviews by the DOC is sufficient to put the United States – as well as other Members – on notice that the expedited review procedure was also under challenge. We note that the European Communities' request refers to 'certain aspects of the sunset review procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]'. The challenge is thus apparently to those aspects of the sunset review procedure that have some relevance to the carbon steel case, which is not true of the expedited review procedure, because the carbon steel case involved a full, not expedited, review. We do not consider the expedited review procedure to be 'a 'measure' that is subsidiary, or so closely related to' any of the measures specifically identified, 'that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party'. We, therefore, find that the expedited review procedure is not sufficiently related to a measure or measures that are specifically identified in the request for establishment as to properly bring it within our terms of reference."[51]

41. In *EC – Export Subsidies on Sugar*, the European Communities argued that the identification of the measure at issue in the panel requests as the export subsidies granted under Regulation No. 1260/2001 or, even more vaguely, under the "EC sugar regime" was not sufficient for purposes of complying with the requirement of Article 6.2 of the DSU, because that provision requires not just the identification of a "measure, but of the "*specific measure* at issue".[52] In particular, the European Communities contended that sales of C beet at prices below the minimum prices for A and B beet were not identified as a "payment" in the panel requests of the Complaining Parties and that, therefore, this "payment" fell outside the Panel's terms of reference.[53] The Appellate Body, however, confirmed the finding of the Panel by reasoning that although the panel requests did not specifically identify that low-priced sales of C beet by growers to producers was one form of such alleged "payments", the panel requests would have sufficiently informed and alerted the European Communities about this practice:

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

[50] Panel Report, *Argentina – Footwear (EC)*, para. 8.40.
[51] Panel Report, *US – Carbon Steel*, para. 8.11.
[52] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 137.
[53] Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 133 and 137.

> We agree with the European Communities that the panel requests did not specifically identify that low-priced sales of C beet by growers to producers was one form of such alleged 'payments'. Nevertheless, we consider that, taken as a whole, the panel requests should have informed the European Communities that the Complaining Parties were alleging in their panel requests that C sugar exports below total average cost of production were being enabled by subsidies in the form of 'payments' within the meaning of Article 9.1(c) of the Agreement on Agriculture. C beet being a critical input for C sugar production, and C beet not being eligible for a minimum guaranteed price, unlike A and B beet, the panel requests should have alerted the European Communities that one form of such alleged 'payments' could be low-priced sales of C beet by growers to producers."[54]

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

> "Interpreting the term 'measure at issue' in Article 6.2 of the DSU in the light of the substance of the specific WTO obligation that is allegedly being violated would generate uncertainty and complexity in WTO dispute settlement proceedings. When drafting a request for the establishment of a panel, the complainant would have to foresee the possible restrictions that the substance of the legal provisions might impose on the type of measure that could be challenged. The identification of the measures at issue in the panel request might prove to be even more complex where the challenge concerns a plurality of provisions of the covered agreements. Moreover, the existence, nature, and scope of possible restrictions would depend on the panel's interpretation of the substance of those legal provisions. The respondent might also be placed in an uncertain situation in presenting its defence because it would have to guess what the panel would identify as the measure at issue on the basis of the panel's interpretation of the substance of the alleged violation. This could lead to unnecessary litigation on a panel's terms of reference, as the responding party may choose to contend at a preliminary stage that, in the light of the substance of the legal provision on which a specific claim is based, the measure identified in the panel request does not fall within the panel's terms of reference."[55]

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

> "The issue before us does not involve the omission of a legal basis for a claim. Rather, it concerns an alleged failure to identify a *measure at issue* (Section 5 of the ETI Act, grandfathering original FSC subsidies).
>
> This measure would be within our terms of reference to the extent that it is *adequately identified* in the EC request for the establishment of the Panel, as required by Article 6.2 of the *DSU*.
>
> In general, when faced with a question relating to the scope of its terms of reference, a panel must 'examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU.*' The task of assessing the sufficiency of a panel request for the purpose of Article 6.2 may be undertaken on a case-by-case basis, in consideration of the panel request as a whole, and in the light of the attendant circumstances. There may be a need to consider whether the defendant's ability to defend itself was prejudiced in light of the text of the panel request."[56]

44. In *US – Zeroing (EC) (Article 21.5 – EC)*, the United States alleged that certain measures were outside the terms of reference because they were not properly identified in the panel request. The Panel stated that it would "determine whether the EC panel request sufficiently put

[54] Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 149 and 152.
[55] Appellate Body Report, *EC – Selected Customs Matters*, para. 136.
[56] Panel Report, *US – FSC (Article 21.5 – EC II)*, paras. 7.72-7.74.

the United States on notice that it was bringing a challenge against the measures listed in the Annex to that panel request". Additionally, the Panel asserted "[t]he other consideration is, in our view, whether the EC panel request clearly defines the scope of this compliance dispute," that is, "whether the EC Article 21.5 panel request creates uncertainty as to the measures that are the subject of this compliance proceeding". The Panel further asserted that the EC panel request "sufficiently identifies the 'subsequent reviews' as 'measures at issue' in this dispute" and it therefore "decline[d] to make the ruling under Article 6.2 of the DSU requested by the United States."[57]

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

> "[S]o long as each measure is discernible in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU."[58]

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

> "Reading the panel request as a whole, we do not find that the mere reference to the legislative instruments in which the disputed requirements were contained identified the pre-establishment legal compliance, the process for becoming approved as a distributor, or the decision making criteria applied by the approving agency as specific measures at issue such that China could reasonably conclude that they were included within the US claims. The United States did not inform China that it was challenging every possible discriminatory requirement in its measures, but rather the specific ones described in the narratives. Just as the European Communities did in *US – Carbon Steel*, the United States has, through its description of its claim in the panel request, only notified China that its claim concerned the specific requirements set forth in the panel request. Therefore, we find that these additional requirements (pre-establishment legal compliance, approval process requirements, and decision-making criteria) are outside our terms of reference."[59]

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

> "Looking at the text of New Zealand's panel request, the Panel finds that, with respect to the 17 items identified by New Zealand through 17 separate bullet points, the request is sufficiently precise in identifying the specific measures at issue with respect to those 17 items, pursuant to Article 6.2 of the DSU.
>
> On the other hand, given the length and complexity of Australia's *FIRA*, the Panel finds that the broad reference in New Zealand's panel request to the 'measures

[57] Panel Report, US – Zeroing (EC) (Article 21.5 – EC), paras. 8.20-8.32
[58] Appellate Body Report, *US – Continued Zeroing*, para. 170.
[59] Panel Report, China – Publications and Audiovisual Products, para. 7.104.

> specified in and required by Australia pursuant to the [*FIRA*]' fails to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU. Accordingly, the Panel finds that its terms of reference are limited to the 17 measures specifically identified by New Zealand in its panel request and do not encompass other measures that may be contained in Australia's *FIRA*, but which were not identified with sufficient precision in the panel request."[60]

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

> "The Panel is concerned with certain aspects of the three lists of challenged measures. After the narrative paragraph(s) in each of the three sections, the complainants identifying the lists of measures with the following phrase: '… these Chinese measures are reflected in, ***among others***' (emphasis added). This phrase indicates that the measures listed by bullet points in the panel requests are not the only measures allegedly inconsistent with WTO obligations and leaves open the possibility that the Complainants might include additional measures in subsequent missions.
>
> The Panel is of the view that the Complainant cannot be allowed to include additional measures other than those listed and identified by the bullet points in the panel requests. Such an 'open ended' list would not contribute to the 'security and predictability' of the WTO dispute settlement system as required by Article 3.2 of the DSU.
>
> For this reason, the Panel considers only the listed measures expressly identified by bullet points in the three sections of the Complainant's panel requests fall within the Panel's terms of reference and will thus be examined by the Panel."[61]

49. The Panel in *Indonesia – Chicken* considered that the Appellate Body's view that the arguments included in a panel request "should not be interpreted to narrow the scope of the measures or the claims"[62] also applies to situations "where the description of the measure varies slightly throughout different sections of a panel request".[63]

50. In *Ukraine – Ammonium Nitrate*, the Appellate Body concluded that in assessing a panel request, panels must "scrutinize carefully the panel request, read as a whole", which includes footnotes. It also pointed out that "footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint."[64] Ukraine contended that the specific measures at issue should be listed clearly in the portion of the panel request said to identify the measures at issue and suggested that if footnotes are to be relied on, they must adopt explicit language that clarifies what measures and claims are being brought, and on what conditions. While acknowledging that footnote 2 mentioned the relevant decisions, Ukraine argued that such decisions were not identified as measures at issue. [65] The Appellate Body stated:

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

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

[62] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

[63] Panel Report, *Indonesia – Chicken*, para. 7.52.

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

[65] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.30.

> "We recall that Article 6.2 of the DSU requires that measures at issue must be identified with sufficient precision such that they are discernible from a panel request, reading the panel request as a whole. While the location of certain information in a panel request – and, in particular, whether such information is in the body text or in a footnote – may have some relevance for understanding whether the measures at issue are discernible, it is unlikely to be dispositive given the need to read the panel request as a whole."[66]

51. Contrary to Ukraine's argument that background information is not capable of assisting with the identification of a specific measure at issue, the Appellate Body in *Ukraine – Ammonium Nitrate*, understood the Appellate Body Report in *Indonesia – Iron or Steel Products* to indicate that whether information is capable of contributing to the identification of the specific measures at issue will depend on the circumstances and facts of each case.[67]

52. In *Indonesia – Raw Materials*, the Panel found within its terms of reference a legal instrument, which had been adopted after the consultations and was included in the complainant's panel request, on the grounds that the narrative description of the challenged measure in the panel request adequately notified the respondent of the substantive nature of the mentioned new legal instrument.[68]

#### 1.3.4.2.2 Identification of products

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

> "Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified. However, with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute.
>
> LAN equipment and PCs with multimedia capacity are both generic terms. Whether these terms are sufficiently precise to 'identify the specific measure at issue' under Article 6.2 of the DSU depends, in our view, upon whether they satisfy the purposes of the requirements of that provision.
>
> …
>
> The European Communities argues that the lack of precision of the term, LAN equipment, resulted in a violation of its right to due process which is implicit in the DSU. We note, however, that the European Communities does not contest that the term, LAN equipment, is a commercial term which is readily understandable in the trade. The disagreement between the European Communities and the United States concerns its exact definition and its precise product coverage. We also note that the term, LAN equipment, was used in the consultations between the European Communities and the United States prior to the submission of the request for the establishment of a panel and, in particular, in an 'Information Fiche' provided by the European Communities to the United States during informal consultations in Geneva in March 1997. We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to

[66] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.32
[67] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.35
[68] Panel Report, *Indonesia – Raw Materials*, paras. 7.14-7.15.

> defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."[69]

54. In *EC – Chicken Cuts*, Brazil and Thailand appealed the Panel's finding on the identification of the products at issue arguing that, although Article 6.2 of the DSU does not explicitly require that the products at issue be identified in the panel request, in the past, the Appellate Body (in *EC – Computer Equipment*) has relied on the product description contained in the panel request to determine the scope of the measure at issue. Moreover, Brazil and Thailand argued that, if the products at issue are in fact described in the panel request, then those products constitute the products within the panel's terms of reference.[70] The Appellate Body rejected these arguments and stated:

> "We are not persuaded by these arguments. Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue."[71]

55. In *Australia – Salmon*, the Appellate Body examined whether the Panel had interpreted correctly its terms of reference with respect to the measure and the product at issue in this dispute. Australia argued that the Panel had exceeded its terms of reference both in terms of products and in terms of the measure at issue. In its request for the establishment of a panel, Canada had identified the measure and the product at issue as follows: "The Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon … and any amendments or modifications to it."[72] The Panel stated that the product coverage of this dispute was limited, in accordance with the request for the establishment of a panel, to "fresh, chilled or frozen salmon" and held explicitly that the product coverage "does exclude heat-treated product"[73] and that "heat-treated product falls outside the product coverage of this dispute".[74] As a result, the Appellate Body rejected Australia's claim that the Panel had exceeded its terms of reference with respect to the *product* at issue.[75] However, the Appellate Body reversed the Panel's conclusions with respect to the *measures* at issue. One of the Australian measures at issue was an import prohibition on *all* salmon; another measure, however, allowed imports which had been subject to "heat treatment". The Panel interpreted this latter measure to mean that the heat treatment required applied not only to smoked salmon, but also to other categories of salmon, including fresh, chilled or frozen salmon; specifically, the Panel had held that the "heat treatment" requirement was merely the corollary ("two sides of a single coin") of the import prohibition contained in another measure. The Panel had concluded that imports of fresh, chilled or frozen salmon were prohibited under one measure, unless they received the required "heat treatment" provided for in another measure:

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

[69] Appellate Body Report, *EC – Computer Equipment*, paras. 67-68, and 70. See also Panel Report, *Canada – Aircraft Credits and Guarantees*, para.7.40, where the Panel found that the term "export credits" was "readily understandable" in the context of a dispute under Article 3.1(a) of the *SCM Agreement*.
[70] Appellate Body Report, *EC – Chicken Cuts*, para. 164.
[71] Appellate Body Report, *EC – Chicken Cuts*, para. 165.
[72] WT/DS18/2.
[73] Panel Report, *Australia – Salmon*, para. 8.24.
[74] Panel Report, *Australia – Salmon*, para. 8.24.
[75] Appellate Body Report, *Australia – Salmon*, para. 96.

> consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported is that imports of fresh, chilled or frozen salmon are prohibited.
>
> We do not share the Panel's position. In our view, the SPS measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon."[76]

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

> "The question of whether a panel request satisfies the requirements of Article 6.2 is to be determined on a case by case basis with due regard to the wording of Article 6.2 … the question is whether Korea is put on sufficient notice as to the parameters of the case it is defending. …
>
> …
>
> Korea argues that each imported product must be specifically identified in order to be within the scope of the panel proceeding. The complainants argue that the appropriate imported product is all distilled beverages. They claim, in fact, that for purposes of Article III, there is only one category in issue. They claim to have identified specific examples of such distilled alcoholic beverages for purposes of illustration, not as limits to the category.
>
> The issue of the appropriate categories of products to compare is important to this case. In our view, however, it is one that requires a weighing of evidence. As such it is not an issue appropriate for a preliminary ruling in this case. This is particularly so in light of the Appellate Body's opinion in *Japan – Taxes on Alcoholic Beverages II,* that all imported distilled alcoholic beverages were discriminated against. That element of the decision is not controlling on the ultimate resolution of other cases involving other facts; however, it cannot be considered inappropriate for complainants to follow it in framing their request for a panel in a dispute involving distilled alcoholic beverages. While it is possible that in some cases, the complaint could be considered so vague and broad that a respondent would not have adequate notice of the actual nature of the alleged discrimination, it is difficult to argue that such notice was not provided here in light of the identified tariff heading and the Appellate Body decision in the *Japan – Taxes on Alcoholic Beverages II.* Furthermore, we note that the Appellate Body recently found that a panel request based on a broader grouping of products was sufficiently specific for purposes of Article 6.2. We find therefore, that the complainants' requests for a panel satisfied the requirements of Article 6.2 of the DSU."[77]

57. In *US – FSC*, the United States argued that the European Communities' request for the establishment of a panel failed to identify the specific measures at issue because the European Communities did not identify the specific products in question, and "the nature of export subsidy obligations imposed by the Agreement on Agriculture differ depending on the products at issue and commitments made by the United States thereunder."[78] The Panel found that the request for the establishment satisfied the requirements of Article 6.2 of the DSU and stated:

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[76] Appellate Body Report, *Australia – Salmon*, paras. 102-103.
[77] Panel Report, *Korea – Alcoholic Beverages,* paras. 10.14-10.16.
[78] Panel Report, *US – FSC*, para. 7.23.

> "In its request for establishment of a panel, the European Communities states that in its view the FSC is an export subsidy and that 'the United States has declared that the [FSC] Scheme is not taken into account for the purpose of compliance with their commitments under the AA … .' Accordingly, given the inherently all-encompassing nature of this claim, it constitutes a claim that the FSC could give rise to violations of the Agreement on Agriculture with respect to any agricultural product. Consequently, and in the absence of any specification as to the products at issue, this request puts the United States and third parties on notice that the European Communities asserts the existence of violations of the Agreement on Agriculture with respect to all agricultural products."[79]

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

> "Article 6.2 of the DSU does not refer to the identification of the products at issue, but instead, only refers to the identification of the specific *measures* at issue. The Appellate Body has explained that under DSU Article 6.2, 'the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather it is a consequence of the scope of application of the specific measures at issue'. Thus, it concluded, that it is 'the *measures* at issue that generally will define the *product* at issue.' At the same time though, it is recognized that it may be necessary to identify the products at issue, in instances where decisions of customs authorities are under challenge, in order to identify the specific measures at issue.
>
> …
>
> … At this stage the Panel confines itself to the issue of whether the products were sufficiently identified for the purposes of Article 6.2. …
>
> We note here that the contested measures are not individual classification decisions by customs authorities, but rather, as was the case in *EC – Chicken Cuts*, are generally applicable legal instruments. In our view, the joint panel request focuses on particular aspects of the measures at issue, which in turn identify the products at issue sufficiently for the purposes of Article 6.2 of the DSU. … Thus, for the purposes of fulfilling the requirements of Article 6.2 of the DSU, we conclude there has been sufficient identification of the products for us to proceed with the dispute at hand."[80]

59. 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 disagreed, noting that the identification of like products in a panel request does not merely amount to argumentation, and should be given relevance:

> "The Panel acknowledges that Article 6.2 of the DSU does not mention the need to specify the products concerned in a panel request. We do however think that the absence of such an obligation should not be taken to mean that, when the particular products affected by the measure at issue are specified in a panel request, such specification is deprived of all relevance. We note that prior panels share our understanding.
>
> We are well aware that, as argued by the United States, the Appellate Body has made a distinction between 'claims' and 'arguments' in reviewing a panel request pursuant to Article 6.2 of the DSU. Indeed, as explained by the Appellate Body, 'Article 6.2 of

[79] Panel Report, *US – FSC*, para. 7.29.
[80] Panel Report, *EC – IT Products*, paras. 7.194 and 7.196-7.197.

> the DSU requires that the *claims*, but not the *arguments* must all be specified sufficiently in the request for the establishment of a panel'.
>
> However, we disagree with the United States in that the identification of the like domestic product in a panel request merely amounts to argumentation. It seems to us that in certain instances, such as the present one, the identification of the specific products at issue in a panel request pertains to the claim at issue, i.e., providing 'a brief summary of the legal basis of the complaint', rather than to the arguments relating to that claim. Indeed, Article 2.1 of the *TBT Agreement* defines the national treatment obligation it embodies in direct reference to the imported product and the like domestic product; both concepts serve to orient the determination of the scope of such an obligation. Therefore, the identification of those two types of products in the panel request rather pertains to the realm of 'providing a brief summary of the legal basis to the complaint' than purely to argumentation."[81]

60. The Panel in *US – Clove Cigarettes*, while noting that Article 6.2 does not require the identification of the products at issue, pointed out that when such identification is made, it becomes an integral part of the panel's terms of reference:

> "The Panel acknowledges that, as explained by the Appellate Body in *EC – Computer Equipment*, 'Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified'. Furthermore, the Appellate Body in *EC – Chicken Cuts* noted that 'the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference'.
>
> We do not disagree with these prior findings and we should not be misinterpreted as saying that a complainant must in all cases identify the products to which the measure at issue applies in order to comply with Article 6.2. We are saying that when the complainant has specified the products in its panel request, as in the present case, and when the claim pertains to a WTO obligation that requires a comparison of particular products, as in the present case, such identification becomes an integral part of the panel's terms of reference, and cannot be 'cured' through argumentation.
>
> Indonesia has argued that its reference to menthol cigarettes in its Panel Request is just an example. The wording of its Panel Request does not seem to coincide with that view. Indeed, as explained above, Indonesia's Panel Request states that 'banning clove cigarettes in the United States while exempting *menthol cigarettes* from the ban is inconsistent', *inter alia*, with 'Article III:4 of the GATT 1994 because the measure provides treatment to an imported product, clove cigarettes, that is 'less favourable' than that accorded to a like domestic product, *menthol cigarettes*' (emphasis added). Similarly, Indonesia's Panel Request claims that the measure at issue is inconsistent with 'TBT Article 2.1 because the measure results in treatment that is 'less favourable' to imported clove cigarettes than that accorded to a like domestic product, *menthol cigarettes*' (emphasis added). This wording does not seem to us to be referring to menthol cigarettes simply as an example, but rather as identifying menthol cigarettes as the domestic like product at issue. If it were to serve only as an example, we would have expected Indonesia to say so or at least include language implying it. Moreover, if the domestic product identified in Indonesia's Panel Request should be treated as a mere example, then given how the claim is phrased, it would necessarily follow that the imported product identified in the Panel Request (i.e., clove cigarettes) should also be treated as a mere example, meaning that Indonesia would have been in principle free to expand the scope of its national treatment claim in its subsequent submissions to include not only clove cigarettes, but also one or more other types of imported products."[82]

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[81] Panel Report, *US – Clove Cigarettes*, paras. 7.137-7.139.

[82] Panel Report, *US – Clove Cigarettes*, paras. 7.140-7.142. See also Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 3.12.

#### 1.3.4.2.3 Identification of industry

61. In *Canada – Aircraft*, Canada asserted before the Panel that the term "civil aircraft industry" was too broad for the purposes of Article 6.2 of the DSU because "[i]t includes firms ranging from machine shops and metal treatment facilities to those involved in advanced instrumentation and communications equipment."[83] The Panel, referring to the Appellate Body report in *EC – Computer Equipment*, stated:

> "We do not consider that the mere fact that the scope of a measure is identified in the request for establishment by reference to a broad product or industry grouping necessarily renders that request for establishment inconsistent with Article 6.2 of the DSU. We believe that the Appellate Body was of a similar opinion in *LAN Equipment,* where it shared the US concern that:
>
> > if the EC arguments on specificity of product definition are accepted, there will inevitably be long, drawn-out procedural battles at the early stage of the panel process in every proceeding. The parties will contest every product definition, and the defending party in each case will seek to exclude all products that the complaining parties may have identified by grouping, but not spelled out in 'sufficient' detail.
>
> Although the Appellate Body's remarks were made in the context of a reference to a broad <u>product</u> grouping in the complaining party's request for establishment, we can see no basis for not adopting a similar approach when the request for establishment refers to a broad <u>industry</u> sector, such as the 'civil aircraft industry'. If a complaining party believes that a measure affects a broad industry sector, in our view that complaining party should be entitled to challenge that measure insofar as it affects the totality of the industry concerned, without having to spell out the individual components of that industry, and without running afoul of Article 6.2 of the DSU."[84]

#### 1.3.4.2.4 Availability of public information regarding measure

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

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

[83] Panel Report, *Canada – Aircraft*, para. 9.23.
[84] Panel Report, *Canada – Aircraft*, paras. 9.36-9.37.

> precise to establish that the French R&TD funding challenged by the United States was within the Panel's terms of reference."[85]

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

> "The Panel considers that in cases where the complaining party is unable to obtain from the respondent certain information regarding the content of the measures at issue, this will naturally have a bearing on the degree of specificity that could reasonably be expected in identifying the legal basis for the complaint for purposes of Article 6.2 of the DSU. The Appellate Body has confirmed that this is so with respect to the degree of specificity expected with respect to the identification of the specific measures at issue, and the Panel sees no reason why the same logic would not apply in the context of assessing whether a panel request identifies 'the legal basis of the complaint sufficient to present the problem clearly'. In the Panel's view, while a complainant must always comply with this requirement, regardless of any difficulties it faces in obtaining relevant information, such difficulties in obtaining relevant information may be highly germane to the appraisal of what is 'sufficient' to present the problem 'clearly' in the circumstances of a particular case.
>
> …
>
> [I]n the circumstances of this case it is not clear what additional degree of specificity could reasonably have been expected from the Philippines in terms of identifying the 'relevant valuation rules' in Articles 2 through 7 with sufficient precision, taking into account the limited information that was communicated to it regarding the basis for calculating the 'actual' value/price in the challenged measures. Therefore, the Panel is not persuaded that the Philippines was required to specify which one of the different customs valuation methods in Articles 2 through 7 constituted the basis of its claim. It sufficed for the panel request to state that the 2002-2003 Charges 'are inconsistent with … Articles 2, 3, 4, 5, 6 and 7 of the CVA', without further specification as to which of one of these different articles was applicable. *A fortiori*, if such specification was not required at the level of these different articles, then the Panel is not persuaded that the Philippines had to go even further and specify which of the three subparagraphs and obligations *within* Article 7 it was invoking."[86]

#### 1.3.4.2.5 Identification of measures at issue by simple reference to external sources

64. In *Argentina – Import Measures*, the Appellate Body reversed the Panel's finding that the European Union's panel request, "on its face", did not identify any specific instance of application of trade-related requirements as a measure on the grounds that a panel request that requires a reader to access information from a website and deduce from that information what the challenged measures are, cannot be said to be "sufficiently precise" in identifying the specific measures at issue for the purpose of Article 6.2 of the DSU. The Appellate Body noted that "[t]he term 'on its face' … must not be so strictly construed as to preclude automatically reference to sources that are identified in its text, but the contents of which are accessible outside the panel request document itself".[87] The Appellate Body reasoned:

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

[85] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 641 and 648.
[86] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.67 and 7.71.
[87] Appellate Body Report, *Argentina – Import Measures*, para. 5.48.

> request identifies the specific measures at issue within the meaning of, and in conformity with, Article 6.2 of the DSU.
>
> At the same time, we do not mean to suggest that the identification of measures at issue by simple reference to external sources will always suffice to meet the requirements of Article 6.2 of the DSU. This is something that must be determined on a case-by-case basis, bearing in mind whether the specific measures at issue can be discerned from the panel request. A complainant whose panel request simply refers to external sources runs the risk that such request may fall short of the requirements of Article 6.2. We observe, in this connection, that the contents of webpages may not always be static. Moreover, a complainant may encounter more difficulty complying with Article 6.2 where its panel request refers to press releases or news articles about measures, rather than to the contents of the measures themselves. Yet, in circumstances where a complainant is confronted with measures that are, for example, unwritten, unpublished, or otherwise publicly inaccessible, reference to such secondary sources may be the only available means of identifying the measure at issue."[88]

#### 1.3.4.2.6 Title of the dispute

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

> "[A] panel's terms of reference are defined by the measures and claims that have been identified in the request for establishment of a panel. Neither Article 7 of the DSU, which defines the panel's terms of reference, nor the linked requirements of Article 6.2 of the DSU, make any reference to the title of the case. Ultimately, the breadth or narrowness of a particular challenge will be governed exclusively by the terms of the relevant request for establishment of a panel."[89]

### 1.3.4.3 "specific"

66. As regards the specificity requirement, the Appellate Body in *EC – Selected Customs Matters* emphasized the purpose of the word "specific" in Article 6.2 of the DSU:

> "The word 'specific' in Article 6.2 establishes a specificity requirement regarding the identification of the measures that serves the due process objective of notifying the parties and the third parties of the measure(s) that constitute the object of the complaint."[90]

67. In *EC – Trademarks and Geographical Indications (Australia)*[91], the European Communities argued that Australia's reference to Regulation 2081/92 in its Panel request was not specific enough to allow it to understand which specific aspects of the Regulation Australia intended to raise as an issue.[92] The Panel, in a preliminary ruling, rejected this argument finding that requests for establishment do not require the "specific aspects" of the "specific measures" to be identified. In this regard, the Panel stated:

> "The Panel considers the ordinary meaning of the terms of the text in Article 6.2 of the DSU, read in their context and in the light of the object and purpose of the provision, to be quite clear. They require that a request for establishment of a panel 'identify the specific measures at issue'. They do not require the identification of the 'specific aspects' of these 'specific measures'."[93]

68. Also, in *EC – Trademarks and Geographical Indications (Australia)*, the Panel found, in a preliminary ruling, that Australia's reference to "related implementing and enforcement measures"

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[88] Appellate Body Report, *Argentina – Import Measures*, paras. 5.51-5.52.
[89] Panel Report, *EC – Selected Customs Matters*, para. 7.43.
[90] Appellate Body Report, *EC – Selected Customs Matters*, para. 152.
[91] See also Panel Report, *EC – Trademarks and Geographical Indications (US)*.
[92] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.
[93] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.

did not lack certainty as it expressly referred to measures implementing and enforcing Regulation (EEC) No. 2081/92. In this regard, the Panel stated:

> "All of the Regulation's implementing and enforcement measures form a group of specific measures which, although they may be a large group, are identified by Australia's request for establishment of a panel."[94]

69. In *EC – Approval and Marketing of Biotech Products,* the European Communities, in a preliminary ruling request, complained that none of the three panel requests clearly distinguished between the alleged suspension and the failure to act and that therefore it was in the dark as to the meaning of these requests.[95] The Panel found that it was unclear whether the United States could have identified the measure more clearly than it had, but that even if it could, that its request sufficiently identified the specific measure being challenged when read together with the introductory paragraph.[96] It also found that neither Canada nor Argentina's panel requests failed to meet the requirements of Article 6.2 in this regard.[97] With regard to the United States' panel request, the Panel stated:

> "In the present case, it is unclear whether the United States could have identified the alleged *de facto* moratorium with more specificity than it has. …
>
> Even assuming that the United States could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the introductory paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in Article 6.2 of the DSU".[98]

70. In *EC and certain member States – Large Civil Aircraft*, the European Communities challenged a number of measures as being outside the Panel's terms of reference. The challenge was based on the grounds that, in its request for the establishment of a panel, the United States had described these measures in an overly broad, ambiguous or overly inclusive manner. According to the European Communities, the United States had thereby failed to comply with the basic obligation under Article 6.2 of the DSU to identify the "specific measures at issue" in its request for the establishment of a panel.[99] In rejecting the European Communities' preliminary ruling request, the Panel noted that compliance with the requirements of Article 6.2 must be determined after the consideration of the panel request as a whole and in light of attendant circumstances, giving examples, in a footnote, of what may be considered to be "attendant circumstances". The Panel stated:

> "A panel's terms of reference are based on the request for establishment of a panel. We recall that, when faced with an issue relating to the scope of its terms of reference, a panel is required to scrutinize carefully the request for establishment of a panel to ensure its compliance with both the letter and spirit of Article 6.2 of the DSU.
>
> … [C]ompliance with the requirements of Article 6.2 must be determined on the merits of each case, after a consideration of the panel request as a whole, and in light of attendant circumstances. Moreover, such compliance must be determined on the merits of each case, after a consideration of the panel request as a whole, and in light of attendant circumstances.
>
> …

[94] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.
[95] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.
[96] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.
[97] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.
[98] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, sub-paras. 23-24.
[99] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.138

> In the Panel's view, Section (6)(e) of the panel request, considered as a whole and in light of attendant circumstances, identifies the measures at issue in a manner sufficient to present the problem clearly."[100]

#### 1.3.4.4 "measures at issue"

##### 1.3.4.4.1 Nexus between "measure" and "Member" (attribution of acts or omissions)

71. See cases under Article 3.3 of the DSU.

##### 1.3.4.4.2 Distinguishing a "measure" from its effect

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

> "The DSU provides for the 'prompt settlement' of situations where Members consider that their benefits under the covered agreements 'are being impaired by *measures* taken by another Member'. Two elements of this reference to 'measures' that may be the subject of dispute settlement are relevant. First, as the Appellate Body has stated, a 'nexus' must exist between the responding Member and the 'measure', such that the 'measure' – whether an act or omission – is 'attributable' to that Member. Secondly, the 'measure' must be the *source* of the alleged impairment, which is in turn the *effect* resulting from the existence or operation of the 'measure'."[101]

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

> "[C]onsultations at the outset of a dispute are based on:
>
> > … measures affecting the operation of any covered agreement taken within the territory [of the responding Member].
>
> This provision contemplates that 'measures' themselves will 'affect' the operation of a covered agreement. Finally, we note that this distinction between measures and their effects is also evident in the scope of the application of the GATS, namely, to 'measures by Members affecting trade in services'.
>
> We are therefore of the view that the DSU and the GATS focus on 'measures' as the subject of challenge in WTO dispute settlement. To the extent that a Member's complaint centers on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the measure that is the *source* of the alleged effects."[102]

74. The Appellate Body in *US – Gambling* stated that if the measure were identified as "prohibition" the respondent would not be in a position to prepare its defence adequately:

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

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[100] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.143-144, and 7.150
[101] Appellate Body Report, *US – Gambling*, para. 121.
[102] Appellate Body Report, *US – Gambling*, paras. 122-124.

> Therefore, we conclude that, without demonstrating the source of the prohibition, a complaining party may not challenge a 'total prohibition' as a 'measure' *per se*, in dispute settlement proceedings under the GATS."[103]

#### 1.3.4.4.3 Distinguishing the "measures" from evidence and implementing instruments

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

> "[I]t is important to distinguish between, on the one hand, the measures at issue and, on the other hand, acts of administration that have been presented as evidence to substantiate the claim that the measures at issue are administered in a manner inconsistent with Article X:3(a) of the GATT 1994. The Panel failed to make the distinction between *measures* and pieces of *evidence*. While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment. In this case, the United States was not precluded from presenting evidence relating to acts of administration before and after the date of Panel establishment. A panel enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment."[104]

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

> "Turning to our consideration of this issue, we observe that, pursuant to Articles 7.1 and 6.2 of the DSU, we are bound by our terms of reference only with respect to our review of measures and claims, but not evidence. In order to fall within our terms of reference, measures and claims must be included in a panel request in accordance with Article 6.2 of the DSU. However, Article 6.2 of the DSU does not require that evidence a complainant relies on in advancing its claims be included in a panel request. Thus, while our terms of reference limit the scope of our review to those measures and claims that have been included in a panel request, they do not limit the scope of our review of evidence."[105]

77. In *India – Sugar and Sugarcane*, the Panel stated that while there are temporal limitations on the measures which may be within a panel's terms of reference, such limitations do not apply in the same way to the evidence of the measure, i.e., legal instruments:

> "As a general rule, to be within a panel's terms of reference, the measure identified in the complainant's panel request must be in force at the time of the panel's establishment. By contrast, legal instruments implementing the challenged measure may be withdrawn, amended or newly introduced over time.
>
> Accordingly, a distinction can be drawn between measures at issue and evidence produced in support of a claim of inconsistency. While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates the panel's establishment. A panel enjoys a margin of discretion in determining the relevance and

[103] Appellate Body Report, *US – Gambling*, paras. 125-126.
[104] Appellate Body Report, *EC – Selected Customs Matters*, para. 188.
[105] Panel Report, *EU – Energy Package*, para. 7.152.

> probative value of a piece of evidence that pre-dates or post-dates its establishment. A panel may consider a piece of evidence that expired before, or came into existence after, the panel's establishment to be relevant to its assessment of whether the measure at issue was inconsistent with the relevant provisions of the covered agreements at the time of the panel's establishment. …
>
> Our review of the complainants' panel requests demonstrates that the elements in the panel requests, which India refers to as 'measures', are in fact legal instruments that, in the view of the complainants, contain the measures at issue. We therefore reject India's request to find that the elements it has identified fall outside our terms of reference."[106]

78. In *Turkey – Pharmaceutical Products (EU)*, the Panel rejected Türkiye's argument that the European Union was required to specifically and exhaustively identify the "various instruments and tools" implementing the localisation requirement and how they interrelate. In the course of its analysis, the Panel stated:

> "The European Union's statement that this measure is 'put in place and evidenced by, and [is] implemented and administered through' a variety of legal instruments and documents confirms that the legal instruments and documents are being referred to for the purpose of evidencing the existence of the measure (as described above) and explaining the means through which it is put in place. In the Panel's view, this statement, and others like it, do not have the effect of equating the listed instruments and documents with the content of the measure itself. Rather, they serve an evidentiary and explanatory purpose. Thus, the description of the content of the localisation requirement is entirely independent from the instruments through which that measure is evidenced and implemented.
>
> …
>
> [T]he Panel does not agree with the premise of Turkey's argument, namely, that the European Union has characterized and described the content of the measure at issue by reference to legal instruments and documents. In the Panel's view, Turkey's argument conflates the content of the localisation requirement with the instruments through which that measure is evidenced and implemented. In some cases, a complaining party may describe and define the content of the challenged measure by reference to certain legal instruments and documents, and in such a way as to equate the content of the measure to one or more legal instruments or documents, and make them constitutive components of the measure itself. In such cases, it may well follow that a complaining party is required to specifically and exhaustively identify all such legal instruments and documents to properly identify the content of the challenged measure. In this case, however, the European Union has not defined the content of the measure by reference to, or in terms of, legal instruments or documents."[107]

79. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator rejected the United States' argument that, as a legal matter, the "ongoing conduct" measure's existence, and thus WTO-inconsistency, only arose in investigations and administrative reviews because the evidence that Canada used to establish the existence of the "ongoing conduct" measure before the Panel was limited to examples taken from these two specific types of proceedings. The Arbitrator stated:

> "We are not convinced by the United States' submission on this point. In our view, the United States' position conflates the scope of *evidence* the Panel relied upon to establish the existence of the unwritten 'ongoing conduct' measure with the *findings* of the Panel on the precise content of that measure. It is true that a party, when attempting to establish the existence of an unwritten measure, must do so with reference to evidence adduced to a panel. However, it is for a panel to evaluate that evidence and determine whether the alleged measure exists, and whether and how

[106] Panel Report, *India – Sugar and Sugar Cane*, Annex E-1, paras. 1.9-1.10 and 1.49.
[107] Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.17 and 7.24.

that measure is WTO-inconsistent. Without reference to the scope of the Panel's *findings*, therefore, the United States' argument is necessarily lacking."[108]

#### 1.3.4.4.4 Temporal scope of "measures at issue"

##### 1.3.4.4.4.1 General

80. 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."[109]

81. In *EC – Selected Customs Matters*, the Appellate Body discussed the temporal limitations of the Panel's terms of reference after the European Communities challenged the Panel's interpretation in respect of "steps and acts of administration that pre-date or post-date the establishment of a panel."[110] The Appellate Body began by discussing the exceptions to the general rule that the measures in a panel's terms of reference must be measures in existence at the time of the establishment of the panel:

> "We begin our analysis by recalling the Appellate Body's statement in *EC – Chicken Cuts*:
>
> > The term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.
>
> This general rule, however, is qualified by at least two exceptions. First, in *Chile – Price Band System*, the Appellate Body held that a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure. Secondly, in *US – Upland Cotton*, the Appellate Body held that panels are allowed to examine a measure 'whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing 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."[111]

82. The Appellate Body in *US – Zeroing (Japan) (Article 21.5 – Japan)* held that "Article 6.2 [does not] categorically prohibi[t] the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested."[112]

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

> "We recall that Article 6.2 of the DSU provides that the request for the establishment of a panel 'shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.' Apart from the reference in the present tense to the fact that the complainant must identify the measures 'at issue', Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request. Indeed, in *US – Upland Cotton*, where the issue was raised in the context of measures that had expired prior to the panel proceedings, the Appellate Body explained that 'nothing inherent in the term 'at

[108] Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, para. 6.39 and fn 118.
[109] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[110] Panel Report, *EC – Selected Customs Matter*s, para. 7.37.
[111] Appellate Body Report, *EC – Selected Customs matters*, para. 184.
[112] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 125.

> issue' sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired'.[113] In *EC – Chicken Cuts*, the Appellate Body stated that '[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.' Nevertheless, the Appellate Body also stated in that case that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[114]

84. In *US – Ripe Olives from Spain*, the Panel pointed out that Article 6.2 does not categorically preclude the inclusion within the Panel's terms of reference of measures that came into existence after the Panel's establishment is requested:

> "[T]here may be circumstances in which it is necessary for a Panel to review measures enacted after its establishment so that it can make the findings and recommendations necessary to resolve the matter in dispute. This may include, for example, a measure that amends a measure that is explicitly identified in a panel request, without changing the essence of that original measure."[115]

85. In this context, the Panel found that the measure in question was covered by its terms of reference, despite not existing at the time the Panel was established:

> "[T]hese terms are sufficiently broad to cover the challenged aspect of the Remand Redetermination because we consider the USDOC's Remand Redetermination supplements and reaffirms its original de jure specificity findings. In this regard, we note that the USDOC's analytical approach to the question of specificity in the Remand Redetermination remains fundamentally unchanged and its findings and analysis are not based on any new evidence introduced during the remand proceeding. The USDOC's Remand Redetermination does not modify the USDOC's original findings and does not alter the essence of the reasoning set out in the preliminary and final issues and decision memoranda. In these circumstances, we consider that the Remand Redetermination is covered by our terms of reference, despite not existing at the time that this Panel was established. In addition, we share the European Union's view that given its close connection with the original findings, our consideration of the European Union's submissions with respect to the Remand Redetermination would assist the resolution of the specific claims in this dispute."[116]

#### 1.3.4.4.4.2 Amendments enacted after establishment of Panel

86. 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

[113] Appellate Body Report, *US – Upland Cotton*, para. 269.
[114] Appellate Body Report, *US – Zeroing (Article 21.5 – Japan)*, para. 121.
[115] Panel Report, *US – Ripe Olives from Spain*, para. 7.12.
[116] Panel Report, *US – Ripe Olives from Spain*, para. 7.14.

> 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."[117]

87. 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".[118]

88. 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."[119] 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*".[120] The Appellate Body further referred to Articles 3.7 and 3.4 of the DSU as well as its decision in *Australia – Salmon*[121] 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'."[122]

89. 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]":

> "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."[123]

90. 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.[124] 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:

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[117] Panel Report, *Argentina – Footwear (EC)*, para. 8.41.
[118] Panel Report, *Argentina – Footwear (EC)*, para. 8.45.
[119] Appellate Body Report, *Chile – Price Band System*, para. 138.
[120] Appellate Body Report, *Chile – Price Band System*, para. 139.
[121] Appellate Body Report, *Australia – Salmon*, para. 223.
[122] Appellate Body Report, *Chile – Price Band System*, para. 143.
[123] Appellate Body Report, *Chile – Price Band System*, para. 144.
[124] Appellate Body Report, *EC – Chicken Cuts*, para. 154.

> "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."[125]

91. 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 proceeded on the basis of the tax as it existed at the time of the request for establishment of the panel.[126]

92. 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."[127]

93. 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

[125] Appellate Body Report, *EC – Chicken Cuts*, paras. 158-160.
[126] Appellate Body Report, *Argentina – Textiles and Apparel*, Section V.
[127] Panel Report, *EC – IT Products*, para. 7.139. See also Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.280 and 7.291.

not permit Members to bring in measures that were clearly not contemplated in the Panel request, the phrase is a useful tool to include certain amendments and prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. The Panel stated:

> "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."[128]

94. In *Colombia – Ports of Entry,* the Panel agreed with the Appellate Body's rationale in *Chile – Price Band System* and stated that "this determination was considered consistent with earlier jurisprudence and was found to be consistent with the object and purpose of the WTO dispute settlement system, as set forth in Article 3.7 of the DSU."[129] The Panel stated that:

> "The Panel agrees with the Appellate Body's rationale. In the dispute before the Panel, Colombia enacted the aforementioned Resolutions 11414, 11412 and 11415 after the Panel was established. In the Panel's view, the terms of the Panama's request for establishment include the relevant amendments and replacements. The Panel therefore finds that Resolutions 11414, 11412 and 11415 are properly part of the measure at issue and within the Panel's terms of reference. In the Panel's view, a failure to consider these additional resolutions would inhibit the Panel from securing a positive solution to the dispute."[130]

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

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

[128] Panel Report, *EC – IT Products*, para. 7.140.
[129] Panel Report, *Colombia – Ports of Entry*, paras. 7.53-7.54.
[130] Panel Report, *Colombia – Ports of Entry*, paras. 7.53-7.54.

> dispute, the due process rights of the European Union cannot be considered to have been undermined by allowing the dispute to go forward challenging the replacement measure rather than the measure named in the panel request. Indeed, to sustain the European Union's objection would not be consistent with the effective functioning of the WTO dispute settlement system, as it might lead to inappropriate legal manoeuvres to avoid dispute settlement, inconsistent with the obligation of Members to engage in dispute settlement 'in good faith in an effort to resolve the dispute'. We therefore consider that Council Regulation No. 1225/2009 is properly before us and will base our findings and recommendations on China's 'as such' claims on the relevant parts of that Regulation."[131]

96. 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."[132]

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

> "We read the Appellate Body Reports in *Chile – Price Band System, EC – Chicken Cuts*, and *US – Zeroing (Japan) (Article 21.5 – Japan)* as clarifying: (a) that the requirements of Article 6.2 of the DSU are such that the measures included in a panel's terms of reference will ordinarily be in existence at the time of the establishment of the panel; and (b) that there are particular, limited circumstances in which measures coming into existence subsequent to the panel request are within a panel's terms of reference. These circumstances, in one way or another, involve new measures that amend, modify, supplement, extend, replace, renew, relate to, or implement the measures that were explicitly identified in the panel request without changing their essence, in light of the claims made by the complaining party. The Appellate Body has thus interpreted the requirements of Article 6.2 of the DSU in a manner that prevents a measure evading review merely because of amendments or modifications to the legal form of the measure during the course of dispute settlement proceedings that do not change its essence in light of the nature of the claims at issue, while still fully respecting the due process rights of responding parties and potential third parties to be informed of the specific measures at issue and the nature of the claims raised by the complaining party."[133]

98. The Panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* explained that "[t]his is also borne out by the approach taken by a number of panels".[134] The Panel went on to explain:

> "For example, in *EC – IT Products*, the complaining parties had identified a number of measures imposing duties on flat panel displays, including Council Regulation No. 2658/87, as amended. Footnote 4 of the panel request noted that the Council Regulation included amendments adopted pursuant to Commission Regulation No. 1214/2007, which contained the CN2008. In addition, the panel request identified as part of the measures at issue 'any amendments or extensions and any related or implementing measures'. The panel explained that the Commission adopted a complete updated version of the CN each year, as an amendment to annex I of Council Regulation No. 2658/87. The CN had been updated twice, by CN2009 and

[131] Panel Report, *EC – Fasteners (China)*, para. 7.34. See also Panel Report, *EU – Footwear*, para. 7.23.
[132] Panel Reports, *China – Raw Materials*, para. 7.15.
[133] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.524.
[134] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.524.

> CN2010, since the complaining parties had filed their panel request. The panel noted that the subsequent amendments to the Council Regulation No. 2658/87 strictly prolonged its period of application without modifying any of the terms or headings at issue in the dispute. Thus, the subsequent amendments, including the 2008-2010 versions, did not change the essence of the CN2007 version set forth in Council Regulation No. 2658/87 that was identified in the panel request. The panel said:
>
> 'While we do not consider that the mere incantation of the phrase 'any amendments or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute 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.'"[135]

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

> "In the original proceeding, the Washington State tax measures enacted under HB 2294 were part of a package of measures designed to retain and attract the aerospace industry to Washington State, specifically by providing tax incentives conditioned on Boeing assembling the 787 in Washington State. SSB 5952 extends the availability of those tax incentives later in time, conditioned, however, on Boeing producing wings and fuselages for a different aircraft, the 777X, in Washington State and using them in the final assembly of the 777X in Washington State. In addition, Boeing will only be entitled to claim the B&O tax rate reduction in respect of future revenues related to the 777X for so long as it conducts wing assembly and final assembly of the 777X exclusively in Washington State. [T]he amendments effected by SSB 5952 change the nature of the Washington State tax measures that will operate from 1 July 2024 in a significant respect, in that their availability post 1 July 2024 is subject to a contingency that does not condition their availability prior to 1 July 2024. Moreover, the availability of the B&O tax rate reduction in respect of future 777X revenues is now subject to a condition that did not previously apply. This is in marked contrast to the new measures in cases such as *Chile – Price Band System*, *Argentina – Footwear (EC)*, *US – Zeroing (Japan) (Article 21.5 – Japan)*, *EC – IT Products*, and *EC – Fasteners (China)*, where the new measures either 'clarified' the measure or essentially replicated the explicitly identified measures through new legislative action, and thus concerned the same measure (in a substantive sense) that was either the subject of panel request or that had been found WTO-inconsistent in the original proceeding."[136]

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

> "[T]he Panel finds that there is (i) an identity of the regulatory purpose; (ii) proximity of design, structure and impact; and (iii) close geographic and temporal relation of the import restrictions on the products at issue from Estonia and Latvia with those of the import restrictions of the products at issue from Lithuania and

[135] Panel Report, US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU), para. 7.525.
[136] Panel Report, US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU), para. 7.537.

> Poland as well as from the rest of the European Union. We consider these factual findings to strongly support the preliminary conclusion that the import restrictions on the products at issue from Estonia and Latvia are closely related to the measures explicitly described in the European Union's panel request."[137]

101. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* considered whether it should address the amended versions of the measures at issue adopted following the establishment of the Panel, the original versions of the measures identified in the panel request, or both versions.[138]

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

> "We note at the outset that neither party has contested the Panel's jurisdiction to review both the versions of the measures that existed at panel establishment and the amended ones. Nor do we see any reason to doubt that our mandate covers either version of the measures. In the absence of jurisdictional obstacles, our decision will be guided by the parties' specific requests and the overarching objective of the dispute settlement system to secure a positive solution to the dispute. We shall also take account of the specific nature of compliance proceedings."[139]

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

> "Starting with the amended versions of the measures, the parties concur that considering them would 'contribute to the prompt settlement of the dispute'. We agree that findings on the recent amendments would be particularly conducive to solving this dispute and note that the parties have extensively argued about the alleged inconsistency of the amended measures. Addressing the amended measures would also be useful if Indonesia is found to have achieved compliance with respect to some or all of them. This is particularly relevant in the context of compliance proceedings. Leaving unresolved new developments that have been properly argued before a panel in such proceedings could not only lead to additional litigation, but also to unnecessary suspension of concessions or other obligations, running counter to the DSU objective of prompt settlement of disputes."[140]

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

> "We would not subscribe to a view whereby a complainant would always and necessarily be 'entitled' to findings that are in addition to findings on a later version of the same measure. There may well be situations where such additional findings would simply not be necessary because the findings already made address all relevant issues.
>
> Regarding the first [reason], we understand Brazil to be making a point about the importance of the RPT. Indonesia was required to achieve substantive compliance by the end of the RPT and there is disagreement between the parties whether Indonesia has done so. To bypass this disagreement and focus only on the current situation would undermine the role of the RPT. It could create an incentive for responding Members to wait for Article 21.5 proceedings to start before implementing the DSB's recommendations and rulings. Therefore, we accept that, to give full effect to the RPT agreed between the parties, it may well be necessary to

[137] Panel Report, *Russia – Pigs (EU)*, para. 7.160.
[138] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.3.
[139] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.5.
[140] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.6.

> make a finding whether substantive compliance was achieved by the end of the RPT."[141]

105. The Panel thus concluded that it would review both the original versions and the amended versions of the challenged measures. The Panel determined that it would first address the amended measures and then the original versions in place at the time of Panel's establishment.[142]

106. 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."[143]

107. 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.[144]

108. In *US – Tariff Measures*, the Panel examined whether the increase in the initially imposed additional duties on List 2 products (one of the challenged sets of measures) introduced after the establishment of the Panel, was covered by its terms of reference. The Panel considered the observations made by prior WTO adjudicators, in particular those by the Appellate Body in *Chile – Price Band System* (see paragraph 88 above), and noted:

> "[T]he examination whether an amendment changes the essence of a measure identified in a panel request must remain circumscribed by the specific circumstances of the case at hand and cannot rely on pre-established factors. Prior WTO adjudicators have considered various factors, including the type of trade-restrictive effect sought (ban/additional duties); the range of products subject to duties; the operation of the measure and the amendment; their legal implications; the identity of their regulatory purpose; the proximity of design, structure and impact; the existence of an explicit reference in the amendment to the original measure; the title of the amendment; the authority that issued the measure and the amendment and the legal basis cited, as well as whether the original measure remained in force 'in substance'. Prior WTO adjudicators have also put emphasis on the question whether the complaining party has requested findings on the measure as amended. In contrast, they have considered that facts such as the 'apparent' consistency or inconsistency of a measure, have limited bearing in this examination."[145]

109. The United States insisted that the increase of the additional duties on List 2 products had its "own, particular rationale"[146], different from the rationale behind the adoption of the initial additional duties. The United States held that the rationale behind a Member's decision to adopt a measure cannot be disentangled from the measure's essence. The Panel disagreed, and pointed out that "the rationale (or the policy justification) behind the increase of the rate of additional

[141] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, paras. 7.8-7.9.
[142] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.11.
[143] Panel Report, *US – Renewable Energy*, para. 7.17.
[144] Panel Report, *US – Renewable Energy*, paras. 7.51-7.53.
[145] Panel Report, *US – Tariff Measures*, para. 7.48.
[146] Panel Report, *US – Tariff Measures*, para. 7.52.

duties on List 2 products from 10% to 25% does not alter the nature or the essence of the measure."[147]

110. The Panel in *Turkey – Additional Duties (US)* stated that the question whether an amendment adopted after panel establishment falls within the panel's terms of reference only arises where the complainant seeks findings on such amendment:

> "The Panel thus considers that, in the light of the emphasis placed by the DSU on the complainant's choices in framing the scope of its complaint, the question whether a particular measure or amendment falls within a panel's terms of reference is only relevant to the extent that the complainant seeks findings on that measure or amendment. The Panel does not consider there to be any basis for making either jurisdictional or substantive findings on a measure or amendment in the absence of a request from the complainant to do so. In the circumstances of these proceedings, where the complainant has explicitly limited its claims to the additional duties measure as applied through the Implementation Notice and the First Amendment, the question whether the Second Amendment falls within the Panel's terms of reference has no legal significance because the Panel has not been asked to make findings on that instrument.
>
> Accordingly, the Panel will assess the United States' claims under the GATT 1994 with reference to the additional duties measure as it existed at the time of the Panel's establishment, that is, as applied through the Implementation Notice and the First Amendment. It will not make findings on the measure as implemented through the Second Amendment. Nevertheless, the Panel is of the view that it may be necessary to reflect the changes implemented through the Second Amendment in its recommendations, if any, under Article 19.1 of the DSU."[148]

111. The Panel in *Turkey – Additional Duties (US)*, despite not having made findings on the amendment adopted after panel establishment, recommended, under Article 19.1 of the DSU, that "Türkiye bring its WTO-inconsistent measure into conformity with its obligations under the GATT 1994, to the extent that it has not already done so".[149]

#### 1.3.4.4.4.3 Consideration of Factual Circumstances Pertaining to the Challenged Measures After the Request for the Establishment of a Panel

112. In *EU and Certain Member States – Palm Oil (Malaysia)*, certain elements of the challenged measures entered into force after the Panel's establishment. This raised the question whether the Panel could take into consideration the factual developments, post-dating the Panel's establishment, concerning the operation of challenged measures. The Panel found that it could:

> "The Panel notes that, as a general rule in WTO dispute settlement proceedings, a panel's terms of reference require it to assess the WTO-consistency of a challenged measure as it existed on the date of the Panel's establishment. However, previous panels and the Appellate Body have confirmed that a panel may consider amending or implementing measures enacted after a panel's establishment. In deciding whether to examine amended or implementing measures, the relevant question is whether that amendment or implementing measure 'changes the essence of the measures' identified in the panel request. The extent to which a reference to 'related' or 'implementing' measures in a panel request may serve to bring measures taken after the establishment of the panel into the scope of a panel's terms of reference is to be assessed 'in light of the circumstances of each particular case'.
>
> These principles have been developed by panels and the Appellate Body in the context of considering whether the 'specific measures at issue' identified in a panel request can include implementing measures taken after the establishment of a panel. However, insofar as WTO dispute settlement practice allows scope for ruling on measures post-dating the establishment of a panel, it stands to reason, *a fortiori*, that a panel is not precluded from

[147] Panel Report, *US – Tariff Measures*, para. 7.53.
[148] Panel Report, *Turkey – Additional Duties (US)*, paras. 7.89-7.90.
[149] Panel Report, *Turkey – Additional Duties (US)*, para. 8.3.

> taking the factual situation post-dating establishment of the panel into account in its assessment of the design and operation of a measure that was in existence at the time of the establishment of the panel.
>
> In light of the foregoing, the Panel considers that it is not necessarily precluded, as a jurisdictional matter, from taking into account factual developments arising from the gradual implementation of RED II and the Delegated Regulation (insofar as they evolved over the course of the proceedings, i.e. after the request for and establishment of the Panel) in its assessment of the design and operation of the high ILUC-risk cap and phase-out. Indeed, both Malaysia and the European Union refer to certain post-establishment events, such as the review of data envisaged in Article 7 of the Delegated Regulation and the adoption of the implementing regulation as provided for in the Status Report and the Delegated Regulation. However, the Panel is not free to do so in a manner that would 'change the essence of the measures' identified in the panel request."[150]

#### 1.3.4.4.4.4 Provisional measures followed/superseded by definitive measures

113. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the Panel found that "despite being two formally distinct measures, the Panel considers that its findings on the Charges necessarily address the Philippines' substantive claims concerning the [notices of assessment, or NoAs] from the perspective of providing guidance on implementation", and that "[i]n these circumstances, making separate and additional findings on the CVA-consistency of the withdrawn NoAs would provide no guidance for implementation beyond the findings that the Panel has already made on the Philippines' identical substantive claims in relation to the 2002-2003 Charges."[151] In the course of its reasoning, the Panel recalled that, in the trade remedies and safeguards contexts, several panels have declined to make findings on distinct claims relating to provisional measures and preliminary determinations when they considered that similarities between the two sets of measures meant that their findings on the final duties and determinations would *a fortiori* address any corresponding issues with the earlier measures.[152] The Panel observed that:

> "In *Dominican Republic – Safeguard Measures*, for instance, the panel observed that 'insofar as the complainants [were to] succeed in making the case that the impugned measures are inconsistent with any of the provisions of the covered agreements, that finding would affect both the impugned definitive measure and the provisional measure'. Likewise, in cases involving laws or regulations amended in the course of the proceeding, panels have sometimes concluded that there would be no practical value in making findings on the earlier measure. In *Russia – Tariff Treatment*, for example, the panel concluded that its findings on the measure as amended were 'sufficient to address the issues raised' by the complainant's claims in respect of the precursor measure as it existed at the time of the panel's establishment. In *Colombia – Textiles*, the panel made findings on replacement measures that were of the 'same essence' as the repealed measures, and was of the view that making findings on the repealed measures therefore 'would amount to a purely academic exercise'.
>
> This consideration, i.e. whether making additional findings on the terminated measure would have any practical value for implementation in the light of its other findings on materially similar measures, accords with the logic underlying the practice of judicial economy. It also comports with the Appellate Body's view that among the powers that are inherent in a panel's adjudicative function 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'. Hence, where the 'matter' before a panel can be fully resolved or examined on the basis of an examination of only those measures that are still in force, such examination obviates

[150] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.59-7.61.
[151] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.499.
[152] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.473 (citing Panel Reports, *China – GOES*, para. 7.423; *China – Broiler Products*, para. 7.326; Panel Report, *Dominican Republic — Safeguard Measures*, paras. 7.19-7.21).

> the need for that panel to address the expired measure, and any findings on the latter would not be necessary to secure a positive solution to the dispute."[153]

114. In *EU – Safeguard Measures on Steel (Turkey)*, Türkiye challenged (a) the provisional safeguard measure and (b) the definitive safeguard measure applied by the European Union on imports of certain steel products. It was undisputed that the provisional safeguard measure had been replaced by the definitive safeguard measure, and was no longer in force. At the same time, Türkiye observed that the regulation that applied the provisional safeguard measure was still in force, which meant that, in Türkiye's view, the legal basis remained to collect provisional safeguard measures retroactively. The Panel found that Türkiye had not provided the Panel with any evidence that duties were either continuing to be collected, or could be collected, by the European Union under the provisional safeguard measure at issue. In these circumstances, the Panel declined to make findings on the consistency with the covered agreements of the provisional safeguard measure as a challenged measure. In the course of its analysis, the Panel stated:

> "In this instance, Turkey concedes that the provisional safeguard is no longer in force. Turkey claims that the provisional safeguard is inconsistent with Article 6 for a subset of the reasons for which it claims the definitive safeguard is inconsistent with other provisions of the Agreement on Safeguards. Indeed, Turkey makes no distinction between its arguments against the provisional safeguard and the corresponding arguments against the definitive safeguard. Given that the provisional safeguard is no longer in force, and that Turkey challenges the provisional safeguard for some of the same reasons for which it challenges the definitive safeguard, we do not consider that making findings on the consistency of the provisional safeguard with the covered agreements is necessary to resolve the dispute, and we therefore refrain from making such findings."[154]

#### 1.3.4.4.4.5 Terminated measures

##### In General

115. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the parties disagreed on whether the Panel should make findings on certain terminated measures. It was clear that at least 796 of the 1,052 revised "notices of assessment" (NoAs) were terminated before the DSB established the Panel, and while the parties disagreed on whether the remaining 256 revised NoAs had also been terminated prior to the Panel's establishment, or only after that point in time, there was no disagreement that they too had been terminated in the course of the proceedings. At the outset of its analysis of this issue, the Panel identified several different considerations previous panels had been guided by:

> "In deciding whether to make findings on expired, terminated, revoked, or repealed measures, panels have been guided by the general objective of securing a positive solution to the particular dispute. In some circumstances, panels have declined to make any findings on the challenged measure; in other circumstances, panels have made findings but refrained from making any recommendation; and in other circumstances, panels have made both findings and recommendations. Panels have attached importance to several different considerations, including most notably (1) whether the measure at issue was withdrawn prior to, or only after, the establishment of the panel by the DSB; (2) whether there was a risk of reintroduction of the same or materially similar measure; and (3) whether findings on the withdrawn measure would have any practical value for implementation in the light of other findings on materially similar measures. None of these three considerations is decisive in and of itself, and they do not necessarily exhaust the circumstances that panels may take into account when deciding how to exercise their discretion in respect of withdrawn measures. However, the Panel considers that these represent the main considerations that panels would take into account in most

[153] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.473-7.474.
[154] Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.9.

> cases involving withdrawn measures, and they will serve as the general framework for the Panel's analysis."[155]

116. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* proceeded to briefly elaborate on each of these considerations below, and beginning with the first consideration, i.e. the timing of the withdrawal of the measure, stated that:

> "[I]n many instances where expired measures arose in past cases, panels have paid particular attention to whether the measures in question had expired before or only after the panel's establishment by the DSB. This has generated on the one hand a line of case law addressing measures that expired *before* panel establishment and on the other hand a line of case law addressing measures that expired *after* panel establishment. In respect of measures withdrawn before panel establishment, panel practice appears to heavily lean against making any findings; in respect of measures withdrawn after panel establishment, panel practice appears to heavily lean towards panels making findings on such measures, but not making any recommendation pursuant to Article 19.1 of the DSU. The Appellate Body has recently confirmed the significance of this distinction. In *EU – PET (Pakistan)*, the panel drew this distinction. On appeal, the Appellate Body agreed, and stated that the respondent in that case appeared 'to overlook this temporal distinction' in the course of suggesting that the case-law showed 'a mixed picture' regarding whether panels and/or the Appellate Body have made findings in cases where the measure at issue expired or was terminated before or during the WTO proceedings. The Appellate Body found that the Panel did not err in 'giving importance to the fact that, in the present dispute, the measure expired after the DSB had established the Panel' and, in that situation, proceeding to make findings on the measure notwithstanding that it had expired."[156]

### Termination prior to panel's establishment

117. The Panel in *US – Gasoline*, in a finding not addressed by the Appellate Body, 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 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."[157]

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[155] Panel Report, Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II), para. 7.468.
[156] Panel Report, Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II), para. 7.469.
[157] Panel Report, *US – Gasoline*, para. 6.19.

118. 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.[158] 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. …
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> [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
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>> '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'."[159]

119. 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 by international law. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced."[160]

120. 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

[158] Panel Report, Argentina – Textiles and Apparel, para. 6.7.
[159] Panel Report, *Argentina – Textiles and Apparel*, paras. 6.11-6.13.
[160] Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.

> because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same."[161]

121. 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."[162]

122. 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.[163] 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.[164]

123. 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.[165]

124. In *Costa Rica – Avocados (Mexico)*, the Panel noted that a manual used as the tool to guide the preparation of the relevant risk analyses (the Reports) had been repealed, and replaced with a new manual, in between the time that Mexico requested consultations with Costa Rica and the time of the request for the establishment of a panel. However, the Panel explained that "this manual was the tool used to guide the preparation of Reports ARP-002-2017 and ARP-006-2016, which were not amended following the issuance of the new manual, so, even though it has been repealed, the manual continues to have an effect on the reports".[166] After recalling relevant statements made by the Appellate Body in *US – Upland Cotton*, *EC – Bananas III* and *EU – PET (Pakistan)*, the Panel concluded that:

> "It follows from the foregoing that panels have the authority to make findings on measures that were no longer in force when the panel was established if the effects of those measures continue to be felt. Although, in general, it appears unnecessary for a panel to make recommendations on a repealed measure, the panel is not precluded from doing so in any particular case."[167]

125. The Panel in *Australia – AD/CVD on Certain Products (China)* declined to make findings or recommendations on measures that had been terminated prior to panel establishment:

> "We therefore recall that certain aspects of the anti-dumping and countervailing duty orders have expired by virtue of: (a) the ADC's findings in the wind towers and stainless steel sinks expiry reviews, which were concluded in 2019 and 2020, respectively; and/or (b) the administrative review, pursuant to which TSP was excluded from the anti-dumping order, concluded in 2020. All were concluded before Panel establishment in 2022. We consider this factor decisive, and we decline to issue findings or recommendations as to the expired aspects of the orders on that basis."[168]

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[161] Panel Report, *Argentina – Textiles and Apparel*, para. 6.15.
[162] Panel Report, *EC – Poultry*, paras. 250-252.
[163] Panel Report, *US – Certain EC Products*, para. 7.1.
[164] Appellate Body Report, *US – Certain EC Products*, para. 81.
[165] Panel Report, *China – Agricultural Producers*, paras. 7.82-7.92.
[166] Panel Report, Costa Rica – Avocados (Mexico), para. 7.47.
[167] Panel Report, Costa Rica – Avocados (Mexico), para. 7.53.
[168] Panel Report, *Australia – AD/CVD on Certain Products (China)*, para. 7.346.

### Termination after the panel's establishment

126. 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."[169]

127. 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."[170]

128. In *Turkey – Rice*, the measure at issue, a tariff quota on rice, had expired more than four months after the establishment of the Panel. Türkiye had thus requested that the Panel refrain from making findings on the measures related to Türkiye's tariff quota regime or otherwise abstain from making recommendations to the DSB. The Panel, further to considering the possibility that Türkiye enforces a similar TRQ, considered 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.
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> …
>
> 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."[171]

129. The Panel in *Turkey – Rice* thus concluded:

> "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

[169] Panel Report, *US – Wool Shirts and Blouses*, para. 6.2.
[170] Panel Report, *Indonesia – Autos*, para. 14.9.
[171] Panel Report, *Turkey – Rice*, paras. 7.170, 7.174-7.175.

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."[172]

130. 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."[173]

131. 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 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

[172] Panel Report, *Turkey – Rice*, para. 7.180.
[173] Panel Report, *US – Poultry (China)*, paras. 7.54-7.56.

> 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.
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> 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."[174]

132. 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."[175]

133. 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.
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> …
>
> 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

[174] 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.
[175] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.19.

> 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."[176]

134. In *India – Tariffs on ICT Goods (EU)*, India, the respondent, introduced a measure which eliminated an alleged violation by India. The European Union, the complainant, requested the Panel to make a finding that until the adoption of this measure India was acting inconsistently with its WTO obligations. India asked the Panel not to make any recommendations on this matter. The Panel did not see any contradiction between these two requests:

> "In our view, the European Union's request for *findings* and India's argument that we may not make *recommendations* are not in tension with each other. To the extent that India was acting inconsistently with its WTO obligations at the time of the Panel's establishment, and India resolved that inconsistency during these proceedings, we can both: (i) make legal and factual findings to that effect; and (ii) refrain from making any recommendations that India bring itself into consistency with its WTO obligations. Given the parties' disagreement as to whether India was, at the time of the Panel's establishment, acting inconsistently with its WTO obligations, we consider it useful for the purposes of resolving the parties' dispute to address this issue. We therefore proceed to assess the tariff treatment accorded by India to line telephone handsets both at the time of the Panel's establishment and following India's amendments that took place during these proceedings."[177]

#### 1.3.4.4.4.6 Identification of Expired Measure in Consecutive Trade Remedy Proceedings

135. In *Australia – AD/CVD on Certain Products (China)*, China argued that certain errors committed in original investigations infected the subsequent proceedings pertaining to the same measure, and that therefore the Panel should make findings in respect of such original investigations, without inquiring whether they have expired. The Panel noted that China's argument required the Panel to make a counterfactual assessment, and declined to do so. In so finding, the Panel rejected China's view that errors committed by an investigating authority in an original investigation cannot expire even if the authority changes its approach on the relevant issues in subsequent proceedings involving the same measure:

> "We first recall China's argument that the alleged errors in the original investigations are 'foundational' in nature. Thus, from China's perspective, such errors in the original investigation 'infect' the anti-dumping or countervailing duty order as it was originally imposed. This infection, according to China, cannot be remedied by later-in-time segments because such segments merely continue the originally flawed order. As a result, in China's view, we should always make findings in respect of the original investigations, and refrain from finding that they may have expired. In support of this conceptual approach, China argues, in particular, that in the absence of the alleged flaws in the original investigations, certain exporters' subsidization margins in the stainless steel sinks proceedings would have been *de minimis* (and thus the exporters would have been excluded from the scope of the countervailing duty order altogether), the injury and causation analyses in the CVD investigation would have been different, and there may not even be a countervailing duty order in place today. China also asserts that previous panels and the Appellate Body have observed that different segments of anti-dumping or countervailing proceedings are interrelated.
>
> We therefore note that China appears to advocate using a broad counterfactual approach to assessing expiry. That is, with respect to any given aspect of the orders, China asks us to envision a world in which the alleged WTO inconsistencies never occurred, assume that this would have required the ADC to change its approach to a given issue (e.g. assessment of subsidy benefit), compare that changed

[176] Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.105 and 7.107.
[177] Panel Report, *India – Tariffs on ICT Goods (EU)*, para. 7.418.

> counterfactual situation to the situation in the actual world, and then, if anything about the anti-dumping or countervailing duty orders would have been different between the two, we could not find that the aspect is expired. We decline to adopt this approach. Because we generally must assess expiry before we determine whether to issue findings, China appears to ask us to assume that violations of WTO law occurred *ex ante*, assume how Australia would comply with any hypothetical findings, and then fashion a counterfactual world based upon those assumptions. We, however, consider it inappropriate to either assume violations of WTO law before they are found to exist or assume how Australia would comply with any findings that we might issue. Moreover, even if China more simply argues that the ongoing legal effect of an aspect of an anti-dumping or countervailing duty order should be judged by the fact that *other, related aspects* have continued legal effect, we still consider this approach flawed. This is so because we consider it illogical to assume that simply because certain aspects of anti-dumping or countervailing duty orders are related, in that one may change when another changes, that means that all such aspects become part and parcel of each other for expiry purposes when only one such aspect is challenged. We therefore recall that, in this dispute, China challenges certain aspects of Australian anti-dumping and countervailing duty orders (e.g. dumping margin calculations, determination of subsidy benefit, etc), and such claims are only lodged on an as-applied basis. This observation, in our minds, also critically undermines China's view that alleged errors committed by an investigating authority in an original investigation can never become expired through the application of a new approach taken by that investigating authority in a post-investigation segment."[178]

136. On this basis, the Panel in *Australia – AD/CVD on Certain Products (China)* resolved the issue of expiry of measures by looking at the present situation:

> "In light of these considerations, it seems to us that the question of whether a challenged aspect of the order is expired is narrower than China envisions. That is, the question of expiry is to be assessed with respect to the situation we observe at present, asking whether Australia legally applies a particular challenged aspect of the order at present or not. This appears consistent with the fact that China only challenges certain, specific aspects of the orders on an as-applied basis. We therefore consider it appropriate to assess expiry on a claim-by-claim basis, focusing on whether the specific, relevant aspects of the orders have expired (i.e. ceased to have legal effect) in the context of the relevant proceedings. We therefore disagree with China's arguments that we cannot find any challenged aspect of the orders to be expired and must make findings with respect to the original investigations whenever they are challenged.
>
> In order to facilitate the expiry examination in a manner consistent with the above reasoning, the Panel will assess the extent to which the challenged aspect changed as between; (a) the original investigations, (i.e. the segment on which China focusses its challenges); and (b) the expiry reviews, i.e. the latest-in-time segments which determined the anti-dumping and countervailing duty rates to which Chinese exporters are currently subject."[179]

137. The Panel in *Australia – AD/CVD on Certain Products (China)* then explained its approach in making the expiry examination, as follows:

> "If the essence of a challenged aspect *remained unchanged* as between the investigations and the expiry reviews, two relevant consequences follow. The first is that, if China challenges the investigations and expiry reviews for a given claim, then an argument against one such segment functions as an argument against both. We thus note that, for all claims with respect to wind towers and stainless steel sinks except AD claims 6.b.ii and 6.b.iii, and CVD claim 5, China challenges not only the original investigations, but also the expiry reviews and the stainless steel sinks interim reviews. If there is no essence change as between the investigations and

[178] Panel Report, *Australia – AD/CVD on Certain Products (China)*, paras. 7.36-7.37.
[179] Panel Report, *Australia – AD/CVD on Certain Products (China)*, paras. 7.38-7.39.

> expiry reviews, therefore, then arguments against the investigations would function as against the expiry reviews and would be deemed lodged in a timely manner.
>
> The second consequence of observing no essence change is that we consider it within our discretion regarding the segment with respect to which we make findings. In these circumstances, and when faced with this choice, we consider it sufficient and most appropriate to make findings with respect to the expiry reviews, these being the latest-in-time segment and the iteration of the anti-dumping or countervailing duty order to which Chinese goods are currently subject. This choice also means that we need not specifically address Australia's arguments that the expiry reviews led to the expiry of the original investigations and interim reviews, because we do not make findings with respect to these segments.
>
> If the essence of a relevant aspect of the order *did change* as between the investigation and the expiry review, this, in our minds, indicates that the challenged aspect of the order present in the original investigation expired (having been effectively replaced by the expiry review). Moreover, this will also mean that China, in order to effectively challenge the expiry reviews, must have raised arguments specific to that changed aspect in a timely manner. We note, however, that the essence-change assessment significantly facilitates, but may not in all cases resolve, the expiry inquiry. This is so because, for example, certain challenged aspects of orders may not technically change over time, but may still become expired through other means. Moreover, any such expiry analysis will ultimately be fact specific."[180]

#### 1.3.4.4.4.7 Prospective measures

138. In *US – Continued Zeroing*, the Panel found that "Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment unless they come into existence during the panel's proceedings".[181] The Appellate Body disagreed with the Panel's view, noting that it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect:

> "The Panel appeared to consider that, because the remedy sought by the European Communities was prospective in nature, the 'measures' with respect to which such remedy was sought could not be regarded as specifically identified in the panel request. In our view, the remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint. As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments."[182]

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

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[180] Panel Report, *Australia – AD/CVD on Certain Products (China)*, paras. 7.40-7.42.
[181] Panel Report, *US – Continued Zeroing*, para. 7.59.
[182] Appellate Body Report, *US – Continued Zeroing*, para. 171.

> "We note that the complainants incorporated the phrase 'any amendments, or extensions and any related or implementing measures' into their joint Panel request. We recall that the complainants, in the joint Panel request, identifies as the specific measure at issue Council Regulation No. 2658/87, '*as amended*' (emphasis added). While we do not consider that the mere incantation of the phrase 'any amendments, or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. This is especially true with the type of measures we have before us, which are amended annually."[183]

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

> "The six determinations before this Panel are 'closely connected' to the determinations explicitly listed in China's panel request, and form part of a chain of measures or a continuum wherein the six determinations were made in administrative reviews that superseded previous administrative reviews or original investigations. Moreover, the six determinations are linked to anti-dumping duty orders on the basis of which anti-dumping duties were originally imposed and, therefore, 'involv[e] the same products, from the same countries'. In addition, the six determinations are 'subsequent measures' because they were issued after, and hence succeeded, the determinations explicitly listed in China's panel request."[184]

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

> "[T]here is a very close nexus between the remand determination and the measures expressly cited in the request for the establishment of the Panel. In particular, the remand determination supplements and reaffirms the USDOC's original determination of disproportionality, and is restricted to that issue. In these particular circumstances, we consider that the remand determination is covered by our terms of reference, despite the fact that it was not in existence at the time that this Panel was established."[185]

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

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

[183] Panel Report, *EC – IT Products*, para. 7.140.
[184] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.260.
[185] Panel Report, *US – Washing Machines*, para. 7.249.

different, resulting in different margins of dumping, we do not agree that the essence of the original determination is unchanged."[186]

#### 1.3.4.4.4.8 New measures closely connected to measures in panel request

143. In *US – Steel and Aluminium Products (Turkey)*, the Panel found that a measure adopted after the filing of the complainant's panel request had a close connection with the measures identified in the panel request, and therefore fell within the Panel's terms of reference:

> "For the foregoing reasons, the Panel concludes that Presidential Proclamation 9980 and the actions set out therein, i.e. the imposition of duties on derivative steel and aluminium products and corresponding exemptions, bear a close connection to the earlier measures on steel and aluminium that are identified in Türkiye's panel request. Moreover, Türkiye's panel request was formulated so as to encompass such supplements or extensions as well as exemptions from those measures. The Panel therefore finds that these measures are within its terms of reference."[187]

#### 1.3.4.4.5 Type of measure

#### 1.3.4.4.5.1 General

144. In Japan – Agricultural Products II, the Appellate Body interpreted the term "measure" within the meaning of Annex B of the SPS Agreement. According to its terms, Annex B applies to all "measures" and lists "laws, decrees and ordinances" as three examples of such measures. The Appellate Body found that the list in Annex B was not exhaustive in nature and held that the term "measure" also included "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to". In the case before it, the Appellate Body found that the Japanese "varietal testing requirement" was a "measure" within the meaning of Annex B of the SPS Agreement.[188]

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

> "We observe that the scope of each element in the phrase 'laws, regulations and administrative procedures' must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 [of the Anti-Dumping Agreement] would vary from Member to Member depending on each Member's domestic law and practice."[189]

#### 1.3.4.4.5.2 Challenging a system as a whole

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

> "[W]e agree with the Panel that 'there is nothing in the DSU nor in the other WTO agreements that would prevent a complaining Member from challenging a responding Member's system as a whole or overall.' We also agree with the Panel that a challenge that a system 'as a whole or overall' is WTO-inconsistent must be presented in a manner that meets the two distinct requirements in Article 6.2 of the DSU. … We also recognize, as the Panel did, that, in this case, the legal instruments referred to by the United States in the panel request, 'cumulatively, contain' a vast number of provisions that relate to a variety of customs areas and that 'entail administration in … diverse

[186] Panel Report, *US – OCTG*, para. 7.132.
[187] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.21. See also ibid. para. 7.26.
[188] Appellate Body Report, *Japan – Agricultural Products II*, paras. 105-108.
[189] Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review, fn 87.

> ways'. However, the essence of the United States' claim was not the administration or application of individual provisions of these legal instruments, but the absence of any mechanism or procedure at the European Communities level to reconcile divergences in the administration of these instruments by the member States of the European Communities. Therefore, we do not think that the due process rights of the European Communities were infringed merely because the claim of the United States related to the manner of administration of the European Communities customs law as a whole or overall.
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> …
>
> … [T]he claim of the United States in this dispute is not an 'as such' claim, in the sense that it does not challenge the substantive content of the measures at issue.
>
> … [T]he United States' contention on the 'design and structure' of the European Communities' system of customs administration was made as an argument to substantiate its 'as a whole' challenge set out in the panel request."[190]

147. The Panel in *Indonesia – Chicken* considered "that for a panel request to properly challenge a regime as a whole, it should clearly indicate that the whole regime is a measure at issue."[191]

#### 1.3.4.4.5.3 Independent operational status test

148. In *US – Export Restraints*, Canada argued that each of the elements cited in its request for establishment of a panel (a US statute, a Statement of Administrative Action, a Preamble and US practice) individually constituted a measure and that "taken together" as well, these elements constituted a measure.[192] In its analysis of these measures, the Panel came up with the *independent operational status test*:

> "In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations. To determine whether each measure is operational on its own, we consider the status of each under US law."[193]

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

> "In our view, upon being filed by the Public Prosecutor and issued by the competent Thai Criminal Court on the same day, the Charges 'do' something concrete, independently of any other instruments or subsequent actions taken by the executive, administrative or judicial organs of Thailand. Specifically, the Charges have the direct legal consequences of: (i) the accused becoming subject to the mandatory jurisdiction of the criminal court; (ii) the accused being required to appear before the court to answer the Charges and attend the hearings relating to the Charges; (iii) the accused having to apply for and pay bail to secure temporary release during the proceedings; (iv) the accused having an officially recorded indictment and accusations; and (v) the accused having to pay the costs of a defence for criminal proceedings. Finally, the Charges deploy negative reputational effects to which the accused is being exposed. Accordingly, the Charges 'operate' in 'some concrete way in its own right' as 'an instrument with a functional life of its own'. In other words, it is an instrument that has 'autonomous status'.

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[190] Appellate Body Report, *EC – Selected Customs Matters*, paras. 166 and 174-175.
[191] Panel Report, *Indonesia – Chicken*, para. 7.39.
[192] Panel Report, *US – Export Restraints*, para. 8.82.
[193] Panel Report, *US – Export Restraints*, para. 8.85.

…

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

…

Based on the foregoing, we conclude that the Charges constitute a distinct 'measure' for purposes of WTO dispute settlement. We next turn to the question of whether the Charges constitute a 'determination' under the CVA."[194]

#### 1.3.4.4.5.4 "practice", "ongoing conduct", and other "unwritten measures"

##### Practice

150. In *US – Export Restraints*, Canada claimed that the United States "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the SCM Agreement was a measure and could be challenged as such. Canada defined the United States' "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations" and claimed that this "practice" has an "operational existence in and of itself".[195] The Panel considered whether the alleged United States practice required the United States' authorities to treat export restraints in a certain way and therefore had "independent operational status". The Panel, which concluded that there was no measure in the form of a United States practice, indicated:

> "[W]hile Canada may be right that under US law, 'practice must normally be followed, and those affected by US [CVD] law … therefore have reason to expect that it will be', past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC 'normally' follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives 'legal effect to that 'practice' as determinative of the interpretations and methodologies it applies'. US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."[196]

151. 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.[197]

152. In *US – Steel Plate*, the United States, in reference to the Panel Report in *US – Export Restraints*, argued that the United States' "practice" (in this case its practice as regards total facts available)[198] could not be the subject of a claim because it did not have "independent operational status" and therefore it was not a "measure".[199] India, on the contrary, claimed that a "practice"

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[194] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.580 and 7.583-7.584.

[195] Panel Report, *US – Export Restraints*, para. 7.120.

[196] Panel Report, *US – Export Restraints*, para. 8.126.

[197] Panel Report, US – Hot-Rolled Steel, para. 7.22.

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

[199] Panel Report, *US – Steel Plate*, para. 7.14.

becomes a "measure" through repeated similar responses to the same situation.[200] The Panel concluded:

> "That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. …
>
> [T]he challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something."[201]

153. In *US – Oil Country Tubular Goods Sunset Reviews*, Argentina brought conditional appeals with respect to: (1) Article X:3(a) of the GATT 1994; and (2) the "practice" of the USDOC regarding its likelihood determinations in sunset reviews. The Appellate Body declined to make a finding on whether a "practice" can be challenged as a "measure", ruling instead that the Panel's record of the dispute did not allow the Appellate Body to complete its analysis of Argentina's conditional appeal with respect to the "practice" of the USDOC regarding the likelihood determination in sunset reviews.[202]

154. The Panel in *US – Zeroing (Japan)* considered that "a measure may be found to have general and prospective application if it reflects a deliberate policy, going beyond the mere repetition of the application of that measure in specific instances."[203]

155. In *US – Gambling*, in the course of examining what measures Antigua was challenging in that dispute, the Panel relied on certain Appellate Body decisions to support its view that "practice" can be considered as an autonomous measure that can be challenged in and of itself. The Panel then observed that certain acts identified by Antigua could constitute "practices", as that term had been understood by the panel in *US – Corrosion Resistant Sunset Steel Review*. However, based on Antigua's clarification in its comments to the United States' request for preliminary rulings, the Panel concluded that Antigua was not challenging any practice as such.[204] The Appellate Body noted that the Panel's statement on "practice" was a mere *obiter dictum* and found no need to rule on it. The Appellate Body however disagreed with the Panel's understanding of the Appellate Body's jurisprudence and reaffirmed that "[t]he Appellate Body has not, to date, pronounced upon the issue of whether 'practice' may be challenged, as such, as a 'measure' in WTO dispute settlement."[205]

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

> "When a challenge is brought against an *unwritten measure*, the very existence and the precise contours of the alleged measure may be uncertain. We would therefore expect complaining parties to identify such measures in their panel requests as clearly

[200] Panel Report, *US – Steel Plate*, para. 7.15.
[201] Panel Report, *US – Steel Plate*, paras. 7.22-7.23.
[202] Appellate Body Report, US – Oil Country Tubular Goods Sunset Reviews, paras. 216-221.
[203] Panel Report, *US – Zeroing (Japan)*, para. 7.34. See also Panel Reports, *US – Stainless Steel (Mexico)*, paras. 7.28-7.42 and 7.84-7.97; *US – Shrimp (Viet Nam)*, paras. 7.110-7.111; and *US – Shrimp (Viet Nam) II*, para. 7.34.
[204] Panel Reports, US – Gambling, para. 6.197 (citing Appellate Body Reports, US – Corrosion-Resistant Steel Sunset Review, para. 97; US – Carbon Steel, para. 157; and US – Countervailing Measures on Certain EC Products, para. 162).
[205] Appellate Body Report, *US – Gambling*, para. 129.

> as possible. We would also expect that complaining parties state unambiguously the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Panel requests should give respondents and third parties sufficient notice of the specific measures that the complainant intends to challenge in WTO dispute settlement proceedings.
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> …
>
> The Appellate Body has addressed, in several cases, the scope of 'measures' that may properly form the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that, '{i}n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.' The scope of measures that can be challenged in WTO dispute settlement is therefore broad. As a general proposition, we do not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement. Nor do we consider that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists. In the present case, however, we are unable to discern in the United States' panel request a challenge to an alleged LA/MSF Programme as a specific measure 'separate from the individual instances of {LA/MSF}', and, as noted, a complainant's subsequent submissions during panel proceedings cannot cure such a defect in a panel request."[206]

### Ongoing conduct

157. The Appellate Body in *US – Supercalendered Paper* reiterated that "in order to prove the existence of an 'ongoing conduct' measure, a complainant must clearly establish that the alleged measure is attributable to the responding Member, its precise content, its repeated application, and that it is likely to continue to be applied in the future."[207]

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

> "The Panel concluded that Canada had provided sufficient evidence to establish the precise content of the alleged measure. The Panel considered that variations in language in Canada's examples did not detract from the fact that the substance of the questions and the USDOC's subsequent reactions were the same in each example. …
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> …
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> Overall, we consider that the Panel was correct to focus on the substance of the USDOC's conduct for each element of the alleged OFA-AFA measure, as evidenced by the USDOC questionnaires and determinations before the Panel. Thus, we see no error in the Panel's finding that Canada had established the precise content of the alleged OFA-AFA measure as the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to the OFA question, applying AFA to determine that such information amounts to countervailable subsidies."[208]

159. In *US – Supercalendered* Paper, the Appellate Body agreed with the Panel's examination of the "'repeated application' by reference to the elements of the alleged measure in this dispute, and not against the particular elements of the measure in *US – Continued Zeroing*".[209] The Appellate

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[206] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 792 and 794.
[207] Appellate Body Report, *US – Supercalendered Paper*, para. 5.17. See also Appellate Body Report, *Argentina – Import Measures*, paras. 5.107-5.108.
[208] Appellate Body Report, *US – Supercalendered Paper*, paras. 5.20 and 5.24.
[209] Appellate Body Report, *US – Supercalendered Paper*, para. 5.31.

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

> "We recall that, in *US – Continued Zeroing*, the European Communities challenged the 'use of the zeroing methodology in a string of connected and sequential determinations' in 18 cases, by which anti-dumping duties were being maintained. The Appellate Body understood the 'string of connected and sequential determinations' to mean successive proceedings in the 18 anti-dumping duty cases. Having reversed the relevant panel findings in *US – Continued Zeroing*, the Appellate Body examined whether there were sufficient factual findings and undisputed facts on the record for it to complete the legal analysis, as requested by the European Communities. In this respect, the Appellate Body found that in only 4 of the 18 cases were there sufficient factual findings indicating the repeated use of the zeroing methodology in a string of determinations, made sequentially over an extended period of time.
>
> In our view, the Appellate Body's analysis concerning the strings of anti-dumping determinations in *US – Continued Zeroing* did not qualify the legal standard of 'repeated application' generally. Rather, the Appellate Body's examination related to the European Communities' characterization of the alleged 'ongoing conduct' measure in that dispute. Indeed, the panel and the Appellate Body in that dispute examined the evidence submitted by the European Communities in light of the manner in which the European Communities had characterized the challenged measure. Thus, we do not understand the Appellate Body to have suggested that a complainant must always show repetition in a string of connected and sequential determinations in successive proceedings pertaining to the same order to demonstrate successfully the 'repeated application' of an alleged 'ongoing conduct' measure.
>
> Unlike in *US – Continued Zeroing*, Canada does not characterize the alleged OFA-AFA measure as occurring in 'a string of connected and sequential determinations' or 'successive proceedings'. Rather, before the Panel, Canada submitted that the alleged OFA-AFA measure consists in the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question, applying AFA to determine that the discovered information amounts to countervailable subsidies. As before the Panel, Canada contends on appeal that this alleged measure has been repeatedly applied since 2012 whenever the relevant circumstances arose."[210]

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

> "We disagree with the United States' suggestion that a complainant is required to establish that a Member has 'adopted' a decision to follow particular conduct in the future. While such an adopted decision may suffice, in certain cases, to show that particular conduct is likely to continue in the future, a complaining Member need not rely on a formal decision by the responding Member to demonstrate the existence of 'ongoing conduct'. Rather, we consider that likelihood of continued application may be demonstrated through a number of factors. In this respect, we agree with the Panel that Canada was not required to prove 'certainty' of future application of the alleged OFA-AFA measure.
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> …
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> … We see no error in the Panel's conclusion that the evidence adduced by Canada sufficiently establishes that the challenged conduct is likely to continue. In particular, we agree with the Panel that the consistent manner in which the USDOC refers to the alleged OFA-AFA measure, the frequent reference to previous applications of the

[210] Appellate Body Report, *US – Supercalendered Paper*, paras. 5.28-5.30.

> alleged measure in USDOC determinations, the fact that the USDOC refers to the alleged measure as its 'practice', and the USDOC's characterization of a departure from the alleged measure as an 'inadvertent error' all support the conclusion that the alleged measure is likely to continue to apply."[211]

161. In *US – Anti-Dumping and Countervailing Duties (Korea)*, after finding that Korea had not satisfied the elements for characterizing an alleged unwritten measure as a "rule or norm of general and prospective application"[212], the Panel addressed Korea's alternative characterization of the same measure as a form of "ongoing conduct".[213] In determining what elements Korea would need to satisfy to demonstrate the content and existence of a measure as "ongoing conduct", the Panel considered that the typical distinctions between a "rule or norm of general and prospective application" and "ongoing conduct" are not always useful. Instead, the Panel focused on Korea's description of the specific measure to ascertain the elements that would need to be demonstrated to establish the existence of the unwritten measure:

> "While many different kinds of measures have been challenged by complainants in previous disputes – including, *inter alia*, a 'rule or norm' and 'ongoing conduct' – nothing in the treaty text distinguishes different measures in this manner. Generally speaking, we agree with the Appellate Body that '[t]hese distinctions are not always useful or appropriate to define the elements that must be substantiated for purposes of proving the existence and nature of a measure at issue'. Instead, as discussed, the additional elements that must be demonstrated to establish the existence of an unwritten measure are to be ascertained in light of the specific measure challenged and how it is described by a complainant in a given case. Rather than focusing on the elements necessary to establish the existence of different kinds of measures in the abstract, our task is better served by examining the precise description of the specific measure offered by Korea with a view to ascertaining the elements that it must demonstrate."[214]

162. Among other observations, the Panel noted that the measure challenged by Korea was markedly different from the measures previously challenged as "ongoing conduct" in other disputes, including *US – Continued Zeroing*. The Panel recalled that the Appellate Body in that dispute had considered the claim against "ongoing conduct" to be distinct from an "as such" claim:

> "The Appellate Body explained that the 'successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order'. For the Appellate Body, the 'use of the zeroing methodology in a string of these stages [was] the allegedly unchanged component of each of the 18 measures at issue' and it was 'with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation'. Notably, the Appellate Body considered that the European Communities' claim against 'ongoing conduct' 'is not an 'as such' claim'."[215]

163. The Panel noted that the measure as characterized by Korea did not challenge the use of "adverse facts available" in connected segments of a determined number of investigations, which may be more typical of "ongoing conduct". Rather, the measure was characterized as allegedly preventing the investigating authority from engaging in WTO-consistent conduct *in general* and *in the future*. Consistent with the "as such" nature of Korea's main challenge to the alleged unwritten measure, as well as Korea's description and demonstration of the precise content of the measure, the measure was more properly characterized as a "rule or norm" than as "ongoing conduct" The Panel also noted that Korea had failed to establish the existence of the "rule or norm", and as Korea's "as such" challenge had been dismissed, the Panel found that Korea had failed to establish the existence of the measure as "ongoing conduct" for the same reasons:

> "In contrast to the measures challenged in these prior disputes, Korea's description of the measure at hand is broadly-worded and is not limited to [a] certain finite number

[211] Appellate Body Report, *US – Supercalendered Paper*, paras. 5.44 and 5.47.
[212] See paragraph 204 below for a summary of the Panel's analysis.
[213] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.700.
[214] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.703.
[215] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.706.

> of proceedings or narrow set of circumstances. Korea does not characterize the alleged unwritten measure as 'ongoing conduct' to challenge the use of 'adverse facts available' by the USDOC in connected segments of a determinate number of investigations, such as, for example, the investigations challenged in this dispute on an 'as applied' basis. Rather, the unwritten measure allegedly prevents the USDOC from engaging in WTO-consistent conduct *in general* and *in the future*. Consistent with the 'as such' nature of Korea's challenge, as well the manner in which it describes and demonstrates the precise content of the alleged unwritten measure, we consider that the alleged unwritten measure described by Korea is properly characterized as a 'rule or a norm' and not as 'ongoing conduct'.
>
> In any event, Korea acknowledges that the arguments and evidence for establishing the 'precise content' of the 'ongoing conduct' measure are the same as those presented in the context of the 'rule or a norm'. We have found above that Korea has failed to establish the existence of the 'rule or a norm' with the precise content alleged by it. Therefore, Korea's attempt at establishing the existence of the 'ongoing conduct' measure also fails for the same reasons."[216]

164. After enunciating its finding, the Panel also noted that the understanding of "ongoing conduct" outlined in *US – Supercalendered Paper* was substantially closer to the notion of a "rule or norm of general and prospective application". The Panel agreed with the observation of a separate Appellate Body opinion, however, that this concept of "ongoing conduct" was broader, and perhaps more vague and less disciplined in its requirements. In the Panel's view, the complainant's description and characterization of the alleged unwritten measure served to caution against a mechanistic and rigid application of those notions:

> "The panel and the Appellate Body in *US – Supercalendered Paper* appear to have shared an understanding of 'ongoing conduct' that is substantially closer to the notion of a 'rule or norm of general and prospective application'. However, as one Appellate Body Member observed in their separate opinion on this issue, '[i]n this case, the Panel and the majority [went] beyond *US – Continued Zeroing* to enhance and broaden the concept of 'ongoing conduct' into something akin to a 'rule or norm of general and prospective application', only vaguer and less disciplined in its requirements'. We agree with this observation and consider that Korea's description and characterization of the alleged unwritten measure in this case serves to caution against a mechanistic and rigid application of these notions."[217]

165. In *US – Softwood Lumber VII*, the complainant had challenged the Maritimes Stumpage Benchmark as a measure of, among other things, "ongoing conduct". This type of measure contains four constituent elements: (a) the attribution of the measure to the United States, (b) the precise content of the measure, (c) the repeated application of the conduct, and (d) the likelihood that such conduct will continue.[218] With respect to the likelihood of continuation of the USDOC's conduct, the Panel considered that the complainant essentially relied on the same type of arguments as it did when contending that the Maritimes Stumpage Benchmark was a measure of "continued application". The Panel rejected the complainant's argumentation for the same reason as it did in that context:

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

[216] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.709-7.710.
[217] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.711.
[218] Panel Report, *US – Softwood Lumber VII*, para. 7.775.

> not established the likelihood of continuation of the conduct, i.e. likelihood of continued application of the Maritimes Stumpage Benchmark."[219]

166. In *Turkey – Pharmaceutical Products (EU)*, the Panel found that the European Union had established the existence of an overarching measure whereby Turkish authorities gave priority, in the context of reviewing certain authorization applications, to domestic pharmaceutical products over like imported products. The Panel concluded that this "prioritization measure" mandated giving priority to the review of applications based on criteria attaching to local production and recalled that rules or norms that mandate certain action may be challenged "as such" in WTO dispute settlement. The Panel rejected Türkiye's argument to the effect that the European Union's description of the measure in its panel request and first written submission, in terms of measure whereby Türkiye "gives priority" to domestic pharmaceutical products, meant that the European Union was challenging a measure in the form of "ongoing conduct" such that the European Union had to provide evidence of that alleged conduct/practice. In the course of its analysis, the Panel recalled that it had already touched upon this issue in the context of a preliminary ruling, and stated that:

> "The Panel does not share Turkey's understanding that the European Union is challenging what Turkey refers to as an 'ongoing conduct/practice' of general application. Indeed, the Panel is compelled to recall that it already clarified its understanding of the panel request in the context of a preliminary ruling. The Panel ruled that this measure did not concern specific instances of application (which, the Panel observes, would necessarily form part of the definition of an 'ongoing conduct' measure). The Panel also found that the European Union did not need to explicitly identify its challenge to the prioritization measure as being 'as such' or 'as applied', and that the reference to 'certain cases' in the panel request covers 'all instances where imported products are still eligible under the reimbursement scheme', as distinct from specific instances of application. Moreover, the European Union clarified in response to Turkey's preliminary ruling request, which pre-dates Turkey's first written submission, that it challenges this measure '*as such*'. Following such clarification by the European Union and the Panel's own ruling, the Panel sees no basis to construe words such as 'gives priority' to imply that the European Union is in fact challenging an 'ongoing conduct' measure (and doing so without providing any evidence of the kind needed to substantiate that type of claim).
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> …
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> Having found that the European Union challenges the prioritization measure 'as such', the European Union is not required to prove any specific instances of application of this measure, that would otherwise have had relevance for evidencing repeated application and likelihood of continued application in establishing an 'ongoing conduct' measure. The Panel therefore disagrees with Turkey's argument that the European Union was required to show that Turkish authorities 'effectively' give priority to applications concerning domestically manufactured pharmaceutical products by evidencing specific instances of application, for the purposes of establishing the existence of the prioritization measure."[220]

### Other unwritten measures

167. In *Argentina – Import Measures*, the complainants established that Argentina required importers and other economic operators to undertake one or more of five trade-related requirements (TRRs), as a condition to import goods or to obtain certain benefits, and that Argentina had imposed one or more of the five TRRs in different combinations.[221] The panel agreed with the complainants that the five TRRs together constituted a "single" measure, and that a separate conclusion on each TRR would "go against the nature of the measure" and not reflect the measure's operation in practice or capture some of its main features.[222] The Appellate Body upheld the panel's findings about the operation of the TRRs measure, and that the "components" of the

[219] Panel Report, *US – Softwood Lumber VII*, para. 7.778.
[220] Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.319 and 7.323.
[221] Panel Reports, *Argentina – Import Measures*, para. 6.221.
[222] Panel Reports, *Argentina – Import Measures*, para. 6.228.

measure (referenced by the Appellate Body in the above-cited statement) were the five TRRs that, according to the complainants' own characterization, constituted the content of the measure at issue. In the course of its analysis, the Appellate Body stated that:

> "A complainant seeking to prove the existence of an unwritten measure is not required to categorize its challenge as either 'as such' or 'as applied'. When tasked with assessing a challenge against an unwritten measure, a panel is also not always required to apply rigid legal standards or criteria that are based on the 'as such' or the 'as applied' nature of the challenge. Rather, the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged. A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven."[223]

168. In *Russia – Railway Equipment*, the Appellate Body found that Ukraine had not established that the Panel erred in its objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.[224] Part of Ukraine's challenge concerned the Panel's assessment of the evidence in its analysis of the existence and systematic nature of the alleged unwritten measure.[225] The Appellate Body outlined the following considerations before reviewing the Panel's assessment:

> In contrast to a written measure, the existence of unwritten measures cannot be established by submitting to a panel the text of a legal instrument. Instead, the existence and content of an unwritten measure must be established based on other, often circumstantial, evidence and arguments. Moreover, the specific measure challenged and the way in which it is described or characterized by a complainant will inform the kind of evidence a complainant is required to submit and the elements that it must establish, in order to determine the existence of the challenged measure."[226]

169. The Appellate Body considered that as part of its assessment of the existence of the unwritten measure, the Panel had to examine evidence relating to the constituent components of the measure, as well as to the way in which the different components interact, in order to achieve a particular objective.[227]

170. In *US – Softwood Lumber VII*, the complainant challenged the Maritimes Stumpage Benchmark as "a measure" of "present and continued application". The Panel noted that, in examining whether Canada had established that the Maritimes Stumpage Benchmark had present and continued application, it would examine the following elements:

> "[W]e must consider whether Canada had established three constituent elements for such a measure of present and continued application:
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> "a. the measure is attributable to the United States;
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> b. the measure has precise content; and
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> c. the measure has present and continued application, which is to say, it currently applies and will continue to be applied in the future."[228]

171. The Panel concluded that the complainant had not established that the Maritimes Stumpage Benchmark was a measure of present and continued application.[229] The Panel pointed,

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[223] Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.
[224] Appellate Body Report, *Russia – Railway Equipment*, paras. 5.249 and 5.251.
[225] Appellate Body Report, *Russia – Railway Equipment*, para. 5.229.
[226] Appellate Body Report, *Russia – Railway Equipment*, para. 5.234.
[227] Appellate Body Report, *Russia – Railway Equipment*, para. 5.236.
[228] Panel Report, *US – Softwood Lumber VII*, para. 7.747. See also ibid. para. 7.750.

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

> "Therefore, based on the above, we conclude that Canada has not established that the Maritimes Stumpage Benchmark has present and continued application. In support of our finding, we note that in *Argentina – Import Measures*, a dispute where the measure was also characterized as having present and continued application, the Appellate Body found that the panel correctly concluded that the measure had 'present and continued application, in the sense that it currently applies and it will continue to be applied in the future *until the underlying policy ceases to apply*'. Canada has not pointed to any evidence that demonstrates the application, or existence, of an underlying policy of the USDOC in relation to the alleged measure. In addition, we consider that Canada has not established the existence of a policy to apply the Maritimes Stumpage Benchmark through the extracts from the USDOC's determinations that it relies upon as evidence."[230]

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

> "[T]he rejection of the input costs reflected in the records of the producer or exporter under investigation on the grounds that they do not reasonably reflect the costs associated with the production and sale of the product under consideration, when such recorded input prices are significantly low, or affected by government regulation or other situations considered by the investigating authorities as 'distortions' in the country of origin; and
>
> the subsequent replacement or adjustment of the recorded input prices by using out-of-country input cost data, without ensuring that the established or adjusted costs represent the cost of production in the country of origin.[231]

173. The Panel considered the precise content of this measure, its attribution to the European Union, and whether any such methodology has general and prospective application.[232] After outlining the precise content of the Cost Adjustment Methodology,[233] the Panel emphasized that the different facts underlying the various anti-dumping determinations did not detract from the fact that the substance of the Cost Adjustment Methodology was replicated in each determination.[234] With respect to the alleged general and prospective application of the Cost Adjustment Methodology, the Panel considered this methodology was a measure of "general application" because the application of the methodology spanned over 15 years and affected an unidentified, varied number of economic operators, as opposed to specified economic operators from a specific WTO Member:[235] The Panel considered that the Cost Adjustment Methodology had "prospective application" on the basis of several factors, including the consistent, systematic and extended application of the methodology; the endorsement of the methodology by the General Court of the European Union and the European Commission's reliance on that endorsement in a particular manner; and the respondent's inability to identify any instance of non-application of the methodology.[236]

174. In *Turkey – Pharmaceutical Products (EU)*, the European Union challenged what it called "the localisation requirement", which in the EU's view was a single and cohesive measure.[237] The Panel noted, based on the text of the EU's panel request, that the EU's description of the measure

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[229] Panel Report, *US – Softwood Lumber VII*, para. 7.774.
[230] Panel Report, *US – Softwood Lumber VII*, para. 7.773.
[231] Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.28.
[232] Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.27.
[233] Panel Report, *EU — Cost Adjustment Methodologies II (Russia),* paras. 7.40-7.43.
[234] Panel Report, *EU — Cost Adjustment Methodologies II (Russia)*, para. 7.44.
[235] Panel Report, *EU — Cost Adjustment Methodologies II (Russia),* para. 7.54.
[236] Panel Report, *EU — Cost Adjustment Methodologies II (Russia),* paras. 7.62-7.63.
[237] Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.1-7.2.

was independent from the listing of legal instruments through which Türkiye allegedly implemented the measure.[238] The Panel then found that, through its arguments, the EU demonstrated *prima facie* the existence of the alleged single measure.[239] The Panel rejected Türkiye's argument that the European Union had characterized and described the content of the measure at issue by reference to legal instruments and documents:

> "For the reasons given above, the Panel does not agree with the premise of Turkey's argument, namely, that the European Union has characterized and described the content of the measure at issue by reference to legal instruments and documents. In the Panel's view, Turkey's argument conflates the content of the localisation requirement with the instruments through which that measure is evidenced and implemented. In some cases, a complaining party may describe and define the content of the challenged measure by reference to certain legal instruments and documents, and in such a way as to equate the content of the measure to one or more legal instruments or documents, and make them constitutive components of the measure itself. In such cases, it may well follow that a complaining party is required to specifically and exhaustively identify all such legal instruments and documents to properly identify the content of the challenged measure. In this case, however, the European Union has not defined the content of the measure by reference to, or in terms of, legal instruments or documents. As already explained above, the precise content of the localisation requirement, as described and characterized by the European Union in its panel request, is that Turkey requires foreign producers to commit to localise in Turkey their production of certain pharmaceutical products, and where commitments are not given, not accepted or not fulfilled relevant products are no longer reimbursed by the SSI."[240]

175. On this basis, the Panel concluded that the European Union established the existence of the alleged single measure.[241]

176. In *China – IPRs Enforcement (EU)*, the Arbitrator in the *ad hoc* appeal arbitration under Article 25 of the DSU recalled the requirements identified in past disputes to demonstrate the existence of unwritten measures, and upheld the Panel's findings in this regard. In particular, the Arbitrator noted with approval the Panel's findings regarding the alleged measure's precise content:

> "First, as part of its assessment of the measure's precise content, the Panel specifically analysed the measure's existence as a single measure composed of elements that go beyond the content of the law and relevant judicial decisions and which operates distinctly from its parts pursuant to a shared objective. It undertook an overall assessment of whether the evidence adduced by the European Union demonstrated the precise content of the ASI policy and whether it went beyond the sum of individual judicial decisions with similar legal basis and factual patterns to include policy objectives endorsed and sanctioned by the NPC and Standing Committee.
>
> We consider that this approach was appropriate in light of the European Union's claim regarding the existence of the unwritten measure. Specifically, the European Union had presented the ASI policy as 'a composite measure featuring numerous parts that, although different in nature, allegedly work together to form a single unwritten measure.' While indeed the essential content of the ASI policy was materialized in the judicial decisions, the European Union did not claim that these judicial decisions constituted the policy themselves. Rather, as the Panel concluded, these decisions were 'an expression of the ASI policy, as a principle or course of action, whereby Chinese courts are empowered to issue ASIs in the context of SEP litigation.' As part of the appraisal of the precise content, the Panel assessed the policy objectives of the Chinese government and found that the judicial decisions where ASIs had been issued were in furtherance of broader policy considerations expressed by Chinese authorities.

[238] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.17.
[239] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.21.
[240] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.24.
[241] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.31.

> The policy objectives refer to: strengthening the protection of independent IP rights; the national innovation-driven development strategy and intellectual property strategy which included 'the construction of an 'anti-suit injunction' system with Chinese characteristics, and the maintenance of judicial sovereignty over foreign-related intellectual property rights'; the protection of legitimate rights and interests of Chinese and foreign property right owners on an equal footing; extraterritorial application of Chinese laws to protect the security and legitimate rights and interests of Chinese citizens and enterprises in foreign countries; and the strengthening of IP-related judicial cooperation with other countries. The Panel found that the policy objectives 'were to be implemented by Chinese courts at all levels'.
>
> Further, the Panel found that 'the ASIs issued by the intermediate people's courts as well as the designation of some of these decisions as typical cases, or other types of designations, were in furtherance of these policy objectives.' Finally, the Panel assessed 'whether the NPC Standing Committee's endorsement of the SPC's work on ASIs extends to a broader measure, i.e. the ASI policy' and concluded that there was sufficient evidence before it that this was the case. In considering the totality of the evidence and argumentation before it, the Panel found that the European Union had substantiated the precise content of the ASI policy."[242]

177. In *China – IPRs Enforcement (EU)*, the Arbitrator in the *ad hoc* appeal arbitration under Article 25 of the DSU also upheld the Panel's analysis on the alleged unwritten measure's general and prospective application:

> "Secondly, as part of its assessment of the measure's general and prospective application, the Panel analysed: whether the measure 'exhibit[ed] normative attributes, similar to those of a written measure'; whether it was 'intended to be generally applied, affecting an unidentified number of economic operators'; and whether there was 'a high likelihood, regardless of whether it is mandatory, that it will continue to exist and be applied in the future'. Specifically, the Panel noted that the measure's endorsement by the NPC and its Standing Committee and promotion by the Chinese judiciary indicated 'that the ASI policy exhibits normative attributes and thus is part of China's legal system'. This, in the Panel's view, 'create[d] an understanding among Chinese courts and private actors that courts are empowered to issue ASIs in the context of SEP litigation, as well as an awareness of how requests for ASIs will be assessed and possible outcomes of those requests.' The Panel further observed that 'the ASI policy enable[d] an undetermined number of economic actors to request an ASI from a Chinese court in the context of SEP litigation' and was persuaded that there was 'a high likelihood that the ASI policy will apply in future cases'.
>
> The Panel concluded that the ASI policy exhibits normative attributes as: 'it creates expectations by public and private actors regarding the availability of ASIs in the context of SEP litigation, it is meant to be applied generally by Chinese courts and affects an undetermined number of economic operators, and there is a high likelihood of its continuation in the future.' The Panel therefore found that the European Union had demonstrated that the ASI policy is a rule or norm of general and prospective application."[243]

178. In *China – IPRs Enforcement (EU)*, the Arbitrator in the *ad hoc* appeal arbitration under Article 25 of the DSU rejected China's argument that an alleged unwritten measure must be operationally distinct from other measures of which it consists:

> "With respect to China's argument that an alleged unwritten measure must be operationally distinct from other measures, we noted above that the Panel correctly applied the legal standard by looking at the attribution, precise content, and general and prospective application of the unwritten measure, as alleged by the European Union.

[242] Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.28-4.30.
[243] Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.31-4.32.

> In our view, the panel reports referred to by China do not support the proposition that, in each case, panels are under an obligation to make a separate determination as to whether an unwritten measure consisting of several elements has 'distinct *normative* content' from its components in order to be challenged in WTO dispute settlement. Instead, the reasoning of the Appellate Body and panels in these cases was informed by the specific measures at issue and the arguments of the parties."[244]

#### 1.3.4.4.5.5 *De jure* versus *de facto* governmental measure

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

> "[T]he panel in *Canada – Wheat Exports and Grain Imports* distinguished between measures of general application and particular actions taken pursuant to such measures.[245] We consider that another appropriate distinction is that between formal (*de iure*) governmental measures and informal (*de facto*) governmental measures. In our view, the informal nature of a governmental measure may affect the degree of precision with which such a measure can be set out in a panel request. Notably, it will often not be possible to identify informal measures by their name, date of adoption and/or legal status."[246]

#### 1.3.4.4.5.6 Application of tariffs as a measure

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

> "We consider that 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. Since the request for the establishment of a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU."[247]

#### 1.3.4.4.5.7 Anti-dumping measures

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

#### 1.3.4.4.6 Whether several instruments may be treated as a single measure

182. The Panel in *US – COOL*, in assessing whether to examine certain instruments as one single measure or individual separate measures, summarized the main factors considered by previous panels and the Appellate Body in relation to this question as follows:

> (i) the manner in which the complainant presented its claim(s) in respect of the concerned instruments; (ii) the respondent's position; and (iii) the legal status of the requirements or instrument(s), including the operation of, and the relationship between, the requirements or instruments, namely whether a certain requirement or instrument has autonomous status.[248]

183. In *US – Tuna II (Mexico)*, the Panel decided to consider several measures jointly in its analysis of Mexico's claims, and make findings based on their combined operation, rather than on

[244] Award of the Arbitrators, *China – IPRs Enforcement (EU)*, paras. 4.35-4.36.
[245] Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling, paras. 20 and 27.
[246] Panel Report, *EC – Approval and Marketing of Biotech Products*, Article 6.2 Ruling, para. 22.
[247] Appellate Body Report, *EC – Computer Equipment*, para. 65.
[248] Panel Report, *US – COOL*, para. 7.50.

the basis of each individual measure separately. In the course of its analysis, the Panel took into account prior jurisprudence on this issue. The Panel began by noting that:

> "In addressing this issue, we first note that it has not been suggested in these proceedings that any of these legal instruments taken in isolation would not constitute an 'act or omission of the organs of the state' attributable to the United States. We further note that the DPCIA and the implementing regulations constitute legislative or regulatory acts of the federal authorities, while the court ruling constitutes an act of the judicial branch. Each of these normative instruments is *a priori* capable of constituting a measure attributable to the United States, which may be challenged in dispute settlement proceedings under the DSU."[249]

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

> "To summarize, together and collectively, the various provisions in the different legal instruments identified by Mexico, including the *Hogarth* ruling, set out the terms of the US 'dolphin-safe' labelling scheme, as currently applied by the United States. We also note that the United States does not object to Mexico's request to consider the various instruments together and that it has articulated its defence in these proceedings on the basis of the measures taken together. In light of these elements, we see merit in considering these closely related instruments together as a single measure for the purposes of this dispute.
>
> We also note that a comparable issue has arisen in two cases relating to SPS measures (*Japan – Apples* and *Australia – Apples*), where the panels considered whether various requirements imposed by Japan and Australia respectively, and embodied in different instruments, should be treated as a single measure or as a combination of several individual measures. In these cases, in addition to considering whether the different requirements might constitute a single measure for the purposes of dispute settlement under the DSU, the panel also had to consider whether they constituted a 'phytosanitary measure' within the meaning of the *SPS Agreement*, an issue that is not before this Panel. Nonetheless, we find that the test developed by the panel in *Japan – Apples* provides useful guidance for our analysis. The panel in that case considered that the various requirements were interrelated and cumulatively constituted the measures actually applied by Japan to the importation of US apple fruit to protect against the entry, establishment or spread of fire blight within its territory. That panel therefore saw no legal, logical or factual obstacle to treating the requirements identified by the United States as a single phytosanitary measure within the meaning of the SPS Agreement.
>
> Similarly, we see no 'legal, factual or logical obstacle' to treating the various interrelated legal instruments identified by Mexico as the basis for its claims in these proceedings as a single measure for the purposes of our findings. Accordingly, we will consider them together throughout these findings. These measures taken together are hereafter referred to as 'the US dolphin-safe labelling provisions'."[250]

185. In *Argentina – Import Measures*, the complainants established that Argentina required importers and other economic operators to undertake one or more of five trade-related requirements (TRRs), as a condition to import goods or to obtain certain benefits, and that Argentina had imposed one or more of the five TRRs in different combinations.[251] The panel agreed with the complainants that the five TRRs together constituted a "single" measure, and that a separate conclusion on each TRR would "go against the nature of the measure" and not reflect the measure's operation in practice or capture some of its main features.[252] The Appellate Body upheld the panel's findings about the operation of the TRRs measure, and that the "components" of the measure (referenced by the Appellate Body in the above-cited statement) were the five TRRs that, according to the complainants' own characterization, constituted the content of the measure at

[249] Panel Report, *US – Tuna II (Mexico)*, para. 7.20.
[250] Panel Report, *US – Tuna II (Mexico)*, paras. 7.24-7.26.
[251] Panel Reports, *Argentina – Import Measures*, para. 6.221.
[252] Panel Reports, *Argentina – Import Measures*, para. 6.228.

issue. In the course of its analysis, the Appellate Body stated, with reference to the above-mentioned passage from the panel in *US – COOL*, that:

> "[A] complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components."[253]

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

> "We recall that 'a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.' In the present case, it was therefore Ukraine's burden to establish that the separate instances of suspensions, rejections, and non-recognition functioned together and formed a single overarching measure, distinct from its parts, in pursuance of an import prevention policy."[254]

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

> "Canada submits that the Maritimes Stumpage Benchmark exists as 'a [m]easure' of present and continued application. The phrase 'a measure' shows that Canada is challenging a single measure. We consider that to establish the precise content of the Maritimes Stumpage Benchmark as a single measure, Canada needs to show that the two benchmarks operate as part of a single measure. To demonstrate that the two benchmarks operate as part of a single measure, the complainant may have to show that the benchmarks are applied and operate together, or collectively advance some underlying policy. In our view, simply asserting that two types of benchmarks comprise 'a [single] measure', without showing for instance how they apply or operate together, or collectively advance some underlying policy, would not be sufficient to establish that they form part of a single measure. We consider that the Appellate Body's findings in *Argentina – Import Measures* offer some useful guidance in this regard.
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> …
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> We consider that the Appellate Body's finding in this regard supports the view that when a complainant challenges different instruments (or as here, different benchmarks used to determine the existence of subsidy), the complainant would have to demonstrate that such different instruments operate as part of a single measure. This demonstration could be made by showing that the instruments apply and operate together, or collectively advance some underlying policy. Neither the complainant, nor a panel could simply assume that different instruments form part of a single measure. Otherwise, the requirement to examine whether a complainant has established the precise content of a measure may well be superfluous.
>
> To be sure, this does not mean that a single measure could not be applied in varying facts and circumstances. There may well be variations in the underlying facts and circumstances in which a measure is applied. However, those variations in the underlying facts and circumstances must not detract from the fact that the substance

[253] Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.
[254] Appellate Body Report, *Russia – Railway Equipment*, para. 5.239.

> of the actions or omissions at issue remain the same across those different facts and circumstances, such that its precise content is discernible."[255]

188. In *Costa Rica – Avocados (Mexico)*, Mexico, the complaining party, requested the Panel to make findings specific to each of the measures, as well as a finding on the operation of the measures in conjunction with each other. Costa Rica argued that the complaint should be dealt with on the basis of the measures as they were presented individually. The Panel saw no reason why it could not consider the measures individually and agreed with Costa Rica that one of the consequences of addressing the measures at issue individually is that the Panel must examine the applicability of the SPS Agreement to each of these measures separately.[256] The Panel construed Mexico's request for the measures to be analysed jointly and in conjunction with one another as an argument that the five measures at issue also constituted a "single measure". After recalling principles articulated in previous disputes (including *Japan – Apples (Article 21.5 – United States)*, *US – COOL* and *Argentina – Import Measures*), the Panel stated that "unlike the aforementioned cases that involve an overarching or single measure, this dispute does not involve a set of requirements that have to be met in order to import the product in question, or a statute, which is the legal basis for certain requirements, and the regulation adopted to implement the statute, or different requirements that function as a single measure by acting in different combinations to realize common objectives".[257] However, while the Panel concluded that Mexico failed to demonstrate the existence of a "single measure" comprised of the five individual measures, the Panel confirmed that analysing the claims put forward by Mexico necessitated that the Panel read certain of the individual measures "together with" the other measures at issue.[258]

189. In *Turkey – Pharmaceutical Products (EU)*, the Panel found that the European Union had established the existence and precise content of the localisation requirement as a "single and cohesive measure". The Panel noted that in its first written submission, the European Union referred to the localisation requirement as a "single and cohesive measure" which is implemented through various instruments and tools, had described in greater detail the localisation requirement's general features and objectives, institutional set-up, and the process and phases of its implementation in practice. The Panel noted that the European Union also explained why, despite the diversity of instruments used, all of these steps were taken within the framework of a single localisation requirement. The Panel considered that, in the absence of any rebuttal arguments from Türkiye, the nature of the explanation provided by the European Union in its first written submission would suffice to establish, *prima facie*, that the localisation requirement may be examined as a single measure for the purposes of this dispute.[259]

190. In *Turkey – Pharmaceutical Products (EU)*, the Panel found that the European Union challenged the so-called prioritization measure "as such"; established the existence of such an overarching measure; and that this measure mandated the Turkish authorities to act in a particular manner.[260] The Panel then noted that the measure was set out in writing, and discussed whether it nevertheless had to assess whether the measure had general and prospective application:

> "Given that the prioritization measure is a rule or norm which is expressly set out in writing in the provisions of the Drug Reimbursement Regulation and Prioritization Guideline, it is not clear that there is any need for the Panel to further assess whether this measure exhibits general and prospective application, typically considered in the context of unwritten measures. Assuming, for the sake of argument, that such further consideration is necessary, the Panel considers that this measure has general application; it is not limited in application to specific economic operators but applies across the board to imported pharmaceutical products not yet subject to the localisation requirement. Moreover, the Panel considers that the prioritization measure has prospective application, on the basis that it is reflected in legal instruments with continuing and prospective effect (i.e. the Drug Reimbursement Regulation and Prioritization Guideline) and implements an underlying current policy of prioritization.

[255] Panel Report, *US – Softwood Lumber VII*, paras. 7.754 and 7.756-7.757.
[256] Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.65-7.66.
[257] Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.260.
[258] Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.266-7.267.
[259] Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.19-7.25.
[260] Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.320-7.321.

> Having found that the European Union challenges the prioritization measure 'as such', the European Union is not required to prove any specific instances of application of this measure, that would otherwise have had relevance for evidencing repeated application and likelihood of continued application in establishing an 'ongoing conduct' measure. The Panel therefore disagrees with Turkey's argument that the European Union was required to show that Turkish authorities 'effectively' give priority to applications concerning domestically manufactured pharmaceutical products by evidencing specific instances of application, for the purposes of establishing the existence of the prioritization measure."[261]

191. In *EU and Certain Member States – Palm Oil (Malaysia)*, the European Union challenged Malaysia's identification of the measures at issue, faulting Malaysia for challenging individual elements of the "EU biofuels regime", rather than the regime as a whole. The Panel disagree with the European Union in this regard:

> "Beginning with the European Union's first line of argument, the Panel sees no basis to question Malaysia's identification of particular aspects of what the European Union refers to as the 'Biofuels regime' as the specific measures at issue for the purposes of defining the subject-matter of its complaint. The fact that these aspects (including the 7% maximum share and the high ILUC-risk cap and phase-out) are part of the broader regulatory framework for the promotion of renewable energy in the European Union provided through RED II does not suggest that they could not validly constitute a challengeable 'measure' for the purposes of Malaysia's identification of the subject-matter of its complaint.
>
> The Panel recalls that a 'measure' challengeable under the DSU may in principle consist of any act or omission attributable to a Member, and sees nothing in Malaysia's analytical approach to the definition of the measures at issue that 'departs from the orthodoxy'. The Panel observes that when a complaining Member challenges one or more measures reflected in one or more written instruments, such as a law, regulation, or directive, it would almost invariably be expected to identify one or more specific provisions of the instrument(s) as the relevant measures at issue for the purposes of defining the subject-matter of its complaint. In other words, a complaining Member would almost invariably be expected to selectively identify one or more isolated provisions contained in the relevant written instrument(s) and characterize those provisions as the measure(s) at issue. Indeed, a complaining Member's failure to single out (or isolate) one or more specific (i.e. selectively identified) provisions contained in a law, regulation or other instrument could potentially render a panel request inconsistent with Article 6.2 of the DSU. That provision requires a complaining Member to identify the *specific* measures at issue.
>
> The Panel does not question that the 7% maximum share and the high ILUC-risk cap and phase-out may be said to 'operate in conjunction' with one another, and with various other provisions of RED II, the Delegated Regulation, and other aspects of the broader regulatory framework (which the European Union refers to collectively as its 'Biofuels regime'). However, that circumstance alone does not suffice to establish that all of these aspects of the broader EU 'Biofuels regime' must be examined as 'a composite whole' in the sense of all of these aspects constituting a single, inseparable measure. Once again, it is only to be expected that, when a complaining Member challenges one or more provisions in a written instrument, the specific provision challenged as the measure at issue would operate in conjunction with other provisions in the same instrument and/or closely related instruments. There is nothing in WTO dispute settlement practice to suggest that, in such circumstances, a complaining Member must identify and challenge a single, inseparable measure comprising all provisions that 'operate in conjunction' with the specific measure that it seeks to challenge."[262]

192. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* also underlined the difference between the complainant's identification of challenged measures in its panel request and the Panel's preferred approach in its assessment:

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[261] Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.322-7.323.
[262] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.7-7.9.

> "Thus, the Panel clearly accepts that in its assessment of the design and operation of the specific measures at issue, it must take into account other provisions of RED II, the Delegated Regulation, and the broader regulatory context to the extent that they are relevant to that assessment. This may include, but is not necessarily limited to, any of the instruments and documents listed above and described in greater detail in section 2 of this Report. However, the Panel reiterates that this does not relate to any issue regarding the identification of the challenged measures as such, but rather to the issue of *how* the Panel should analyse the specific measures at issue.
>
> …
>
> The Panel notes that whether two measures (or two aspects of a measure) may be treated as a single measure is a question to be determined by a panel. That determination should be informed by the formulations used by the complaining Member and/or the responding Member but is not controlled by how the parties refer to and characterize the measure(s)."[263]

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

#### 1.3.4.5.1 General

193. The Panel, in *US – Continued Zeroing*, noted that the distinction between claims that take issue with measures of general and prospective application ("as such" claims) and claims targeting acts that apply to specific situations ("as applied" claims) was "developed as an analytical tool to facilitate the understanding of the nature of the measure at issue."[264] In agreeing with the Panel, the Appellate Body noted the relevance of this distinction in the identification of the measures at issue:

> "We share the Panel's view that the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm."[265]

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

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

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

[263] Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.13 and 7.24.
[264] Appellate Body Report, *US – Continued Zeroing*, para. 179.
[265] Appellate Body Report, *US – Continued Zeroing*, para. 179.

> Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement,* provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'. We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances."[266]

195. On the basis of the aforementioned finding of the Appellate Body in *US – 1916 Act*, the Panel in *Argentina – Import Measures* concluded that "challenges against a measure 'as such' can be brought independently or simultaneously with challenges against a measure 'as applied'."[267]

#### 1.3.4.5.3 "As such" claims

##### 1.3.4.5.3.1 General

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

> "In our view, 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims."[268]

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

> "When a measure is challenged 'as such', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required."[269]

198. The Appellate Body in *EC – Selected Customs Matters* held that "an 'as such' claim in WTO parlance challenges the substantive content of the measure at issue regardless [of] its application in individual instances."[270]

##### 1.3.4.5.3.2 Instruments with normative value

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

> "[I]n GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or

[266] Appellate Body Report, *US – 1916 Act*, paras. 60-61. See also Panel Report, *Argentina – Import Measures*, para. 6.317.
[267] Panel Report, *Argentina – Import Measures*, para. 6.316.
[268] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[269] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.
[270] Appellate Body Report, *EC – Selected Customs Matters*, fn 404

> norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[271]

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

> "The Panel adopted a similar narrow approach in finding that the Sunset Policy Bulletin is not an 'administrative procedure' within the meaning of Article 18.4 of the *Anti-Dumping Agreement.* Having adopted the view that an administrative procedure is 'a pre-established rule for the conduct of an anti-dumping investigation', the Panel assumed that a 'rule' means a 'mandatory rule' and used its previous finding that the Sunset Policy Bulletin is not a mandatory legal instrument to come to the conclusion that it therefore cannot be an administrative procedure. Again, the Panel did not consider the normative nature of the provisions of the Sunset Policy Bulletin, nor compare the type of norms that USDOC is required to publish in formal regulations with the type of norms it may set out in policy statements. These inquiries would have assisted the Panel in determining whether the Sunset Policy Bulletin is, in fact, an 'administrative procedure' within the meaning of Article 18.4 of the *Anti-Dumping Agreement*."[272]

201. In *US – Oil Country Tubular Goods Sunset Reviews*, another anti-dumping case dealing with the United States Sunset Policy Bulletin (see *US – Corrosion-Resistant Steel Sunset Review*, paragraphs 196 and 197 above), the Appellate Body stressed that whether an instrument has legal value under domestic law is immaterial when establishing whether it can be a measure subject to dispute settlement. The Appellate Body, referring to its findings in *US – Corrosion-Resistant Steel Sunset Review*, explained that what matters is that the instrument has normative value, in the sense of providing administrative guidance, creating expectations among the public and among private actors, and intended to have general and prospective application:

> "We note the argument of the United States that the SPB is not a legal instrument under United States law. This argument, however, is not relevant to the question before us. The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC 'is entirely free to depart from [the] SPB at any time'. However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that 'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement. We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews

[271] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.
[272] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 98.

> taking place after its issuance. Thus, we confirm—once again—that the SPB, as such, is subject to WTO dispute settlement."[273]

202. In *EC – IT Products*, the Panel noted that, in general, measures challenged "as such" should have general and prospective application, and "necessarily" result in a breach of WTO obligations.[274] The Panel observed that the legal effect of a measure is not a primary issue in an assessment of whether a measure can be challenged "as such". Rather, the issue is whether the measure sets forth rules or norms that are intended to have general and prospective application, and whether the measure has normative value in providing administrative guidance and creating expectations among the public and among private sectors:

> "[I]n the Panel's view, the legal effect of CNEN on the CN is not the primary issue before it. The issue before it is whether CNEN set forth rules or norms that are intended to have general and prospective application, and whether CNEN have normative value in providing administrative guidance, and create expectations among the public and among private actors. Stated another way, the issue is whether CNEN are 'authoritative' such that '*per se*' requirements set out in the CNEN could validly form the basis of an 'as such' claim of a breach of Article II of the GATT."[275]

203. In *US – Zeroing (EC)*, the Appellate Body addressed whether the United States' zeroing methodology could be challenged as such as a measure in dispute settlement proceedings.[276] The European Communities asserted that, in this case, "overwhelming" evidence exists demonstrating that the zeroing methodology is a "norm".[277] In reaching its findings, the Appellate Body first reiterated, as related to the concept of "measure", that "rules or norms" could be challenged, as such, even if they are *not* expressed in the form of a written instrument.[278] Subsequently, the Appellate Body upheld the Panel's determination (although for separate reasons) that the United States' zeroing methodology could be challenged, as such, due to its "general and prospective application" under the specific circumstances of the dispute:

> "In our view, when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the 'rule or norm' may be challenged, as such. This evidence may include proof of the systematic application of the challenged 'rule or norm'. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such.
>
> …
>
> [W]e believe that, in the specific circumstances of this case, the evidence before the Panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application. This evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract. We therefore cannot agree with the United States that the Panel's approach, in this case, would mean that when a

[273] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.
[274] Panel Report, *EC – IT Products*, para. 7.154.
[275] Panel Report, *EC – IT Products*, para. 7.157.
[276] The Appellate Body noted that the Panel had not focused in its report on the Standard Zeroing Procedures as a measure *per se*, but instead considered that the procedures as "'relevant evidence to ascertain the existence of a methodology.'" (See Appellate Body Report, *US – Zeroing (EC)*, para. 176).
[277] Appellate Body Report, *US – Zeroing (EC)*, para. 194.
[278] Appellate Body Report, *US – Zeroing (EC)*, para. 193. In this regard, the Appellate Body referred to Article 3.3 of the *DSU* (Ibid. para. 187), Article 17.4 of the *Anti-Dumping Agreement* (Ibid. para. 191), and Article 18.4 of the *Anti-Dumping Agreement* (Ibid. *US – Zeroing (EC)*, para. 192).

> Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an 'as such' challenge, at least if the Member repeats the action with some indeterminate frequency.
>
> In the light of these considerations, we conclude, albeit for reasons different from those set out by the Panel, that the zeroing methodology, as it relates to original investigations in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, as such, in WTO dispute settlement."[279]

204. The Appellate Body in *US – Zeroing (EC)* also determined that a separate measure, the United States' "Standard Zeroing Procedures", was not an "act or instrument that sets forth rules or norms intended to have general and prospective application" to be challenged, as such, due to the fact that such procedures are only applicable in particular anti-dumping proceedings.[280] The Appellate Body referred to the Panel's analysis in this regard:

> "The Panel found that 'to characterize the 'Standard Zeroing Procedures' as an act or instrument that sets forth rules or norms intended to have general and prospective application is somewhat difficult to reconcile with the fact that the 'Standard Zeroing Procedures' are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer program[] used in that particular proceeding.' According to the Panel, 'the need to incorporate these lines of computer code into each individual program[] indicates that it is not the 'Standard Zeroing Procedures' *per se* that set forth rules or norms of general and prospective application.' We agree with the Panel. Therefore, we find that the Standard Zeroing Procedures are not a measure that can be challenged, as such, in WTO dispute settlement."[281]

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

> "We now turn to the issue of whether what Japan terms 'zeroing procedures' can be considered to be a measure that can be challenged as such in light of the criteria enunciated by the Appellate Body, particularly in *US – Zeroing (EC)*. It is our understanding that by 'zeroing procedures', Japan means the zeroing methodology *per se,* as distinguished from the standard zeroing line. The concept of zeroing procedures, as used by Japan in this proceeding, does not correspond to a provision of legislation or regulation of the United States or to any other type of written instrument adopted by the United States that explicitly provides for zeroing as a rule or norm of general and prospective application. This raises the question of whether a procedure not to be found in legislation or regulation or in some other form of written instrument may nevertheless constitute a measure challengeable as such in WTO dispute settlement. A closely related question that arises is whether it is of any consequence that the term 'zeroing procedures' is not employed in the anti-dumping legislation and practice of the United States but has been created by Japan for the purpose of this dispute settlement proceeding.
>
> We consider, consistent with the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, that the fact that a norm to act in a given way in a given situation is not contained in legislation or regulation does not entail that such a norm cannot be challenged as such in WTO dispute settlement. In order for a measure to have the 'normative value' necessary to render it susceptible of being challenged as such, the measure must meet certain requirements. Its content must be clear and it must be understood by those to whom it will apply that it will be applied generally and prospectively. We also concur with the observation of the panel in *US – Zeroing (EC)*

[279] Appellate Body Report, *US – Zeroing (EC)*, paras. 198, 204-205. See also Panel Report, *Argentina - Import Measures*, para. 6.318.
[280] Appellate Body Report, *US – Zeroing (EC)*, para. 231.
[281] Appellate Body Report, *US – Zeroing (EC)*, para. 231.

> that a finding regarding the WTO-inconsistency of a norm as such must be based on solid evidence enabling a panel to determine the precise content of the norm and the future conduct to which it will necessarily give rise. It stands to reason that a measure can only have these properties if it has a legal basis and that a measure is unlikely to be capable of being challenged as such in WTO dispute settlement if it is not grounded in the relevant domestic legal framework. However, this does not mean that the measure must necessarily be in the nature of legislation or regulation.
>
> …
>
> [T]he evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or duty assessment rates."[282]

206. In arriving at the conclusion discussed in paragraph 205 above, the Panel in *US – Zeroing (Japan)* acknowledged the difficulties of providing evidence when the rule or norm is not contained in a written instrument:

> "We also do not consider that the fact that there exists no written instrument that explicitly lays down a rule or norm of zeroing is of decisive importance. We can see no logical basis in the GATT and WTO dispute settlement practice for the proposition that an 'as such' claim is only possible where a rule or norm of general and prospective application is recorded in a written instrument. …
>
> We recognize that an analysis of an 'as such' claim regarding a measure not embodied in legislation or regulation or other type of written instrument raises particular problems with respect to the evidence required to establish that the measure constitutes a rule or norm of general and prospective application, especially because, in our view, consistent practice is to be distinguished from the notion of a rule or norm of general and prospective application."[283]

207. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the United States asserted that Korea's "as such" claim concerning the use of adverse facts available was outside the Panel's jurisdiction. In the United States' view, the panel request contained "multiple inconsistent descriptions" of the alleged written measure challenged by Korea as a "rule or norm of general and prospective application".[284] In response to the United States' assertion, the Panel considered that the panel request clearly reflected the distinction between measures and claims set forth in Article 6.2 of the DSU:

> "We disagree with the United States that Korea's panel request contains 'multiple inconsistent descriptions' of the alleged unwritten measure at issue. Part I is aimed expressly at identifying the specific measures at issue and contains *one* description of the alleged unwritten measure being challenged. Part II of the panel request sets out a brief summary of the legal basis for each challenge. In doing so, Section II.C also refers to the alleged unwritten measure identified in Section I.C by using slightly different explanations, including the two allegedly 'conflicting' descriptions identified by the United States as the primary basis for its jurisdictional challenge.
>
> Article 6.2 treats *measures* and *claims* as distinct and sets out separate requirements that must each be satisfied in a panel request in order for a 'matter' to be within a panel's terms of reference. In our view, the structure of Korea's panel request clearly reflects this distinction between the specific measures at issue, which are identified in Part I, and the corresponding claims of WTO-inconsistency, which are set out in Part II.
>
> It is the description of the alleged unwritten measure in Part I, and not the formulations used by Korea as part of describing its claims in Part II, that ought to be

[282] Panel Report, *US – Zeroing (Japan)*, paras. 7.47-7.48, and 7.50.
[283] Panel Report, *US – Zeroing (Japan)*, paras. 7.49-7.50.
[284] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.594.

> tested against the requirement under Article 6.2 of the DSU to identify the 'specific' measure at issue."[285]

208. The Panel then turned to the question of the existence and precise content of the alleged unwritten measure. The Panel noted that, when a challenge is brought against a measure that is not expressed in written form, the very existence of the challenged measure may be uncertain. The Panel added that a panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" to conclude that such "rule or norm" can be challenged on an "as such" basis:

> "An 'as such' challenge can, in principle, be brought against a measure that is not expressed in the form of a written document under both the Anti-Dumping Agreement and the SCM Agreement. That said, when a challenge is brought against a measure that is not expressed in written form, the very existence of the challenged measure may be uncertain – as is the United States' position in the present proceedings. 'As such' challenges are 'serious challenges' and their implications 'are obviously more far-reaching than 'as applied' claims', as they seek to prevent Members *ex ante* from engaging in certain conduct.
>
> Panels are well advised to '*not lightly assume* the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document'. Instead, in order to make an 'objective assessment' under Article 11 of the DSU, '*[p]articular rigour* is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is not expressed in the form of a written document'. In particular, a panel 'must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such'. This does not, however, mean 'that a *mere abstract principle* would qualify as a 'rule or norm' that can be challenged, as such'."[286]

209. The Panel further noted that the manner in which a complainant characterizes the measure at issue is one of many important aspects that inform the kind of evidence that a complainant must submit and the elements that it must prove:

> "We note that the 'specific measure at issue, whether it is written or unwritten, and *how it is described, characterized, and challenged by a complainant*', are important aspects that 'inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged'.
>
> Mindful of the seriousness of 'as such' claims and the uncertainty inherent in challenges against unwritten measures, we begin by examining how Korea – as the complainant – identifies and describes the alleged unwritten measure challenged in these proceedings."[287]

210. The Panel considered that the distinction between "as such" and "as applied" served as an analytical tool to facilitate the understanding of the nature of the measure at issue. Specifically, the Panel considered Korea's characterization of its challenge as an "as such" claim to demonstrate that Korea sought to prevent the USDOC from engaging in certain conduct "in general and in the future":

> "Korea makes clear that it challenges the alleged unwritten measure on an 'as such' basis. We agree that 'the distinction between 'as such' and 'as applied' challenges neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures susceptible to challenge'. Nonetheless, we note that 'this distinction serves as an analytical tool to facilitate the understanding of the nature of a measure at issue'. In the case at hand, the fact that Korea characterizes its challenge as an 'as such' claim helps us, at the very least,

[285] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.600-7.602.
[286] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), paras. 7.608-7.609.
[287] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), paras. 7.610-7.611.

> understand that it seeks to prevent the United States from 'engaging in certain conduct in general and in the future, as opposed to addressing particular instances of application that are occurring or have occurred'."[288]

211. In its review of Korea's characterization of the measure at issue, the Panel noted Korea's reliance on dispute settlement reports in three prior WTO disputes.[289] Having reviewed the characterizations of the use of adverse facts available in those disputes, the Panel considered that the precise content and scope of the measures in those disputes differed from the precise content and scope of the use of adverse facts available as challenged by Korea.[290] In particular, the Panel noted the following:

> "We recall that panels must '*not lightly assume* the existence' of an unwritten measure and must exercise '*[p]articular rigour* … to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document'. In keeping with these duties, our findings on the existence of an unwritten measure cannot be based on certain general observations made by panels and the Appellate Body in prior WTO disputes. The precise content and scope of the alleged unwritten measure identified by Korea in this dispute are different from that of the measures challenged in prior WTO disputes. The evidence that Korea adduces is also not exactly the same as the evidence that was examined in these past cases. In *US – Carbon Steel (India)*, the Appellate Body examined a claim against *written* US legislation and emphasized that India did not challenge an unwritten practice. Given the Appellate Body's limited engagement with the factual question of the existence of such a practice, its observations in that dispute cannot, in our view, demonstrate the existence of the alleged *unwritten* measure identified by Korea in this dispute. The measures at issue in *US – Anti-Dumping Methodologies (China)* and *US – Supercalendered Paper* were also limited to a significantly narrower set of circumstances and situations in contrast to the broad scope of the alleged unwritten measure challenged by Korea in these proceedings, which is triggered upon a finding of non-cooperation by the USDOC in *any* circumstance and on *any* question or issue."[291]

212. The Panel further noted that, even if the measure at issue in this dispute were the same as the use of adverse facts available in prior disputes, factual findings made in prior disputes would not determine the facts in the present dispute. The Panel noted that it would be obliged to make its own determination afresh and on the basis of the evidence before it. Thus, the Panel disagreed with the complainant that the prior WTO disputes that it cited had confirmed the existence of the measure at issue or the claims made about the measure:

> "Even if the measures at issue were the same – which they are not – we note that 'factual findings made in prior disputes do not determine facts in another dispute'. Although '[e]vidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding', panels, as the 'finders of fact[,] are of course obliged to make their own determination afresh and on the basis of all the evidence before them'. Only if the 'critical evidence is the same and the factual question about the operation of domestic law is the same', is it 'likely that the finder of facts would reach similar findings in the two proceedings'. In these circumstances, we cannot agree with Korea that these prior WTO disputes 'confirmed the existence of the United States' AFA Norm or similar AFA Ongoing Conduct' nor that they 'confirm the claims made by Korea about the use of AFA as a Norm or as a form of Ongoing Conduct'."[292]

213. Finally, the Panel noted that Korea appeared to have described the impugned measure by reference to the USDOC's alleged failure to fulfil its treaty obligations under the WTO covered agreements. The Panel stated that the USDOC had not used any of the treaty terms cited by

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[288] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.621.
[289] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.623.
[290] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), paras. 7.623-7.632.
[291] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.633.
[292] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.634.

Korea, and that the use of these treaty terms had the effect of blurring the line between the factual question of the existence of the measure and the issue of its WTO-consistency. The Panel also considered this approach to be flawed, introducing uncertainty because the identification of the measure would vary depending on the substance of the legal provision invoked by a complainant and the interpretation that a panel might give to that provision:

> "To the extent that Korea takes the position that the alleged unwritten measure comprises of the USDOC selecting 'adverse facts available' without engaging in the *kind* of analysis and evaluation that is *required* under the covered agreements, it appears to describe the impugned measure by reference to a treaty obligation. As discussed, at times – including in its responses to the Panel's questions concerning the individual determinations that it discusses – Korea asserts that the AFA rule or norm entails the USDOC's failure to select the 'best information available' in the 'particular circumstances' or its failure to undertake the 'required comparative assessment' to arrive at an 'accurate determination'. These terms are not used by the USDOC but are instead found in the covered agreements and in WTO jurisprudence. The fact that Korea describes the alleged unwritten measure as comprising of the USDOC's failure to act WTO-consistently by not undertaking the 'required' evaluation has the important effect of blurring the line between the factual question of the existence of the measure and the issue of its WTO-consistency. This is because Korea's unwritten measure is defined by reference to the USDOC engaging in WTO-inconsistent conduct, i.e. its failure to select the 'best information available' or to undertake a 'comparative evaluation'. At the same time, Korea alleges that it is for this very 'reason' that the unwritten measure is WTO-inconsistent. We agree with the Appellate Body in this regard that such an approach is 'flawed' and 'introduce[s] uncertainty because the identification of the measure would vary depending on the substance of the legal provision invoked by a complainant and the interpretation that a panel might give to that provision'."[293]

214. The Panel thus found that the complainant had failed to establish the existence of the unwritten rule or norm of general and prospective application. The Panel subsequently addressed the complainant's alternative characterization of the alleged unwritten measure as a form of "ongoing conduct" that can be challenged in WTO dispute settlement proceedings.[294]

215. In *Turkey – Pharmaceutical Products (EU)*, the Panel found that the European Union had established the existence of an overarching measure whereby Turkish authorities gave priority, in the context of reviewing certain authorization applications, to domestic pharmaceutical products over like imported products. The Panel concluded that this "prioritization measure" mandated giving priority to the review of applications based on criteria attaching to local production and recalled that rules or norms that mandate certain action may be challenged "as such" in WTO dispute settlement. Given that the measure was expressly set out in writing, as opposed to being an unwritten measure, the Panel expressed some doubt as to whether it was necessary to further assess whether this measure exhibits "general and prospective application":

> "Given that the prioritization measure is a rule or norm which is expressly set out in writing in the provisions of the Drug Reimbursement Regulation and Prioritization Guideline, it is not clear that there is any need for the Panel to further assess whether this measure exhibits general and prospective application, typically considered in the context of unwritten measures. Assuming, for the sake of argument, that such further consideration is necessary, the Panel considers that this measure has general application; it is not limited in application to specific economic operators but applies across the board to imported pharmaceutical products not yet subject to the localisation requirement. Moreover, the Panel considers that the prioritization measure has prospective application, on the basis that it is reflected in legal instruments with continuing and prospective effect (i.e. the Drug Reimbursement Regulation and

[293] Panel Report, US – Anti-Dumping and Countervailing Duties (Korea), para. 7.698.
[294] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.700. For more information on the Panel's review of this measure, see paragraph 161 above.

Prioritization Guideline) and implements an underlying current policy of prioritization."[295]

#### 1.3.4.5.4 Discretionary versus mandatory legislative rule

##### 1.3.4.5.4.1 Reference to previous GATT practice

216. In *US – 1916 Act (EC)*, the United States argued, *inter alia*, that, according to established GATT practice, the measure at issue, referred to as the 1916 Act, could not be challenged "as such", i.e. independently of its application in a specific case, because it was "discretionary legislation". Specifically, the United States argued that the 1916 Act was non-mandatory because "(i) with respect to both civil and criminal proceedings, United States' courts had in the past interpreted and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States and (ii) the United States Department of Justice had discretion whether to initiate criminal proceedings under the 1916 Act."[296] The Appellate Body recalled GATT practice in respect of this subject-matter. See paragraph 191 above.

##### 1.3.4.5.4.2 Relevant type of discretion for distinguishing between discretionary and mandatory legislation

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

> "The practice of GATT panels was summed up in *United States – Tobacco* as follows:
>
> > '… panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. ' (emphasis added)
>
> Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government.
>
> The 1916 Act provides for two types of actions to be brought in a United States federal court: a civil action initiated by private parties, and a criminal action initiated by the United States Department of Justice. Turning first to the civil action, we note that there is no relevant discretion accorded to the executive branch of the United States' government with respect to such action. These civil actions are brought by private parties. A judge faced with such proceedings must simply *apply* the 1916 Act. In consequence, so far as the civil actions that may be brought under the 1916 Act are concerned, the 1916 Act is clearly mandatory legislation as that term has been understood for purposes of the distinction between mandatory and discretionary legislation."[297]

##### 1.3.4.5.4.3 Assessment of whether or not legislation "mandates" action

218. In *US – Upland Cotton*, Brazil challenged section 1207(a) of the FSRI Act of 2002 mandating user marketing payments to exporters of upland cotton as a per se export subsidy in violation of relevant provisions of the Agreement on Agriculture. Brazil argued that the text of this measure clearly indicates that the user marketing programme is mandatory in that the United

[295] Panel Report, *Turkey – Pharmaceutical Products (EU),* para. 7.322.
[296] Panel Report, *US – 1916 Act (EC)*, para. 6.82. See also Panel Report, *US – 1916 Act (Japan)*, para. 6.95.
[297] Appellate Body Report, *US – 1916 Act*, paras. 88-90. See also, Panel Report, *US – Steel Plate,* paras. 7.88-7.89, and 8.3.

States Secretary of Agriculture did not have discretion to apply it in a WTO-consistent manner. The United States argued that the relevant question under a mandatory/discretionary analysis is whether the provisions establishing the export credit guarantee programmes mandate a breach of any WTO obligation. The Panel in *US – Upland Cotton* considered the use of "shall" in the language of the statute of the measure at issue, and the fact that payments must be made to all those who meet the conditions for eligibility in determining that the measure was mandatory and not discretionary. The Panel explained:

> "We are of the view that section 1207(a)(1) of the FSRI Act of 2002 mandates the granting of subsidies in that the United States authorities have no discretion not to allow it if exporters fulfil certain conditions. This is not a situation in which the United States executive enjoys a discretion to somehow grant user marketing (Step 2) payments to exporters in a WTO-consistent manner. Every user marketing (Step 2) payment to an exporter constitutes a prohibited export subsidy.
>
> The fact that the actual payment of subsidies is triggered only if certain market conditions prevail does not impact upon our analysis of the normative nature and operation of the measure within the United States legal system. The operation of the world upland cotton market, and the underlying determinative prices for the level of user marketing (Step 2) payments to upland cotton, are not exclusively within the control of the United States government. When certain market conditions exist, the Secretary of Agriculture has no discretion: the payments are automatically triggered."[298]

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

> "We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of 'changed circumstances'. We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement."[299]

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

> "[W]e find nothing in Brazil's various submissions in support of this argument. The only factual evidence proffered by Brazil in support of its argument is the quote from EDC's mandate that EDC was established 'for the purposes of supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities.' This

[298] Panel Report, *US – Upland Cotton*, paras. 7.745 – 7.746.
[299] Panel Report, *US – DRAMS*, para. 6.53.

> statement by itself clearly cannot be viewed as a *requirement* to provide prohibited export subsidies. Nor has Brazil demonstrated otherwise that such support and development necessarily involves subsidization. Although such support and development might conceivably take the form of subsidization, there is nothing to suggest that this will necessarily be the case. In our view, a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since such support and development could be provided in a broad variety of ways.
>
> … We again recall that the panel in *US – Tobacco* recollected 'that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority … to act inconsistently with the General Agreement could not be challenged as such … [.]'"[300]

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

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

> "We are not aware of any GATT/WTO precedent that would require a panel to consider whether legislation is mandatory or discretionary *before* examining the substance of the provisions at issue. To the contrary, we note that a number of panels, in disputes concerning the consistency of legislation, have *not* considered the mandatory/discretionary question in the abstract and as a necessarily threshold issue. Rather, the panels in those cases first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and only then considered *in light of those findings* whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. That is, the mandatory/discretionary distinction was applied *in a given substantive context.*
>
> We consider such an approach to be appropriate in this case. In particular, identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions.
>
> Finally, we note that, whether or not a panel sees the mandatory/discretionary question as a necessarily threshold issue or, as suggested by Canada, as an issue that may arise as part of a panel's examination of the legal claims, it remains true – at least under the classical test which we shall be employing – that legislation as such cannot be found to be inconsistent with a Member's WTO obligations unless it is mandatory in nature. Thus, in any event, the order in which the two issues – the

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

> question of the type of legislation and the substance of the case – are addressed would not alter any eventual finding of consistency or lack thereof."[301]

222. In *US – Section 129(c)(1) URAA*, the Panel did not follow the approach of the Panel in *US – Export Restraints* and preferred to analyse first whether the United States' legislation at issue was mandatory, before analysing whether the behaviour mandated would be inconsistent with the relevant WTO provisions.[302]

#### 1.3.4.5.4.5 Rejection of the mandatory versus discretionary distinction

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

> "[W]e believe that resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation? Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.
>
> We can express this view in a different way:
>
> (a) Even if we were to operate on the legal assumption that, as argued by the US, only legislation *mandating* a WTO inconsistency or *precluding* WTO consistency, can violate WTO provisions; and
>
> (b) confirm our earlier factual finding in paragraph 7.31(c) that the USTR enjoys full discretion to decide on the content of the determination,
>
> we would still disagree with the US that the combination of (a) and (b) *necessarily* renders Section 304 compatible with Article 23, since Article 23 may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. In other words, rejecting, as we have, the presumption implicit in the US argument that no WTO provision ever prohibits discretionary legislation does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions. Indeed that is the very test we shall apply in our analysis. It simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO. If, for example, it is found that the specific obligations in Article 23 prohibit a certain type of legislative discretion, the existence of such discretion in the statutory language of Section 304 would presumptively preclude WTO consistency."[303]

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[301] Panel Report, *US – Export Restraints*, paras. 8.11-8.13.
[302] Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.22-6.25.
[303] Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54. See also Panel Report, *US – Section 129(c)(1) URAA*, para. 6.22.

224. In *US – 1916 Act*, the Appellate Body, further to referring to GATT practice (see paragraphs 216 and 194), declined to answer the question of whether the mandatory/discretionary distinction continued to be relevant under WTO law:

> "We note that answering the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement* would have no impact upon the outcome of these appeals, because the 1916 Act is clearly not discretionary legislation, as that term has been understood for purposes of distinguishing between mandatory and discretionary legislation. Therefore, we do not find it necessary to consider, in these cases, whether Article 18.4, or any other provision of the *Anti-Dumping Agreement*, has supplanted or modified the distinction between mandatory and discretionary legislation. For the same reasons, the Panel did not, in the Japan Panel Report, need to opine on this issue."[304]

225. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body, when examining the question whether Section 1677(5)(F) was inconsistent *per se* with the WTO obligations of the United States because it mandated a particular WTO-inconsistent method of determining the existence of a "benefit", clarified in a footnote that: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect."[305]

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

> "We also believe that the provisions of Article 18.4 of the Anti-Dumping Agreement are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of 'conformity' set forth in Article 18.4.
>
> This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'. To the extent that the Panel's findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.
>
> We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements'. As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a

[304] Appellate Body Report, *US – 1916 Act*, para. 99.
[305] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, fn 334.

> panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."[306]

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

> "We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such. As the Panel seemed to acknowledge, we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."[307]

228. In *US – Zeroing (EC)*, the Appellate Body relied on its view expressed in *US – Corrosion-Resistant Steel Sunset Review* that the mandatory/discretionary distinction should not be applied mechanistically. In the context of assessing whether a Panel violated Article 11 of the DSU by failing to apply the mandatory/discretionary distinction in analyzing and finding a violation of Article 2.4.2 of the Anti-Dumping Agreement, the Appellate Body reiterated that "the import of the 'mandatory/discretionary distinction' may vary from case to case."[308]

#### 1.3.4.6 Claim Presented by Respondent Against Complainant During Panel Proceedings

229. In *India – Tariffs on ICT Goods (Japan)*, India, the respondent, asked the Panel to find that Japan, the complainant, had violated its obligations under the GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions by raising an objection, unfounded in law, to India's request for a draft rectification of its WTO Schedule.[309] The Panel recalled that its mandate was limited to the matter raised in Japan's panel request, i.e. whether the tariff treatment imposed by India on certain ICT products was inconsistent with Articles II.1(a) and (b) of the GATT 1994.[310] Since India's request for findings did not concern the matter before the Panel, it fell outside the Panel's terms of reference.[311] The Panel also noted that Article 11 of the DSU did not allow the Panel to make the findings requested by India.[312] On this basis, the Panel concluded:

> "In sum, we conclude that, in accordance with the provisions of the DSU, our terms of reference do not permit us to assess in the present proceedings whether: (i) Japan violated paragraph 3 of the 1980 Decision by raising an objection unfounded in law; or (ii) Japan's action was an impediment to India's rights to make a formal rectification to its Schedule of concessions under the 1980 Decision. We also note that, even if we did indeed have the legal mandate to make the findings requested by India, doing so would not assist in resolving this dispute. For these reasons, we do not consider it necessary to assess whether the 1980 Decision is a 'covered agreement' within the meaning of Article 1.1 of the DSU, or the substance of India's arguments that its

[306] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 87-89.
[307] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.
[308] Appellate Body Report, *US – Zeroing (EC)*, para. 214.
[309] Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.217, 7.230, and 7.239.
[310] Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.236.
[311] Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.240.
[312] Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.242.

> rectification request was purely of a formal nature and Japan's objection was inconsistent with its obligations under the 1980 Decision."[313]

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

#### 1.3.5.1 General

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

> "[I]n its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."[314]

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

> "All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly."[315]

#### 1.3.5.2 Concept of "claim"

232. The Appellate Body in *Guatemala – Cement I* noted that "the legal basis of the complaint" could also be referred to as "the claims".[316]

233. In *Korea – Dairy,* when distinguishing between claims and arguments, the Appellate Body emphasized that "[b]y '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."[317]

#### 1.3.5.3 Identification of the claims

##### 1.3.5.3.1 General

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

> "In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission."[318]

##### 1.3.5.3.2 Availability of public information regarding claims

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

> "We observe that, as confirmed by the Appellate Body, whether a measure can be identified in conformity with the requirements of Article 6.2 of the DSU may depend

[313] Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.247.
[314] Appellate Body Report, *Korea – Dairy*, para. 120.
[315] Appellate Body Report, *India – Patents (US)*, para. 94.
[316] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[317] Appellate Body Report, *Korea – Dairy*, para. 139.
[318] Appellate Body Report, *Thailand – Steel*, para. 97.

> on the extent to which that measure is specified in the public domain. We similarly consider that, a complainant's ability to 'provide a brief summary of the legal basis of the complaint in order to present the problem clearly' might be affected by the availability of relevant information in the public domain. In our view, it may well be open to a complainant to argue, with due substantiation, that information pertinent to its claim was not publicly available and that, as a consequence, its ability to comply with the requirements of Article 6.2 of the DSU was affected."[319]

#### 1.3.5.3.3 Identification of treaty provisions

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

> "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[320]

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

> "The panel request alleges an inconsistency with the requirements of the Agreement on Agriculture, without specifying any provision thereof. It also states that 'the EC's measures are inconsistent with the following Agreements and provisions *among others*', suggesting that there may be inconsistencies with unspecified agreements and inconsistencies with unspecified provisions of the specified agreements. In these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal 'problem' is asserted. While a reference to a specific provision of a specific agreement may not be essential if the problem or legal claim is otherwise clearly described, in the absence of some description of the problem, a mere reference to an entire agreement or simply to 'other' unspecified agreements or provisions is inadequate under the terms of Article 6.2. Accordingly, we find that references to a WTO agreement without mentioning any provisions or to unidentified 'other' provisions are too vague to meet the standards of Article 6.2 of the DSU."[321]

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

> "We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a

[319] Panel Report, in *EU – Energy Package*, para. 7.213.
[320] Appellate Body, *Korea –Dairy,* para. 124. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.28.
[321] Panel Report, EC – Bananas III (Guatemala and Honduras), para. 7.30.

> panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, the rebuttal submissions and the first and second panel meetings with the parties."[322]

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

> "[A] claim *must* be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case.
>
> With respect to Article 63, the convenient phrase, 'including but not necessarily limited to', is simply not adequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the *TRIPS Agreement* does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel."[323]

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

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

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

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

> In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."[324]

241. In *US – Lamb* the United States requested the Panel to rule that the panel requests of the complainants were insufficiently specific as they had merely listed the provisions of the Safeguard Agreements alleged to have been violated by the United States, which was insufficient in accordance with the Appellate Body's decision in *Korea – Dairy*. The Panel observed that while the Appellate Body in *Korea – Dairy* found that there are occasions when a mere listing of articles, in and of itself, may fall short of the standard of DSU Article 6.2, it gave examples of such situations thus implying that the listing of articles may in fact suffice in other situations. According to the Panel, the situations where a mere listing of articles would be insufficient is one in which "the paragraphs and subparagraphs of the articles at issue involve not only one single obligation, but rather *multiple* obligations in a 'complex multi-phased process [in which] every phase must meet with certain legal requirements and comply with the legal standards set out in the agreement'." In this particular dispute, the Panel found that the listing of the articles did, in light of the attendant circumstances, ensure sufficient clarity.[325]

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

> "We note that the Panel request refers generally to the Articles of the *Anti-Dumping Agreement* in question (i.e. Articles 6, 9 and 12) and contains the phrase 'especially (but not exclusively)' when enumerating selective provisions (not including the provisions concerned here) under these Articles. However, we do not view such a general reference as sufficiently clear to identify the specific provisions at issue. This is particularly so in view of the fact that Articles 6, 9 and 12 of the *Anti-Dumping Agreement* contain multiple and diverse obligations, which relate to different subject-matters than the obligations contained in the specific provisions that are cited in the Panel request.[7] The phrase 'especially, but not exclusively' may be convenient, but is inadequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the *DSU*. Furthermore, even assuming *arguendo* that the obligations in these provisions may be 'inter-linked' with or 'dependent' upon a provision that is identified in the Panel request, we do not consider that this consideration is relevant here. The mere fact that a claim may be legally dependent upon another claim does not mean that it is subsumed within, or encompassed by, that claim. If a claim is not identified in the Panel request, the fact that it may be 'inter-linked' with an identified claim is not determinative."[326]

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

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

[324] Appellate Body Report, *Korea – Dairy*, paras. 123 and 127.
[325] Panel Report, *US – Lamb*, paras. 5.18-5.31.
[326] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14.

its interests throughout the course of these Panel proceedings by the way these 'claims' appeared in the Panel request."[327]

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

> "The Panel considers that the mere listing of provisions of the relevant covered agreements may not satisfy the standard of Article 6.2 of the DSU, for instance, where the listed provisions establish multiple obligations rather than one single, distinct obligation. However, where the multiple obligations are closely related and interlinked, a reference to a common obligation in the specific listed provisions may be sufficient to meet the standard of Article 6.2 of the DSU under certain circumstances in a particular case."[328]

245. In *EC – Approval and Marketing of Biotech Products*, the Panel stressed that the sufficiency of a panel request is to be determined on the circumstances of each case and "there is no requirement to identify specific clauses or sub-clauses within an article, paragraph or sub-paragraph"[329]:

> "We do not consider that, for the purposes of an Article 6.2 inquiry, the structure of the provisions contained in the WTO agreements constitutes some kind of 'safe haven', such that it would always be sufficient to specify sub-paragraph numbers in cases where a provision has several sub-paragraphs, etc. In our view, whether a particular manner of citing provisions is sufficient will depend on the circumstances of each case, and in particular on the extent to which the particular citation sheds light on the nature of the obligation at issue. Having said this, we think that the fact that two or more distinct obligations are set out, e.g., in one and the same sub-paragraph may provide a strong indication that those obligations are very similar in nature. In such cases, specification of the relevant sub-paragraph number may shed sufficient light on the nature of the obligation at issue to meet the minimum standard of precision required under Article 6.2."[330]

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

> "Neither the text of Article 6.2 nor relevant jurisprudence suggests that a complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party's written submissions and oral statements. Accordingly, we do not consider that the Complaining Parties' panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions. Nor do we consider that the panel requests are defective because they do not make it clear whether all of the provisions listed are alleged to apply to the same aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure. It is sufficient to recall in this regard that a panel request need not set out arguments 'as to which specific aspects of the measures at issue relate to which specific provisions of the agreements alleged to have been violated."[331]

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[327] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.22. See also ibid. paras. 7.26-7.27.
[328] Panel Report, EC – Trademarks and Geographical Indications (Australia), para. 7.2, sub-para. 35
[329] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, para. 78.
[330] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, para. 79.
[331] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, para. 88.

247. In *Korea – Commercial Vessels,* Korea argued that the European Communities had failed to meet Article 6.2's requirements by failing to choose between prohibited and actionable subsidies claims regarding the measures at issue.[332] The Panel decided, in a preliminary ruling, that complementary or alternative claims under multiple provisions is not only permitted but also required by Article 6.2. In this regard, it stated:

> "[W]e can only conclude that if a complaining party wishes to pursue claims in respect of a given measure under multiple provisions, whether complementarily or alternatively, not only is it *permitted* by Article 6.2 of the DSU to refer to all of those provisions in its request for establishment, but it is *required* to do so. In this respect, we find that the European Communities' request for establishment meets this requirement, as it identifies quite clearly which provisions are at issue ... and it explicitly states the European Communities' view that, pursuant to these provisions, the relevant measures are specific subsidies that are export contingent, and that cause serious prejudice to the interests of the European Communities. There is thus no doubt as to which provisions are cited by the European Communities in respect of which measures, and on what basis".[333]

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

> "While we consider that the US request for establishment could have been clearer in identifying precisely which of the paragraphs of Article VI of the GATT 1994 the United States claims to have been violated, we do not agree with Mexico that the request for establishment in this respect did not provide a brief summary of the legal basis of the claim sufficient to present the problem clearly. We consider that it is important when examining the consistency of part of the request for establishment with Article 6.2 of the DSU, not to examine parts of this request in isolation. Rather, in our view, the request must be considered as a whole, and the different claims in the request for establishment must be read in their context. In our view, the accompanying narrative and the provisions of the AD Agreement also alleged to have been violated make it clear that the US claims in this respect concern the determination of injury caused by dumped imports."[334]

249. In *US – Ripe Olives from Spain*, the United States argued that the European Union's claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement were not compliant with Article 6.2 of the DSU and were outside the Panel's terms of reference since neither claim was specifically mentioned in the European Union's consultations request nor its panel request. The Panel disagreed and found that the European Union's panel request met the minimum requirements of Article 6.2 of the DSU:

> "Having carefully considered the parties' arguments as well as the relevant language contained in the European Union's panel request, the Panel considers that, in citing Article 15.1 of the SCM Agreement and Article 3.1 of the Anti-Dumping Agreement, and in referring to certain language contained in Article 15.1 and Article 3.1 to make an 'objective examination of … the consequent impact of [subsidized/dumped] imports on domestic producers of such products', the European Union has provided a brief summary of the legal basis of the complaint sufficient to meet the minimum requirements of Article 6.2 of the DSU, with respect to claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement.
>
> Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement govern the determination of injury and causation in countervailing and anti-dumping proceedings in almost identical terms. There is undoubtedly a close normative relationship between the different subparagraphs within each set of these provisions, which together operate to establish the relevant legal framework and disciplines for investigating authorities to follow when conducting an injury and causation analysis.

[332] Panel Report, *Korea – Commercial Vessels*, para. 7.2.
[333] Panel Report, *Korea – Commercial Vessels*, para. 7.2.
[334] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31.

> Within this framework, we consider that Article 15.1 and Article 3.1 each function as an overarching provision that is directly linked with the more detailed obligations set forth in provisions such as Article 15.4 and Article 3.4, and the inquiries foreseen under the subparagraphs that follow serve as elements of a single, overall analysis addressing the question of whether subsidized or dumped imports are causing injury. In light of this, there is a distinct possibility that a claim under Article 3.1 and Article 15.1 may need to be resolved by assessing compliance with a more specific provision, such as Article 15.4 and Article 3.4, in respect of assessing the WTO-consistency of an investigating authority's examination of impact. Indeed, in prior disputes, panels have shared this view, finding that a claim of inconsistency with Article 15.1 or Article 3.1 will not normally be made or resolved independently of other provisions of Article 15 or Article 3, respectively. We therefore consider that by referring to both Article 15.1 and Article 3.1 and stating that the Injury Determination 'does not involve an objective examination of … *the consequent impact on the domestic producers*', the European Union's panel request signals to the United States the likelihood that the European Union intended to pursue a claim in respect of Article 15.4 and Article 3.4, and that compliance with those articles was necessarily concomitant with the claims under Article 15.1 and Article 3.1 respectively, as specifically adverted to in the panel request by the use of the words 'consequent impact'.
>
> …
>
> [W]e therefore conclude that in citing Article 15.1 of the SCM Agreement and Article 3.1 of the Anti-Dumping Agreement, and in referring to certain language contained in Article 15.1 and Article 3.1 to make an 'objective examination of … *the consequent impact of [subsidized/dumped] imports on domestic producers of such products*', the European Union has provided a brief summary of the legal basis of the complaint sufficient to meet the minimum requirements of Article 6.2 of the DSU with respect to claims under Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement."[335]

250. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, Costa Rica, the complainant, had in its panel request referred to Articles 3.1 and 3.2 of the Anti-Dumping Agreement, accompanied by a narrative that followed closely the text of Article 3.1. Before the Panel, Costa Rica pursued claims under these two provisions with regard to aspects of the investigating authority's determination in the underlying investigation other than those identified in the narrative in its panel request. The Dominican Republic, the respondent, argued that aspects of the claim pursued by Costa Rica under these two provisions that had not been identified in the panel request were outside the Panel's terms of reference.[336] The Panel disagreed:

> "[W]e consider that Costa Rica has provided a brief summary of the legal basis of the claim sufficient to meet the minimum requirements of Article 6.2 of the DSU with respect to the claims made about the analysis of price undercutting by the dumped imports. First, it is clear that Article 3.2 is explicitly cited in Costa Rica's panel request. Therefore, Costa Rica's allegations under Article 3.2 clearly fall within the Panel's terms of reference. It is also obvious that, in its request, Costa Rica provided a brief explanation in which it questioned the CDC's analysis of 'the effects of the imports under investigation on prices in the domestic market for like products', arguing that it was not based on an 'objective examination' on the basis of 'positive evidence' or an examination of all 'relevant evidence'.
>
> [T]he fact that the request refers generally to the text of Article 3.1 does not limit Costa Rica's claim regarding the 'objective nature' of the CDC's examination or the 'positive nature or relevance' of the evidence, as is argued by the Dominican Republic. As we see it, the assertions made by Costa Rica in its first written submission with regard to the effect of the dumped imports on prices constitute arguments in support of its claim of a violation of Article 3.2 and fall within the scope of its claim under that provision. These arguments include that: (a) the CDC failed to consider whether the

[335] Panel Report, *US – Ripe Olives from Spain*, paras. 7.192-7.193, and 7.195.
[336] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7-118-7.120.

> undercutting was 'significant'; (b) the CDC did not consider whether the undercutting was the effect of the dumped imports; (c) the CDC's price depression analysis does not comply with the requirement that an investigating authority must consider whether the effect of the imports is otherwise to depress prices to a significant degree; and (d) in the price suppression analysis, the CDC did not take into account Costa Rica's imports."[337]

251. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, Costa Rica, the complainant, pursued claims under Article 3.1 of the Anti-Dumping Agreement with regard to the investigating authority's threat of injury determination. The part of its panel request contesting the threat of injury determination, however, did not refer to Article 3.1. For this reason, the Dominican Republic, the respondent, argued that Costa Rica's claims with regard to the threat of injury determination under Article 3.1 were outside the Panel's terms of reference. The Panel rejected the Dominican Republic's jurisdictional objection and found the claim to be within its terms of reference. In so doing, the Panel underlined the general nature of the obligation found in Article 3.1 and its interlinkage with the more specific obligations set out in the remaining paragraphs of Article 3, including Article 3.7:

> "For the foregoing reasons, concerning the claims made under Article 3.1 and 3.7 of the Anti-Dumping Agreement, we conclude that, by identifying Article 3.7 in its panel request, and considering the text of the request as a whole and the function of Article 3.1 (i.e. that of an informative, overarching provision that is directly linked to the more specific obligations in the succeeding provisions, including Article 3.7), Costa Rica provided a brief summary of the legal basis of the complaint that is sufficient to satisfy the minimum requirements of Article 6.2 of the DSU.
>
> We therefore reject the Dominican Republic's argument that the fact that Costa Rica identified Article 3.1 as a legal basis for other claims in its panel request indicates that it failed to make reference to the provisions of Article 3.1 in its claim under Article 3.7. In particular, for the foregoing reasons, this fact does not preclude Costa Rica's claim under Article 3.7 from encompassing matters pertaining to whether the CDC's threat of injury analysis constituted an objective examination and whether its determination was based on positive evidence."[338]

252. In *Australia – AD/CVD on Certain Products (China)*, Australia argued that China could not bring challenges under the Anti-Dumping Agreement with regard to certain expiry reviews because its panel request did not cite Article 11.3 of that Agreement, the "gateway" provision that would allow claims under Article 2 of the Agreement to be brought in the context of an expiry review.[339] The Panel rejected this argument, noting that China brought claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994:

> "In light of this discussion of Article 9.3, we therefore recall that all of China's other claims raised under the Anti-Dumping Agreement are brought under Article 2 of the Anti-Dumping Agreement, i.e. they address the manner in which ADC established dumping margins. Logically, therefore, we would need to assess China's Article 2 claims (addressing how dumping margins were determined) in order to assess China's Article 9.3 claim (addressing whether the dumping margins were determined in a manner inconsistent with Article 2 and consequently were too high). We therefore consider that, even assuming that Australia is correct that a formal 'gateway' provision is required in order for China to raise challenges *vis-a-vis* the expiry reviews, China's claim under Article 9.3 functions as such a 'gateway' for China's claims under Article 2. That being the case, it is unnecessary to require China to have also cited Article 11.3 as an additional 'gateway', and thus unnecessary for us to address Australia's claim that Article 11.3 had to be included in the panel request. We further note that because section B.1 of the panel request directs all anti-dumping claims (including Article 2 claims) against all segments listed in the appendix to the panel request 'unless otherwise stated', and the expiry reviews appear in the appendix, we

[337] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.125-7.126.
[338] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.245-7.246.
[339] Panel Report, *Australia – AD/CVD on Certain Products (China)*, para. 7.46.

> do not consider that a reference to Article 11.3 was otherwise necessary to satisfy the requirements of Article 6.2 of the DSU."[340]

253. The Panel in *China – IPRs Enforcement (EU)* noted that the European Union's panel request did not include a reference to the obligation in the second sentence of Article 63.3 of the TRIPS Agreement, and therefore found the claim presented under that provision to be outside its terms of reference:

> "The Panel is of the view that if the European Union was intending to bring two separate claims with respect to two distinct obligations with different scopes of application, one under the first sentence of Article 63.3 and the other under the second sentence, its panel request should have clearly specified that this was the case. The European Union's panel request, however, refers to Article 63.3 in general and does not specifically mention whether its claim is with respect to the first sentence, the second sentence, or both. Nothing in the text of the panel request indicates that the European Union was bringing a claim under the second sentence of Article 63.3.
>
> It is only in its first written submission that the European Union presents its claims as two separate violations – one of the first sentence and one of the second sentence. This is the first time the European Union uses the phrase 'specific judicial decisions'.[341] This shift goes beyond a mere clarification of the claims as they were presented in the panel request. As noted above, a party's submissions may not cure a defect in the panel request.
>
> Based on the above, the Panel concludes that the European Union's claim under Article 63.3, second sentence is outside its terms of reference. The Panel cannot, therefore, proceed with the analysis of the European Union's claim."[342]

#### 1.3.5.3.4 Identification of claims vs. applicability of the relevant legal provisions

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

> "By contrast, Article 6.2 does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the *applicability* of a given covered agreement. These provisions are not directly part of the 'legal basis of the complaint', for they are not 'claimed to have been *violated* by the respondent'. Instead, the fact that a panel request contains claims of violation under the substantive provisions of a covered agreement logically *presupposes* that the complainant considers that such provisions are applicable and relevant to the case at hand.
>
> … Where a measure is not subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's consistency with that agreement. The examination regarding the 'applicability' of certain provisions logically precedes the assessment of a measure's 'conformity' with such provisions. Indeed, as noted by the Appellate Body, a panel may be required to 'determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure' with that provision or covered agreement."[343]

255. In *China – Additional Duties (US)*, the measures challenged were additional duties imposed by China on certain goods originating in the United States. The United States challenged the measures under Articles I and II of the GATT 1994 whereas China maintained the view that the application of these provisions was suspended since the challenged measures had been taken as countermeasures pursuant to Article XIX of the GATT 1994 and Article 8.2 of the Agreement on

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[340] Panel Report, *Australia – AD/CVD on Certain Products (China)*, para. 7.49.
[341] (*footnote original*) European Union's first written submission, paras. 648-649.
[342] Panel Report, *China – IPRs Enforcement (EU)*, paras. 7.466 and 7.469-7.470.
[343] Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.30-5.31.

Safeguards.[344] China maintained that since the United States' panel request did not identify these two provisions, it fell short of the requirements of Article 6.2 of the DSU in terms of providing a brief summary of the legal basis of the complaint.[345] The Panel disagreed with China's argument, and underlined in its reasoning that Article 6.2 does not require that the summary of the legal basis of the complaint be "correct". The Panel pointed out that:

> "Article 6.2 of the DSU does not qualify the concept of the 'legal basis of the complaint' in terms of correctness. Article 6.2 requires only that the brief summary of the legal basis of the complaint be 'sufficient to present the problem clearly'; it does not require that such a summary be 'correct'. The wording of Article 6.2 of the DSU, and the requirement that the summary of the legal basis present the 'problem' clearly, thus entrust to each complainant the discretion to articulate the 'problem' about which it is concerned in any given dispute. This includes identifying the measures it wishes to challenge and deciding which of the covered agreements to bring claims under. Provided that the complainant clearly identifies the provisions under which it seeks to bring claims and properly links those provisions to the measures at issue in a manner sufficient to present its 'problem' clearly, a panel request satisfies the requirements of Article 6.2 of the DSU.
>
> In the Panel's view, whether the panel request has identified the correct legal basis is a matter that goes to the merits of the complainant's case, and not to the sufficiency of its panel request. The Panel notes that a central part of every panel's duty to make an 'objective assessment of the matter' pursuant to Article 11 of the DSU is the obligation to assess 'the applicability of the relevant covered agreements'. If a complainant identifies in its panel request provisions that a panel later finds to be inapplicable to the measure at issue, its case cannot succeed, and it cannot raise additional claims later in the proceedings. However, a panel request that identifies what either the respondent considers, or the panel ultimately finds, to be the incorrect legal basis for a claim is not thereby retrospectively rendered defective in terms of Article 6.2 of the DSU.
>
> In these proceedings, the United States has challenged the additional duties measure as being inconsistent with Articles I and II of the GATT 1994. China has not argued that the panel request fails to identify those specific provisions with sufficient clarity. Instead, China argues that the additional duties measure is subject to the WTO safeguards regime, and not to Articles I and II of the GATT 1994. This is a disagreement that the Panel will need to resolve in fulfilling its mandate under Article 11 of the DSU, as detailed in the following section. In the Panel's view, however, the question whether the United States' panel request identified the correct legal basis is not relevant to an examination of the compliance of that request with the requirements of Article 6.2 of the DSU."[346]

#### 1.3.5.3.5 Relationship between claims raised in an anti-dumping investigation and claims raised in a panel request

256. As regards the claims that a WTO Member chooses to bring before a WTO dispute, in *Thailand – H- Beams*, the Appellate Body ruled on the relationships between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO:

> "[I]t cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. Furthermore, although the defending party will be aware of the issues raised in an underlying investigation, other parties may not. Thus, the underlying investigation cannot normally, in and of itself, be determinative in assessing the sufficiency of the claims made in a request for the establishment of a panel. We, therefore, are of the view that, in this case, the Panel erred to the extent

[344] Panel Report, *China – Additional Duties (US)*, para. 7.48.
[345] Panel Report, *China – Additional Duties (US)*, para. 7.1.
[346] Panel Report, *China – Additional Duties (US)*, paras. 7.27-7.29.

that it relied mainly on issues raised in the underlying anti-dumping investigation in assessing the sufficiency of Poland's panel request under Articles 2 and 5."[347]

#### 1.3.5.3.6 Distinction between claims and arguments

257. After agreeing with the Panel that the request for the establishment of the panel contained sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU, the Appellate Body in *EC – Bananas III* set out the difference between claims and arguments, and furthermore rejected the notion of "curing" a faulty panel request where claims had not been included in the panel request:

> "In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.
>
> Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[348]

258. In *EC – Hormones*, the European Communities argued on appeal that since the Panel was not entitled to make findings beyond what has been requested by the parties, it had erred by basing the main part of its reasoning on Article 5.5 of the SPS Agreement on a claim that the complainants had not made. The Appellate Body rejected the European Communities' argument and emphasised the distinction between claims and arguments:

> "Considering that in its request for the establishment of a panel in the proceeding initiated by the United States, as well as in the proceeding started by Canada, both complainants have included a claim that the European Communities ban is inconsistent with Article 5 of the *SPS Agreement*, we believe that the objection of the European Communities overlooks the distinction between legal claims made by the complainant and arguments used by the complainant to sustain its legal claims…. Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the *DSU* limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the *DSU*, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute. Given that in this particular case both complainants claimed that the European Communities measures were inconsistent with Article 5.5 of the *SPS Agreement*, we conclude that the Panel did not make any legal finding beyond those requested by the parties."[349]

259. The Panel in *Thailand – H-Beams* discussed the sufficiency of a panel request, stressing the distinction between claims and arguments:

> "Thailand argues that 'a panel may only accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings.' According to Thailand, 'this would be the case only where (1) a panel found that the complainant had failed to present a prima facie case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in

[347] Appellate Body Report, *Thailand – H-Beams*, para. 94.
[348] Appellate Body Report, *EC – Bananas III*, paras. 141-143. See also Appellate Body Reports, *US – Lead and Bismuth II*, paras. 72 and 73, and *US – Anti-Dumping Measures on OCT*G, paras. 7.16-7.17.
[349] Appellate Body Report, *EC – Hormones*, para. 156.

> the request.' We are concerned here that Thailand is blurring the distinction between, on the one hand, the sufficiency of the panel request and, on the other, the issue of whether or not the complaining party establishes a *prima facie* case of violation of an obligation imposed by the covered agreements. We recall that 'there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.' Article 6.2 DSU does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of the claims set out in the panel request. Nor does it determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings."[350]

260. In *Chile – Price Band System*, Chile had asked the Appellate Body to reverse the Panel's finding on the inconsistency of Chile's price band system with Article II:1(b) second sentence on the ground that Argentina had not actually made a claim under that second sentence. Argentina referred to paragraph 156 of the Appellate Body Report in *EC – Hormones* in support of its argument that "even if none of the parties had advanced arguments regarding the second sentence of Article II:1(b) of the GATT 1994, the Panel would have had the *right*, indeed the *duty*, to develop its own legal reasoning to support the proper resolution of Argentina's claim." The Appellate Body considered that, in this case, the Panel "had neither a "right" nor a "duty" to develop its own legal reasoning to support a claim under the second sentence" and stressed that "the Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue":

> "In *EC – Hormones*, and in *US – Certain EC Products*, we affirmed the capacity of panels to develop their own legal reasoning in a context in which it was clear that the complaining party had made a claim on the matter before the panel. It was also clear, in both those cases, that the complainant had advanced arguments in support of the finding made by the panel—even though the arguments in support of the claim were not the same as the interpretation eventually adopted by the Panel. The situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.
>
> Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a 'right' nor a 'duty' to develop its own legal reasoning to support a claim under the second sentence. The Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue."[351]

261. In *India – Patents (US)*, on the issue of claims and arguments, the Appellate Body stated:

> "[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as a case proceeds."[352]

262. In *Korea – Dairy*, Korea argued in its appeal that the Panel had erred by failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at, or subsequent to, the rebuttal stage. The Appellate Body emphasized the difference between claims and arguments as follows:

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[350] Panel Report, *Thailand – H-Beams,* para. 7.43.
[351] Appellate Body Report, *Chile – Price Band System*, paras. 166-168.
[352] Appellate Body Report, *India – Patents (US)*, para. 88.

> "[W]e agree with Korea that a party to a dispute settlement proceeding may not introduce a new claim during or after the rebuttal stage. Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request. By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties. In *European Communities – Hormones*, we emphasized the substantial latitude enjoyed by panels in treating the *arguments* presented by either of the parties and said:
>
> > '… Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. '
>
> Both 'claims' and 'arguments' are distinct from the 'evidence' which the complainant or respondent presents to support its assertions of fact and arguments."[353]

263. In *Canada – Autos,* the Panel considered whether Japan's claim that it could "[reserve] its right to elaborate during the course of the panel deliberations" had prejudiced Canada's ability to defend itself. The Panel indicated that Canada had suffered no prejudice:

> "First, the Panel does not consider that this is a situation where, as argued by Canada, the complaining party is permitted 'to eke out its claims incrementally during the various stages of the case'. In making this argument, Canada refers to the Appellate Body decision in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III)*. However, the situation here is unlike that in *EC – Bananas III*, where the Appellate Body stated that 'Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint' (WT/DS27/AB/R, para. 143). In the case before us there is no Article 6.2 issue of specificity of the measures identified in the panel request. Japan in this dispute has not attempted to reserve a right to present a new claim at a later stage of the proceedings; rather, it appears that Japan has simply indicated that it may wish to further elaborate its arguments as to claims already set out in the panel request and in its initial arguments. As such, the Panel does not consider, at this stage, that Canada is likely to be prejudiced in its ability to defend itself in this action.
>
> Second, to the extent any issue of procedural fairness should arise, for example, as to the right of rebuttal by Canada should Japan wait until a later stage of these proceedings to develop its arguments as to its GATT Article III:4 and TRIMS Article 2.1 claims with respect to the 'manufacturing requirement' (production-to-sales ratio requirement), the Panel will ensure such procedural fairness by providing Canada with adequate opportunity to respond to any such further elaboration by Japan of its arguments under these claims.
>
> Third, in addition to ensuring procedural fairness, it is of course necessary to set a cut-off date beyond which no new argumentation as to the claims in issue may be accepted, except upon a showing of good cause. In the instant case, the Panel considers that no new argumentation should be introduced beyond the second panel

[353] Appellate Body Report, *Korea – Dairy*, para. 139. See also Panel Report, *Egypt – Steel Rebar*, para. 7.58.

> meeting with the parties, except in response to any questions posed by the Panel or otherwise upon a showing of good cause."[354]

264. The Panel in *EC – Bed Linen (Article 21.5 – India)* noted the distinction drawn by the Appellate Body between claims and arguments and indicated that there existed "no obligation on a party to limit its arguments to only those treaty provisions about which claims have been identified in the request for establishment."[355]

265. In *EC – Approval and Marketing of Biotech Products,* the Panel, in a preliminary ruling, found that Article 6.2 did not require an explanation of the reasons for identifying certain treaty provisions and that panel requests did not have to set out arguments about which measures violated which obligations:

> "Neither the text of Article 6.2 nor relevant jurisprudence suggests that a complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party's written submissions and oral statements. Accordingly, we do not consider that the Complaining Parties' panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions".[356]

266. In *EC – Selected Customs Matters,* the Appellate Body asserted that Article 6.2 requires the "claims" to be set out in a panel request in a way that is sufficient to present the problem clearly, not the "arguments":

> "[A]rticle 6.2 of the DSU requires that the *claims*—not the *arguments*—be set out in a panel request in a way that is sufficient to present the problem clearly. Nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims. Accordingly, we are of the opinion that the Panel erred when it found that the list of areas of customs administration in the third paragraph of the panel request limits the scope of the 'specific measures at issue'."[357]

267. In *Indonesia – Chicken*, Indonesia claimed that Brazil's panel request lacked sufficient clarity as to which aspects of the general prohibition were inconsistent with which provisions of the covered agreements listed by Brazil, including a brief indication of how and why. Although the Panel agreed with Indonesia that Brazil's request could have been structured in a clearer manner, it observed that the request did not fall short of the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly:

> "[T]he amount of detail that Indonesia considers necessary would require Brazil to develop arguments in addition to setting out the claims. Indeed, Indonesia seems to expect Brazil's panel request to describe the precise and specific manner in which each of the constitutive elements of the general prohibition, not the measure itself, are inconsistent with the relevant articles of the covered agreements. The Appellate Body has been clear in acknowledging that Article 6.2 requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly. In our view, accepting Indonesia's arguments would require us to blur this distinction."[358]

268. The Panel in *US – Clove Cigarettes* rejected the United States' argument that the identification of the like domestic product in a panel request merely amounts to argumentation. According to the Panel, in certain circumstances, "the identification of the specific products at issue in a panel request pertains to the claim at issue, i.e., providing 'a brief summary of the legal basis of the complaint', rather than to the arguments relating to that claim":

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[354] Panel Report, *Canada – Autos,* paras. 4.11-4.13.
[355] Panel Report, EC – Bed Linen (Article 21.5 – India), para. 6.63.
[356] Panel Report, EC – Approval and Marketing of Biotech Products, para. 7.47.
[357] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.
[358] Panel Report, *Indonesia – Chicken*, para. 7.27.

> "Article 2.1 of the TBT Agreement defines the national treatment obligation it embodies in direct reference to the imported product and the like domestic product; both concepts serve to orient the determination of the scope of such an obligation. Therefore, the identification of those two types of products in the panel request rather pertains to the realm of 'providing a brief summary of the legal basis to the complaint' than purely to argumentation.
>
> …
>
> We do not disagree with these prior findings and we should not be misinterpreted as saying that a complainant must in all cases identify the products to which the measure at issue applies in order to comply with Article 6.2. We are saying that when the complainant has specified the products in its panel request, as in the present case, and when the claim pertains to a WTO obligation that requires a comparison of particular products, as in the present case, such identification becomes an integral part of the panel's terms of reference, and cannot be 'cured' through argumentation."[359]

269. The Panel in *India – Agricultural Products* held that "the identification of a domestic measure as evidence for the purpose of demonstrating discrimination between imported and domestic products pertains to the argumentation of the discrimination claim, as opposed to constituting a distinct claim."[360] The Panel explained:

> "[A] measure to which a party refers solely for the purpose of making a comparison with a challenged measure in respect of a discrimination claim may serve as evidence in the argumentation in support of that claim, and does not in itself constitute a measure that must be identified in a panel request by virtue of Article 6.2 of the DSU."[361]

270. In *China – Publications and Audiovisual Products*, the Panel, in a statement not modified by the Appellate Body, also noted that although a complainant must provide a "summary of the legal basis" of its complaint, this does not mean that the complainant is required, in its request for establishment, to set out the arguments in support of a particular claim. The Panel considered "that there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims."[362]

271. In *Australia – Apples*, the Panel applied the Appellate Body's distinction between claims and arguments set out in *EC – Bananas III* to rule that a comparison situation in the dispute relating to a Japanese product did not form part of New Zealand's claim, but rather formed part of New Zealand's arguments:

> "The Panel does not view the comparison situation in this dispute, namely the one relating to Japanese nashi pears, as part of New Zealand's claim. Rather, it belongs to New Zealand's arguments. In *EC – Bananas III*, the Appellate Body established a clear distinction between claims and arguments. '[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under *DSU* Article 7, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.'"[363]

272. In *Costa Rica – Avocados (Mexico)*, the Panel found that, in its panel request, Mexico had "limited its claim" under Article 6.1 of the SPS Agreement to the alleged failure to adapt Costa Rica's measures to the sanitary or phytosanitary characteristics of the area to which the product was *destined*. In view of the foregoing, the Panel found that, as regards the alleged failure

[359] Panel Report, *US – Clove Cigarettes*, paras. 7.139 and 7.141.
[360] Panel Report, *India – Agricultural Products*, para. 7.50.
[361] Panel Report, *India – Agricultural Products*, para. 7.53.
[362] Panel Report, China – Publications and Audiovisual Products, para. 7.23.
[363] Panel Report, *Australia – Apples*, para. 7.926.

to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product *originated*, Mexico failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", pursuant to Article 6.2 of the DSU. The Panel concluded therefore that the claim under Article 6.1 of the SPS Agreement, with respect to the alleged failure to adapt Costa Rica's measures to the phytosanitary characteristics of the area from which the product *originated*, fell outside the Panel's terms of reference. The Panel was not persuaded that the reference to "the area to which the product is destined" in the panel request formed part of the "arguments", and not the claim:

> "Nor is the Panel convinced by Mexico's second argument that the reference to 'the area to which the product is destined' in its panel request forms part of the arguments and not the claim. For the purposes of Article 6.2 of the DSU, the word 'claim' refers to an allegation 'that the responding party has violated … an identified provision of a particular agreement', while the arguments 'are statements put forth by a complaining party 'to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision'. The Panel does not consider that simply mentioning the alleged failure to adapt to the sanitary or phytosanitary characteristics of the area to which the product is destined in Mexico's panel request can be characterized as an argument. Mentioning it, without further detail or explanation, cannot be considered as a statement put forth by Mexico to demonstrate that Costa Rica's measure does indeed infringe upon Article 6.1 of the SPS Agreement."[364]

273. In *Colombia – Frozen Fries*, the Panel recalled that a complainant's arguments in support of its claims must be included in its submissions during the panel proceedings, not in its panel request. Turning to the case at hand, the Panel found that the European Union's panel request complied with this principle:

> "Accordingly, the European Union's panel request did not need to engage in detail with all the factual aspects of the calculation that led to Colombia's alleged failure to perform a fair comparison. In particular, it was not necessary for the panel request to outline which specific adjustment was allegedly not – or incorrectly – made and why".[365]

#### 1.3.5.3.7 Considering a claim against the design of a system "as a whole" challenge

274. In *EC – Selected Customs Matters*, the Appellate Body agreed that a Member is allowed to challenge within the WTO dispute settlement proceedings another Member's system *as a whole* or *overall* and established that challenging the design or structure of a system is also permissible:

> "By referring to the 'design and structure' of the European Communities' system of customs administration, the United States sought to demonstrate how and why the instruments identified in the first paragraph of the panel request, as a whole, are administered in a manner leading to a lack of uniformity in their administration. Thus, the United States' contention on the 'design and structure' of the European Communities' system of customs administration was made as an argument to substantiate its 'as a whole' challenge set out in the panel request. We therefore disagree with the Panel's characterization of the United States' contention on the 'design and structure' of the European Communities' system of customs administration as a claim in itself. We noted earlier that the 'as a whole' challenge of the United States is set out in the panel request consistently and according to the specificity requirements contained in Article 6.2 of the DSU. We therefore see no reason why the Panel was precluded from considering the United States' arguments on the 'design and structure' of the European Communities' system of customs administration."[366]

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[364] Panel Report, *Costa Rica – Avocados (Mexico)*, Annex D-1, Preliminary Ruling by the Panel, para. 3.15.
[365] Panel Report, *Colombia – Frozen Fries*, para. 7.231.
[366] Appellate Body Report, *EC – Selected Customs Matters*, para. 175.

### 1.3.5.4 "present the problem clearly"

#### 1.3.5.4.1 General

275. In *US – Oil Country Tubular Goods Sunset Review*, the Appellate Body, further to referring to its previous reports on *Thailand – H-Beams* and *Korea – Dairy*, considered that a request for establishment "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed" in order to present the problem clearly:

> "[I]n order for a panel request to 'present the problem clearly', it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer, and … begin preparing its defence'."[367]

276. The Panel in *US – Pipes and Tubes (Turkey)* found certain measures to be outside its terms of reference on the ground that Türkiye, the complainant, had not plainly connected the relevant claim with those measures.[368] In so finding, the Panel rejected Türkiye's argument that the United States had not been prejudiced by this deficiency in Türkiye's panel request:

> "We further find irrelevant whether the United States was prejudiced or not by a lack of precision in Turkey's panel request. As we explain above, Article 6.2 of the DSU requires a complainant to 'identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly'. A panel's examination of whether a panel request complies with these requirements 'must be objectively determined on the basis of the panel request as it existed at the time of the filing' and be 'demonstrated on the face' of the request. Article 6.2 of the DSU does not separately require a finding of prejudice to a responding party in order to determine whether or not a given claim falls within a panel's terms of reference. Rather, as we explain above, a panel request forms the basis of a panel's terms of reference and establishes a panel's jurisdiction. Importantly, the panel request also serves a due process function by providing the respondent notice as to the nature of the complainant's case. We therefore reject Turkey's arguments. "[369]

#### 1.3.5.4.2 Relevance of presenting the problem clearly

277. In *Thailand – H-Beams*, the Appellate Body explained the due process objectives behind the requirement for sufficient clarity in a panel request:

> "Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the 'claims' that are being asserted by the complaining party. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[370]

278. Also, in *Thailand – H-Beams*, the Appellate Body explained further how claims of prejudice should be assessed (commenting particularly on the timing of challenging the sufficiency of a Panel request):

> "Thailand argues that it was prejudiced by the lack of clarity of Poland's panel request. The fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow

[367] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 162. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.27.
[368] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.236.
[369] Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.241.
[370] Appellate Body Report, *Thailand – H-Beams*, para. 88.

> it to defend itself. In assessing Thailand's claims of prejudice, we consider it relevant that, although Thailand asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to Articles 5 and 6 of the *Anti-Dumping Agreement* at the time of filing of its first written submission, it did not do so at that time with respect to Poland's claims under Articles 2 and 3 of that Agreement. We must, therefore, conclude that Thailand did not feel at that time that it required additional clarity with respect to these claims, particularly as we note that Poland had further clarified its claims in its first written submission. This is a strong indication to us that Thailand did not suffer any prejudice on account of any lack of clarity in the panel request."[371]

279. In *Chile – Price Band System*, the Appellate Body ruled that "[t]he requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement":

> "Argentina appears to suggest that a claim may be made implicitly, and need not be made explicitly. We do not agree. The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement."[372]

280. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States had made a request for a number of preliminary rulings regarding both the clarity of the request for establishment and the scope of the terms of reference of the Panel. The Panel, after declining all requests for preliminary rulings, clarified that it had undertaken a textual analysis of the Panel request and that, therefore, it did not need to enter into the issue of whether the United States had been prejudiced in its right to defend itself due to the alleged inconsistencies in Argentina's panel request:

> "[W]e note that as our analysis with respect to the totality of the United States' request for preliminary rulings was based on a textual analysis of Argentina's panel request, we did not need to inquire into the issue of whether the United States had been prejudiced in its right to defend itself in the present proceedings due to the alleged inconsistencies in the panel request. We nevertheless note that the United States has not shown to the Panel that it had been prejudiced in its right to defend itself in these proceedings due to these alleged inconsistencies in Argentina's panel request. In several instances, the United States argued that it did not know what case it had to answer because of the lack of precision with respect to certain parts of Argentina's panel request. However, we consider that without supporting arguments, this simple allegation can not be taken to establish prejudice."[373]

281. In *EU – Energy Package*, the Panel made the following finding with regard to the reference to "the problem" in the text of Article 6.2:

> "We consider that the reference to '*the* problem' in Article 6.2 of the DSU indicates a particular legal problem that a complainant is seeking to resolve through recourse to dispute settlement. Therefore, in our view, once a complainant has set out in its panel request a brief summary of the legal basis of the complaint that is 'sufficient' to clearly present a particular legal problem, a complainant may not assert, in the course of the panel proceedings, a claim that presents a different legal problem. If a complainant were allowed to do so it would mean that a panel could consider claims not included in a panel request – a result that is, in our view, manifestly incompatible with

[371] Appellate Body Report, *Thailand – H-Beams,* para. 95. See also Panel Report, *Canada – Aircraft Credits and Guarantees,* para. 7.43, where the Panel also considered whether a lack of specificity in a panel request had prejudiced the respondent.

[372] Appellate Body Report, *Chile – Price Band System*, para. 164.

[373] Panel Report, US – Oil Country Tubular Goods Sunset Reviews, para. 7.71.

> Articles 6.2 and 7.1 of the DSU and the due process objective they serve to protect."[374]

#### 1.3.5.4.3 Clarity of claims in written submissions

282. In *EC – Tube or Pipe Fittings*, the European Communities had requested the Panel to refuse to consider certain of Brazil's claims on the grounds that these claims were defective as they were too vaguely defined in Brazil's first written submission. In the view of the European Communities, admission of these claims would constitute an infringement of the European Communities' rights of defence and a departure from the good faith standard in Article 3.10 of the DSU and from the due process requirement that underlies the DSU. The Panel, in a preliminary ruling, rejected the European Communities' request on the grounds that the opportunity would still exist for Brazil to provide further supporting evidence and argumentation in its subsequent submissions with a view to clarifying those allegations in the course of the Panel proceedings:

> "To the extent the European Communities is arguing that the first submission is determinative for the clarity of the claims for the purpose of the entire proceeding -- in the sense that if a claim is not clearly stated there, no further opportunity exists for clarification over any of the remaining portion of the proceedings -- we cannot accept this argument. In our view, it is in the nature of the Panel process that the claims made by a party may be progressively clarified and refined throughout the proceeding. This may occur through the submission of supporting evidence and argumentation by the parties, commencing with their first written submission, and followed by a round of rebuttal submissions, supplemented by oral statements and answers to questions. It is, of course, clear that this process of progressive clarification would not allow a party to add additional claims (which were not included in the request for establishment of the Panel) during the course of the proceedings. The fundamental due process rights of the parties are thereby preserved.
>
> …
>
> We find support for our ruling in the statement by the Appellate Body in its report on *US – FSC* that the 'procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes'."[375]

#### 1.3.5.5 Late presentation of claims

283. 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.[376] 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

[374] Panel Report, *EU – Energy Package*, para. 7.98.
[375] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.10.
[376] Panel Report, *EC – Bananas III*, paras. 7.57-7.58.

> 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."[377]

284. 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."[378] 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."[379]

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

> "In this instance, Turkey asserted its claim under Article VI:6(a) only in response to our written questions. It articulated this claim only <u>after</u> 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."[380]

286. 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 consistent with due process:

> "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

[377] Appellate Body Report, *EC – Bananas III*, paras. 145 and 147. See also Appellate Body Report, *Chile – Price Band System*, para. 158.
[378] Panel Report, *Japan – Apples*, para. 8.64.
[379] Panel Report, *Japan – Apples*, paras. 8.65-8.66.
[380] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.64-7.65.

> 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."[381]

#### 1.3.5.6 Abandoned claims

287. 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 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."[382]

288. 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

[381] Panel Report, Thailand - Cigarettes (Philippines) (Article 21.5 – Philippines II), para. 7.86.
[382] Panel Report, *US – Steel Plate*, paras. 7.27-7.29.

> occasions, panels have not examined claims abandoned by complainants in the course of panel proceedings."[383]

289. The Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* held that the existence of abandoned claims in a panel request does not affect the conformity with Article 6.2 of the DSU of the identification of the remaining claims:

> "We do not agree with the United States that China's abandonment of its claims 'cured' the alleged lack of specificity of Part D of the panel request. The existence of the abandoned claims does not affect the conformity of the identification of the remaining claims with Article 6.2 of the DSU… While a panel request making general references to treaty provisions containing multiple claims may be viewed as being over-inclusive, it is important to note that abandoning one set of claims is an issue entirely different from attempting to cure deficiencies in the listing of the remaining set of claims in a panel request. A panel request may list multiple claims with sufficient specificity, and it may list few claims in a manner that does not comply with the requirements of Article 6.2. Subsequently dropping claims does not add to, or detract from, an independent assessment of whether the remaining claims are identified in a manner that is sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU."[384]

290. In *EU – Energy Package*, Russia decided not to pursue its claims with regard to certain measures that had been identified in its panel request, and the Panel decided not to address such claims.[385]

### 1.3.6 Preliminary rulings under Article 6.2

*Note: This sub-section provides information on preliminary rulings under Article 6.2 of the DSU. It should be noted that disputing parties have requested preliminary rulings in respect of a wide range of other issues, including but not limited to the adequacy of consultations, admissibility of claims with respect to new or expired measures, issues related to panel composition, alleged conflicts of interest, enhanced third party rights, admissibility of evidence, procedures for business confidential information and other confidentiality issues, participation of private counsel, the panel's timetable, amicus curiae briefs, open hearings, and consultations with scientific experts. Such rulings may be appealed with the final panel report along with any other legal issues subject to appeal.*

#### 1.3.6.1 Regulation of a request for a preliminary ruling in standard working procedures

291. In *EC – Bananas III,* the Appellate Body noted that the compliance of the Panel request with Article 6.2 could be decided early by a preliminary ruling if panels had detailed, standard working procedures allowing for this.[386] In *Colombia – Ports of Entry,* the Panel referred to the Appellate Body's statement in *EC – Bananas III* with regard to preliminary rulings and noted that "[w]hile the *DSU* does not expressly envision preliminary rulings by panels, it has become an occurrence in the past few years. The Appellate Body has commented that panel working procedures should allow for the possibility of requests for preliminary rulings."[387]

#### 1.3.6.2 Absence of a requirement to rule on a preliminary basis

292. In *Canada – Aircraft*, Canada asked the Panel to issue a preliminary ruling on its jurisdiction before the deadline for the parties' first written submission. The Panel denied the request on the grounds that there is no requirement nor established practice in that regard:

> "Canada asked the Panel to issue the requested ruling on the Panel's jurisdiction prior to the deadline for the parties' first written submissions. In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties'

[383] Panel Reports, *China – Raw Materials*, para. 7.23.
[384] Appellate Body Report, US – Countervailing and Anti-Dumping Measures (China), para. 4.49.
[385] Panel Report, *EU – Energy Package*, paras. 7.20-7.22.
[386] Appellate Body Report, *EC – Bananas III*, paras. 142 and 144.
[387] Panel Report, *Colombia – Ports of Entry*, para. 7.13.

> first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, there may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling. Indeed, we considered it necessary to request such clarification in the present case. In our view, the possibility for obtaining such clarification would be lost – or at least significantly undermined – if a panel were required to rule on preliminary issues before the deadline for the parties' first written submissions. For these reasons, we rejected Canada's request for a preliminary ruling on this issue prior to the deadline for the parties' first submissions."[388]

293. In *India – Autos*, India made a "conditional" preliminary ruling request. The Panel denied the request. Noting the panel's statement in *Canada – Aircraft*, the Panel in *India – Autos* found also that it was appropriate to seek further clarifications on the nature of the matter before it.[389]

#### 1.3.6.3 Issuance and circulation of preliminary rulings under Article 6.2

294. In some cases, panels have circulated their preliminary rulings, as WTO documents, to the DSB.[390]

295. In most cases to date, panels have issued preliminary rulings to the parties (and sometimes third parties) and reproduced the rulings in their final reports (where these have not already been circulated as a WTO document).[391]

296. In *India – Tariffs on ICT Goods (Japan)*, the Panel rejected India's request to defer the issuance of its preliminary ruling regarding India's terms of reference objection and give parties further opportunities to express views on this matter:

> "Depending on the circumstances of the case, a panel may find it appropriate, when assessing a request for a preliminary ruling, to solicit further submissions from the parties, pose questions, or seek the parties' views during a meeting. However, as observed by the panel in *Argentina – Import Measures*, '[a]ny of those steps is not an acquired right for the parties, but is instead an instrument for a panel to obtain the necessary information that will allow it to rule on the relevant issues'. In the present case, having perused the parties' submissions, the Panel is satisfied that it can make a decision regarding India's requests on the basis of the arguments and evidence contained therein. The Panel thus does not find it necessary to request further submissions, pose questions to the parties, or to seek the parties' views at the first substantive meeting of the Panel."[392]

### 1.4 Relationship with other provisions of the DSU

#### 1.4.1 Article 7.1

297. In *EC – Selected Customs Matters*, the Appellate Body, in considering the purpose of a panel request, resorted to the provisions of Article 7.1 inasmuch as they set out the Panel's terms of reference on the basis of the panel request. On a plain reading of Article 7.1, the Appellate Body linked its provisions with the requirements under Article 6.2 of the DSU:

> "[A] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a

[388] Panel Report, *Canada – Aircraft*, para. 9.15.
[389] Panel Report, *India – Autos*, para. 7.7.
[390] For instance, Panel Reports, *Canada – Wheat Exports and Grain Imports*, para. 5.7; *Australia - Apples*, para. 1.10; and *China – Raw Materials*, para. 1.13.
[391] For instance, Panel Reports, *Guatemala – Cement II*, para. 8.11; *US – FSC (Article 21.5 – EC)*, para. 6.3; and *EC – Approval and Marketing of Biotech Products*, para. 7.47.
[392] Panel Report, *India – Tariffs on ICT Goods (Japan)*, Annex E-2, para. 2.6.

panel will have the authority to examine and on which it will have the authority to make findings."[393]

### 1.4.2 Article 19.1

298. In *EC – Selected Customs Matters*, the Appellate Body recalled its findings in *US – Upland Cotton*, and stressed that Article 19.1 does not place restrictions on the identification of measures at issue in a panel request:

> "In *US – Upland Cotton*, the Appellate Body emphasized that the nature of a recommendation a panel may make under Article 19.1 of the DSU with respect to a measure 'is not … dispositive of the preliminary question of whether a panel can address claims in respect of that measure'. In that case, the Appellate Body had to address the issue of whether an expired measure can be a 'measure at issue' within the meaning of Article 6.2 of the DSU. The Appellate Body rejected the United States' argument that, because an expired measure is not susceptible to a recommendation under Article 19.1 of the DSU, it cannot be a 'measure at issue' under Article 6.2. For the Appellate Body, the question of whether a panel can address claims in respect of an expired measure is to be distinguished from the question of whether that measure is susceptible to a recommendation under Article 19.1. Although the issue addressed by the Appellate Body in *US – Upland Cotton* is not identical to that raised by the United States' appeal in this case, the Appellate Body's reasoning in *US – Upland Cotton* supports our position that Article 19.1 of the DSU does not place restrictions on the type of measure that can be identified in a panel request under Article 6.2 of the DSU."[394]

### 1.4.3 Article 21.5

299. The Appellate Body in *US – FSC (Article 21.5-EC I)* stated that the requirements of Article 6.2 need to be adapted to a panel request under Article 21.5, as they apply to an original panel request. The Appellate Body stated that it "has … not been called to determine the precise scope of the phrase 'these dispute settlement procedures' in Article 21.5 and how it relates to Article 6.2 of the DSU."[395] The Appellate Body was of the view that the phrase "does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5."[396] The Appellate Body went on to say that "given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5."[397]

300. In *US – FSC (Article 21.5 – EC II)*, the Appellate Body discussed the relationship between Articles 6.2 and Article 21.5:

> "The Appellate Body has, to date, not been called upon to determine the precise scope of the phrase 'these dispute settlement procedures' in Article 21.5 and how it relates to Article 6.2 of the DSU. We do not consider it necessary, for purposes of resolving the present dispute, to determine the precise scope of this phrase. However, we are of the view that the phrase 'these dispute settlement procedures' does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5. At the same time, given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5."[398]

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[393] Appellate Body Report, *EC – Selected Customs Matters*, para. 131.
[394] Appellate Body Report, *EC – Selected Customs Matters*, para. 135.
[395] Appellate Body Report, *US – FSC*, para. 59 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 - US)*, paras. 52-53 and 67)
[396] Appellate Body Report, *US – FSC*, para. 59
[397] Appellate Body Report, US – FSC, para. 59. See also Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 109; Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.506.
[398] Appellate Body Report, *US – FSC (Article 21.5) II*, para. 59.

301. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* rejected the European Union's argument that the "clear contrast" between the wording of the claims in the panel request in the original proceeding, and the wording of the claim in the Article 21.5 compliance panel request must be given meaning. The Panel disagreed, noting that since the two panel requests concerned two different proceedings, the language used in the original proceedings could not be determinative of the meaning of the compliance panel request:

> "As to whether this conclusion should be altered in light of the different wording used by the United States in its panel request in the original proceeding and in the panel request for this compliance proceeding, we note that the two panel requests are distinct procedural documents. We are aware of situations where, within the same proceeding, panels have examined the terminology used in requests for consultations to confirm the interpretation of terms in the related panel request. However, in this instance the separate panel requests relate to separate proceedings. There does not, in our view, appear to be a basis for treating the language of the United States' original panel request as probative of the meaning to be attributed to the compliance panel request."[399]

302. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* rejected Indonesia's arguments that Brazil's claims under Article 4.2 of the Agreement on Agriculture regarding the positive list requirement and under Article XI:1 of the GATT 1994 concerning the intended use requirement with respect to its enforcement provisions were outside of the Panel's terms of reference.[400] After having evaluated the parties' arguments on this matter, the Panel considered that it was not in dispute between the parties that the positive list requirement and the intended use requirement were within its terms of reference. Rather, as noted by the Panel, Indonesia had argued that the *claims* pertaining to these *measures* could not be subject to review because these *claims* did not link back to any of the DSB recommendations and rulings in the original proceedings.[401]

303. The Panel considered that, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. The Panel also highlighted that a complainant in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding:

> "In our view, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. Such a requirement would effectively limit the scope of Article 21.5 proceedings to claims on which a panel made findings of violations in the original proceedings. However, it is well-settled that Article 21.5 panels are not merely called upon to examine whether measures taken to comply effectively implement specific recommendations and rulings adopted by the DSB in the original proceeding. Instead, the mandate of Article 21.5 panels, according to the terms of that provision, is to examine either the existence of measures taken to comply or their consistency with a covered agreement. As rightly pointed out by Brazil, a complaining party in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding."[402]

[399] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.217.
[400] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, paras. 2.3 and 2.8.
[401] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.6.
[402] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.7.

## 1.5 Relationship with other WTO Agreements

### 1.5.1 Anti-Dumping Agreement

#### 1.5.1.1 Article 17

##### 1.5.1.1.1 The term "matter" under paragraphs 4 and 5 of Article 17

304. In *Guatemala – Cement I*, the Appellate Body held that "[Article 1.2 of the DSU] states … that … special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions". In this case, the Appellate Body considered whether there is inconsistency between Article 6.2 of the DSU and Article 17.5 of the Anti-Dumping Agreement. The Appellate Body stated:

> "In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a 'matter' is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the DSU."[403]

##### 1.5.1.1.2 Anti-dumping measures

305. As regards the concept of anti-dumping measures, see Article 17 of the Section on the Anti-Dumping Agreement.

##### 1.5.1.1.3 Legal basis for claims under Article 17

306. Article 17 of the Anti-Dumping Agreement provides for the dispute settlement procedures for matters under the Anti-Dumping Agreement. With respect to the legal basis for claims under the Anti-Dumping Agreement, see Article 17 of the Section on the Anti-Dumping Agreement.

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[403] Appellate Body Report, *Guatemala – Cement I*, para. 75. See also the discussion on the special and additional rules above.