

WORLD TRADE ORGANIZATION

*Panel established pursuant to Article 6 of the
Understanding on Rules and Procedures Governing the Settlement of Disputes*

**AUSTRALIA – MEASURES AFFECTING THE
IMPORTATION OF APPLES FROM NEW ZEALAND
(WT/DS367)**

Written Submission of Australia:

**Request for a preliminary procedural ruling in relation
to the consistency of New Zealand's panel request with
Article 6.2 of the DSU**

Geneva, 13 March 2008

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Cases cited in this submission

Short Title	Full Case Title and Citation
<i>Brazil – Dessicated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2807
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2887
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 589
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004

A. Introduction

1. Australia requests the Panel to make a preliminary procedural ruling as to the consistency of New Zealand's request for the establishment of a panel¹ (panel request) with the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

2. Australia submits that New Zealand's panel request does not, as required by Article 6.2 of the DSU:

- (i) identify the specific measures at issue; or
- (ii) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3. These are discrete and independent claims. Australia therefore requests the Panel to address *each* of these claims.²

4. In regard to Australia's first claim, it is unclear from the panel request whether New Zealand is challenging all of the "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand*"³ (Final IRA Report), or whether it is only challenging those 17 "measures" listed in bullet point form in the panel request. In regard to Australia's second claim, the panel request fails to set out the legal problem with sufficient clarity because it is unclear which legal obligations New Zealand alleges have been breached by which "measure".

5. The lack of precision in New Zealand's panel request with respect to these matters has created considerable uncertainty about the case Australia has to answer. This uncertainty has impaired, and continues to impair, the preparation of Australia's defence. The lack of precision

¹ New Zealand, *Request for the Establishment of a Panel by New Zealand*, WT/DS367/5 (7 December 2007) ("New Zealand's panel request"). (New Zealand's original communication was received by Australia on 6 December 2007.)

² In *EC – Selected Customs Matters*, the Appellate Body advised 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 analyzed separately." (Appellate Body Report, *EC – Selected Customs Matters*, para. 131.)

³ New Zealand's panel request, second paragraph.

violates Australia's basic right to due process in these dispute settlement proceedings and has resulted in ongoing prejudice to Australia.

6. Australia has raised its concerns with New Zealand as to the consistency of its panel request with Article 6.2 of the DSU on a number of occasions. However, despite Australia's good faith efforts to resolve this issue bilaterally (outlined below), New Zealand has failed to engage with Australia on this matter and has taken no action whatsoever to clarify its panel request.

7. Clarity in panel requests contributes to the more efficient and effective resolution of WTO disputes, consistent with Article 3.3 of the DSU. It is entirely possible to set out claims clearly and yet *briefly*, in accordance with Article 6.2 of the DSU.

8. Accordingly, Australia requests the Panel to examine the consistency of New Zealand's panel request with Article 6.2 of the DSU, and urges the Panel to make a preliminary ruling on this matter as early as possible in the proceedings. Australia further requests that the working procedures and timetable for the panel process reflect the fact that the Panel's terms of reference may not be clear until the Panel has delivered its ruling on this matter.

9. Australia submits that the Panel should rule that New Zealand's panel request fails to fulfil the requirements of Article 6.2 of the DSU, and therefore that the Panel should refrain from considering the substance of New Zealand's claims in this dispute.

10. Australia is willing to explore options for addressing the deficiencies of New Zealand's panel request in order to expedite the resolution of this matter.

11. Australia would welcome an opportunity to respond to any submission made by New Zealand on this matter, preferably by way of an oral hearing.

B. Australia has raised its concerns in a timely manner

12. Australia submits that it has raised its concerns as to New Zealand's panel request in a timely manner, in accordance with the obligation in Article 3.10 of the DSU to engage in dispute settlement procedures in good faith.

13. The Appellate Body pointed to the relevance of the principle of good faith in relation to addressing alleged procedural deficiencies in the *US – FSC* dispute, as follows:

The ... principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. 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.⁴

14. In the context of an examination under Article 6.2 of the DSU, the Appellate Body made the following observation in *Thailand – H-Beams*:

We ... 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. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures “in good faith in an effort to resolve the dispute”.⁵

15. In Australia’s view, the above statements provide the Panel with relevant guidance on the good faith obligation in Article 3.10 and its relationship to claims made under Article 6.2 of the DSU.

16. In the present case, Australia requested New Zealand to take the necessary steps to remedy the deficiencies in its panel request on a number of occasions prior to filing this submission with the Panel. During its statement to the Dispute Settlement Body (DSB) on 21 January 2008 (the date of panel establishment), Australia clearly expressed its view that New Zealand’s panel request failed to satisfy the requirements of Article 6.2 of the DSU, and also reserved its right to bring those procedural deficiencies to the attention of a panel (the text of this statement is reproduced at Attachment A). Immediately before the DSB meeting, Australia provided details of the substance of its Article 6.2 concerns in a letter to New Zealand and indicated that it would welcome the chance to discuss its concerns with New Zealand at the earliest available opportunity (the text of this letter is reproduced at Attachment B). Australia followed up this letter on 1 February 2008 (i.e. before panel composition) via a telephone call to the New Zealand Permanent Mission to the WTO. However, despite Australia’s good faith

⁴ Appellate Body Report, *US – FSC*, para. 166.

⁵ Appellate Body Report, *Thailand – H-Beams*, para. 97.

efforts to resolve this matter expeditiously on a bilateral basis, New Zealand has refused to discuss Australia's concerns and has taken no action whatsoever to clarify its panel request.

17. As a consequence of New Zealand's failure to engage with Australia on its concerns, Australia had no alternative but to bring these procedural deficiencies to the Panel's attention, and has done so by filing this written submission immediately following the composition of the Panel. This was the earliest possible opportunity for Australia to seek a ruling from the Panel itself. These events and actions demonstrate Australia's genuine desire to have this matter resolved quickly.

C. Article 6.2 of the DSU applies to New Zealand's panel request

18. In its panel request, New Zealand alleges that certain Australian measures are inconsistent with Australia's obligations under the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*. Article 11.1 of the *SPS Agreement* provides that:

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

19. Accordingly, Article 6.2 of the DSU is directly applicable in disputes under the *SPS Agreement*. It states that:

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.

20. Australia concurs with the Appellate Body that Article 6.2 of the DSU imposes the following requirements on panel requests:

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.⁶

⁶ Appellate Body Report, *Korea – Dairy*, para. 120.

As noted by the Appellate Body, requirements (iii) and (iv) “[t]ogether, ... 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.”⁷

D. Panel requests must be sufficiently precise

21. Article 6.2 of the DSU requires that panel requests be “sufficiently precise”⁸ because they directly inform a panel’s terms of reference, and thereby its jurisdiction, and they also fulfil an important due process objective. As the Appellate Body observed in *EC – Bananas III*:

It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.⁹

22. Consequently, panels should examine any panel request very carefully to ensure compliance with the requirements of Article 6.2 of the DSU.¹⁰ Panels should bear in mind that Article 6.2 is purposive in nature. Thus, the consistency of any particular panel request with Article 6.2 will depend upon whether its contents satisfy the above purposes of that provision.¹¹

(1) The panel request defines the scope of the dispute

23. The panel request effectively defines the scope of a dispute, because a panel’s terms of reference are generally based on the panel request. The importance of the panel request in this context was explained by the Appellate Body as follows:

... the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings.¹²

⁷ Appellate Body Report, *US – Carbon Steel*, para. 125.

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

⁹ Appellate Body Report, *EC – Bananas III*, para. 142. Also, see: Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *EC – Selected Customs Matters*, para. 130; Appellate Body Report, *Brazil – Dessicated Coconut*, page 22.

¹⁰ See: Appellate Body Report, *EC – Bananas III*, para. 142.

¹¹ See: Appellate Body Report, *EC – Computer Equipment*, para. 68.

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

24. The panel request therefore goes to the *jurisdiction* of a panel.¹³ The Appellate Body has underlined that panels must address the issue of jurisdiction “if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.”¹⁴

25. In accordance with the above, failure of a panel request to meet the requirements of Article 6.2 of the DSU affects the scope of the dispute. Those elements of a panel request that are inconsistent with Article 6.2 will not form part of a panel’s terms of reference. The Appellate Body noted in *Dominican Republic – Import and Sale of Cigarettes* that:

... [it had] consistently maintained that, where a panel request fails to identify adequately particular measures or fails to specify a particular claim, then such measures or claims will not form part of the matter covered by the panel’s terms of reference.¹⁵

26. This view was applied by the panel in *Canada – Wheat Exports and Grain Imports*. In that case, the panel granted Canada’s request for a preliminary ruling that the United States’ panel request failed in part to identify the specific measures at issue, and, as such, the panel refrained from considering that part of the substance of the United States’ claims. The panel noted that the options open to the United States, in the event it wished a panel to address the substance of its claim, included the possibility of the United States filing a new panel request.¹⁶ The United States accordingly did so.¹⁷

(2) Due process and prejudice

27. Panel requests also fulfil an important due process objective, by giving “the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case.”¹⁸ As underlined by the Appellate Body, panel requests should comply with “both the letter and the *spirit*” of Article 6.2 of the DSU.¹⁹

¹³ Appellate Body Report, *Brazil – Dessicated Coconut*, page 22. Also, see: Appellate Body Report, *US – Carbon Steel*, para. 123.

¹⁴ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

¹⁵ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120.

¹⁶ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-paras. 32 & 64-65 of para. 6.10.

¹⁷ Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 1.8 & 1.9.

¹⁸ Appellate Body Report, *Brazil – Dessicated Coconut*, page 22.

¹⁹ Appellate Body Report, *EC – Bananas III*, para. 142. (emphasis added)

28. In Australia’s view, failure to fulfil the due process objective of Article 6.2 results in prejudice to the respondent and any third parties. Support for this notion of prejudice can be found in the approach of the panel in *Canada – Wheat Exports and Grain Imports*. In that case, because the panel request created “significant uncertainty regarding the identity of the precise measures at issue and thus impair[ed] Canada’s ability to ‘begin preparing its defence’ in a meaningful way”,²⁰ the panel found part of the panel request to be inconsistent with the requirements of Article 6.2 of the DSU.

29. The panel in *Japan – DRAMs (Korea)* also recently supported the notion that a panel request that fails to fulfil the due process objective of Article 6.2 results in prejudice to the respondent, as follows:

[T]he 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 [of the panel]. 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 begin preparing its defence at the beginning of the panel process.²¹

30. As expressed at the conclusion of the panel’s statement, prejudice is suffered by a respondent due to a flawed panel request because such a request provides inadequate notice of the case the respondent has to answer, thereby hindering the preparation of its defence.

E. New Zealand has failed to identify the specific measures at issue

31. Australia submits that New Zealand’s panel request has not identified the specific measures at issue with sufficient precision to satisfy either the jurisdictional or due process objectives of Article 6.2 of the DSU and is therefore inconsistent with that provision. As the panel in *Canada – Wheat Exports and Grain Imports* recognised:

Whether sufficient information is provided on the face of the panel request [to identify the precise measures at issue] will depend ... on whether the information provided serves the purposes of Article 6.2, and in particular its

²⁰ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 28 of para. 6.10. (footnotes omitted)

²¹ Panel Report, *Japan – DRAMs (Korea)*, para. 7.9.

due process objective, as well as the specific circumstances of each case, including the type of measures that is at issue.²²

32. Article 6.2 of the DSU requires that a panel request must “identify the specific measures at issue”. In *EC – Selected Customs Matters*, the Appellate Body explained that:

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.²³

33. The panel in *Canada – Wheat Exports and Grain Imports* observed that:

... without identification of the precise measures at issue, the jurisdiction of a panel could not be clearly established. Likewise, the due process objective of notifying and informing the responding party and the third parties could not be attained.²⁴

34. The panel in that case also opined that “[d]ue process requires that the complaining party fully assume the burden of identifying the specific measures under challenge”.²⁵ Australia submits that the above statements reflect appropriate interpretations of the requirements imposed by Article 6.2 of the DSU in regard to identifying the specific measures at issue.

35. New Zealand’s panel request has created significant uncertainty for Australia as to the identity of the precise measures at issue because it is unclear from the panel request whether New Zealand is challenging *all* of the “measures specified in and required by Australia pursuant to” the Final IRA Report²⁶, or whether it is only challenging those 17 “measures”²⁷ listed in bullet point form (following the third paragraph) in the panel request.

36. The second and third paragraphs of New Zealand’s panel request state:

²² Panel Request, *Canada – Wheat Exports and Grain Imports*, sub-para. 20 of para. 6.10.

²³ Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

²⁴ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 16 of para. 6.10.

²⁵ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 24 of para. 6.10.

²⁶ New Zealand’s panel request, second paragraph.

²⁷ Australia’s reference in this submission to the “measures” identified by New Zealand in the panel request is without prejudice to any potential future argument as to whether the items referred to by New Zealand as “measures” can be correctly characterised as such.

Australia further notes the statement by the Appellate Body in *EC – Selected Customs Matters*, that the term “measure at issue” in Article 6.2 of the DSU should not be interpreted in the light of the substance of the specific WTO obligation that is allegedly being violated. According to the Appellate Body, to do so “would generate uncertainty and complexity in WTO dispute settlement proceedings.” (See: Appellate Body Report, *EC – Selected Customs Matters*, paras. 132-137.)

New Zealand considers that the measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand* are inconsistent with the obligations of Australia under the [SPS Agreement].

In particular, New Zealand considers that the following measures are, both individually and as a whole, inconsistent with the obligations of Australia under the SPS Agreement: ...²⁸

These paragraphs are directly followed by 17 “measures” listed in bullet point form.

37. Had New Zealand’s panel request referred only to “the measures specified in and required by Australia pursuant to” the Final IRA Report, in isolation (that is, without also listing the “measures” in bullet point form), then it would arguably have been sufficiently clear to Australia that it should begin preparing its defence on the basis that New Zealand was challenging *all* of the “measures specified in and required by Australia pursuant to” the Final IRA Report.

38. However, the significant uncertainty for Australia and the third parties arises as a result of what follows in the panel request. That is, the statement in the third paragraph that “New Zealand considers the following measures are, both individually and as a whole, inconsistent” with Australia’s obligations²⁹, which precedes the listing of 17 alleged “measures” in bullet point form.

39. The detailed listing of the 17 “measures” in bullet point form (which have been grouped according to the relevant pest or disease) is suggestive of an intention on New Zealand’s part to target its challenge at those “measures” (“individually and as a whole”) but not the other “measures” contained in the Final IRA Report. This impression is strengthened by the paragraph following the listing of the “measures”, which refers to “the above measures” as being inconsistent with Australia’s obligations.

40. However, the use of the words “in particular”³⁰ at the beginning of the sentence which directly precedes the listing of the 17 “measures”, suggests that New Zealand’s panel request

²⁸ New Zealand’s panel request, second and third paragraphs.

²⁹ New Zealand’s panel request, third paragraph. (emphasis added)

³⁰ According to *The New Shorter Oxford English Dictionary* (1993 Edition), the phrase “in particular” means: “as one of a number distinguished from the rest; especially.”

may not be limited to the 17 “measures” listed in bullet point form. Australia recalls that panel requests are to be read “as a whole”.³¹

41. The lack of clarity that arises from the framing of the panel request is of considerable concern to Australia because the Final IRA Report recommends numerous risk management measures, including for pests and diseases not referred to in New Zealand’s panel request. These include measures to manage the risks in relation to leafrollers, apple scab, codling moth and mealybugs.³² It is entirely unclear to Australia whether it should be preparing its defence in relation to the measures for these pests or diseases in addition to the “measures” listed in the panel request in bullet point form for fire blight, European canker and apple leafcurling midge.

42. Australia recalls the concerns expressed by the panel in *Canada – Wheat Exports and Grain Imports* in similar circumstances:

[B]y creating considerable uncertainty as to the identity, number and content of the laws and regulations which [the United States] is challenging, [the panel request] does not provide adequate information on its face to identify the specific measures at issue. In particular, we consider that it does not fulfil the due process objective inherent in Article 6.2. Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge. In the present case, the panel request effectively shifts part of that burden onto Canada as the responding party, inasmuch as it leaves Canada little choice, if it wants to begin preparing its defence, but to undertake legal research and exercise judgment in order to establish the precise identity of the laws and regulations implicated by the panel request.³³

In the same way, New Zealand’s panel request has created considerable uncertainty for Australia as to the identity, number and content of the “measures” being challenged, and has similarly left Australia with little option but to make a “best guess” as to the precise “measures” New Zealand may be challenging.

43. Australia considers this matter to be crucial to the preparation of Australia’s defence, and also to the panel’s jurisdiction. Accordingly, Australia sought clarification of this matter in its letter to New Zealand on 21 January 2008, in which it stated: “it is unclear whether New Zealand’s panel request is challenging all of the measures specified in and required by Australia

³¹ Appellate Body Report, *US – Carbon Steel*, para. 127.

³² Biosecurity Australia, *Final Import Risk Analysis Report for Apples from New Zealand* (November 2006), Part B, page 313 ff.

³³ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 24 of para. 6.10. (footnote omitted)

pursuant to the *Final Import Risk Analysis Report for Apples from New Zealand*, or whether it is only challenging those measures set out in the bullet point list in the panel request.”³⁴

44. Australia considers it to be a matter of fundamental importance that this issue be clarified as soon as possible, and submits that the Panel should find that New Zealand’s panel request does not meet the Article 6.2 requirement to “identify the specific measures at issue”.

F. New Zealand has failed to provide a brief summary of the legal basis of its complaint sufficient to present the problem clearly

45. Australia submits that New Zealand has merely “summarily identified” the legal basis of its complaint in the panel request, and that by doing so it has failed to satisfy the requirement in Article 6.2 to “present the problem clearly.”³⁵ In *Korea – Dairy*, the Appellate Body explained that, in order to meet the requirements of Article 6.2, “[i]t is not enough ... that ‘the legal basis of the complaint’ is summarily identified; the identification must ‘present the problem clearly’.”³⁶ Failure to “present the [legal] problem clearly” means that the due process objective of Article 6.2 is not fulfilled. This was recognised by the Appellate Body in *Thailand – H-Beams*, as follows:

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.³⁷

46. There are two grounds upon which Australia submits that New Zealand’s panel request is insufficiently precise to present the problem clearly to Australia:

- (i) the mere listing of the treaty provisions alleged to have been breached; and

³⁴ The text of this letter is reproduced at Attachment B.

³⁵ Australia acknowledges that it is the legal *claims*, and not detailed *arguments*, that are required by Article 6.2 of the DSU to be set out in a panel request (see, for example: Appellate Body, *EC – Bananas III*, para. 143). It is not Australia’s submission that Article 6.2 obliges New Zealand to have set out detailed arguments in its panel request. Australia’s argument is that New Zealand’s panel request has failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

³⁶ Appellate Body Report, *Korea – Dairy*, para. 120.

³⁷ Appellate Body Report, *Thailand – H-Beams*, para. 88. (footnotes omitted)

- (ii) the failure to connect the challenged measure(s) with the provision(s) alleged to have been breached.

47. Australia considers that the deficiencies relevant to each ground *alone* should be sufficient for the Panel to find that New Zealand’s panel request fails to meet the requirements of Article 6.2. However, in the event that the Panel disagrees, Australia alternatively requests the Panel to consider the impact of the deficiencies identified under both grounds cumulatively, in order to find that New Zealand’s panel request fails to “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”

48. New Zealand’s panel request opens by referring to a large number of “measures” which it alleges are “inconsistent with the obligations of Australia” under the *SPS Agreement*. Following its list of certain “measures” in bullet point form, New Zealand’s panel request then states:

New Zealand considers that the above measures are inconsistent with the obligations of Australia under Articles 2.2, 2.3 (both sentences), 5.1, 5.2, 5.5 (first sentence), 5.6 and 8 (in relation to Annex C) and Annex C(1)(a) of the *SPS Agreement*.

This statement is the only point in the panel request where New Zealand asserts a breach of any treaty provision more specific than its general opening reference to the alleged inconsistency with Australia’s “obligations” under the *SPS Agreement*.

- (i) *The mere listing of the treaty provisions alleged to have been breached*

49. Australia submits that New Zealand’s panel request merely lists the treaty provisions alleged to have been breached, and that by doing so its panel request falls short of the standard of clarity required by Article 6.2. Although Article 6.2 only obliges a complainant to provide a “brief summary” of its legal case, in order for such a summary to sufficiently “present the problem clearly” for the respondent, in most cases, a complainant will need to do more than merely list the relevant provisions alleged to have been violated in order “to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question.”³⁸

³⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

50. Although it is clear that “the identification of the treaty provisions claimed to have been violated is a ‘minimum prerequisite’ for stating of the legal basis of a complaint”,³⁹ the mere listing of treaty provisions “may not always be enough”⁴⁰ to fulfil the requirements of Article 6.2. The Appellate Body reasoned in *Korea – Dairy* that:

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 6.2.⁴¹

51. The Appellate Body indicated in *US – Carbon Steel* that whether mere listing of the treaty provisions alleged to have been violated meets the requirements of Article 6.2:

... will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.⁴²

52. New Zealand has merely attempted to satisfy “a *necessary* ‘minimum prerequisite’”⁴³ for compliance with Article 6.2 by listing the provisions, but has not met the standard of clarity required by Article 6.2. New Zealand’s panel request lists eight separate provisions of the *SPS Agreement*. Each of those provisions appears to contain two or more legal obligations. For example, although Article 2.2 of the *SPS Agreement* is in fact a paragraph of an Article itself, it appears to contain three distinct obligations with respect to an SPS measure: (i) that it must be applied only to the extent necessary to protect human, animal or plant life or health; (ii) that it must be based on scientific principles; and (iii) that it must not be maintained without sufficient

³⁹ Appellate Body Report, *US – Carbon Steel*, para. 172. (footnote omitted)

Also, see: Appellate Body Report, *Korea – Dairy*, para. 123, where the Appellate Body stated that: “we 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*’.” (original emphasis)

⁴⁰ Appellate Body Report, *Korea – Dairy*, para. 124.

⁴¹ Appellate Body Report, *Korea – Dairy*, para. 124.

⁴² Appellate Body Report, *US – Carbon Steel*, para. 130. (footnote omitted)

⁴³ Appellate Body Report, *US – Carbon Steel*, para. 130. (original emphasis)

scientific evidence.⁴⁴ For Article 2.2 and the other provisions cited in the panel request, it is unclear to Australia which of these obligations in the provisions are alleged to have been violated. In *Korea – Dairy*, the Appellate Body suggested that where the articles listed establish not one single, distinct obligation, but rather multiple obligations, the mere listing of the provisions alleged to have been violated may not meet the requirements of Article 6.2 of the DSU.⁴⁵

53. There is no attempt (beyond mere listing of the provisions) in New Zealand’s panel request to indicate which obligations it is referring to by, say, referring to the nature of those obligations or explicitly referring to any of the text of the provisions cited.⁴⁶ Nor has New Zealand’s panel request provided any other explanation or context to shed light on the nature of the obligation at issue.

54. Also, in light of the important objectives that panel requests are supposed to fulfil, i.e. defining the scope of the dispute and ensuring due process, compliance with Article 6.2 “must be demonstrated on the face”⁴⁷ of the panel request. Accordingly, a deficient panel request cannot be “cured” by what has passed between the parties prior to the panel request being made. This was recognised by the Appellate Body in *Thailand – H-Beams*, where it took issue with the panel’s reasoning that the mere listing of the treaty provisions alleged to have been violated was sufficient in that case because the complainant had raised certain substantive issues with the respondent prior to the WTO proceedings.⁴⁸

55. There is a further aspect to Australia’s claim that the mere listing of the provisions alleged to have been violated is completely inadequate in this case, inhibiting the preparation of Australia’s defence. This aspect relates to New Zealand’s claims under Article 2.3 and Article 5.5 of the *SPS Agreement*. Both of these provisions require comparisons to be made between

⁴⁴ The suggestion in this submission that Article 2.2 of the *SPS Agreement* imposes such three distinct obligations, is made without prejudice to any arguments Australia chooses to assert in relation to the obligations imposed by Article 2.2 in the substantive proceedings of this dispute.

⁴⁵ Appellate Body Report, *Korea – Dairy*, para. 124.

⁴⁶ This may be contrasted to the panel request in the *Thailand – H-Beams* dispute; the complainant in that case had cited the language of the provision concerned and referred to certain key factors enumerated in that provision. See: Appellate Body Report, *Thailand – H-Beams*, paras. 90-94.

⁴⁷ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁴⁸ Appellate Body Report, *Thailand – H-Beams*, para. 94. Also, see: Appellate Body Report, *US – Carbon Steel*, para. 127.

measures adopted by a Member in different situations in order to substantiate claims of discrimination or the imposition of disguised restrictions on international trade. As such, Australia submits that in order to prepare its defence to claims under Article 2.3 and Article 5.5, it requires notice of which measures specified in the Final IRA Report are the subject of these claims and, equally importantly, which of Australia's other SPS measures are being used by New Zealand as points of comparison with the measures in the Final IRA Report.

56. Australia applies a range of SPS measures in relation to different products from many WTO Members. New Zealand's failure to identify in its panel request which of those measures it seeks to compare with the measures in the Final IRA Report, in order to substantiate its claims under Article 2.3 and Article 5.5, means that Australia is forced to wait to receive New Zealand's first written submission to identify the basis of its claims under those provisions. Without such information, Australia is not able to commence preparation of its defence in relation to these provisions on the basis of the panel request. Australia submits that such an outcome cannot be consonant with due process. Australia is not arguing that New Zealand should have elaborated its arguments on Article 2.3 and Article 5.5 in its panel request. Australia is arguing that New Zealand should have properly outlined its claims under those provisions so that Australia could commence preparation of its defence before receiving New Zealand's first written submission.

(ii) *The failure to connect the challenged measure(s) with the provision(s) alleged to have been breached*

57. New Zealand's panel request also fails to plainly connect each challenged "measure" with the provisions of the *SPS Agreement* claimed to have been infringed, as required by Article 6.2 to ensure sufficient clarity. This requirement was recognised by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, as follows:

[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".⁴⁹

⁴⁹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

58. New Zealand’s panel request merely lists the provisions alleged to have been violated, and it is therefore unclear whether New Zealand is asserting that each challenged “measure” violates each treaty provision listed, and furthermore whether each “measure” violates each obligation in each treaty provision listed. This lack of clarity is further exacerbated by the uncertainty as to the actual measures at issue in this dispute as previously identified by Australia.

59. It is notable that in the *Korea – Dairy* dispute, the Appellate Body considered the European Communities’ identification of the legal basis of its claims to have been inadequate because it merely listed the treaty provisions, even though in that dispute there was only *one* measure at issue. So, even in the absence of having to connect the provisions allegedly violated with the measures at issue (because there was only a single challenged measure), the Appellate Body considered that the panel request in that case should have been more detailed.⁵⁰

60. New Zealand’s panel request lists not one, but at least 17 “measures”, and eight separate provisions of the *SPS Agreement*, each of which contains two or more obligations. Having engaged in this listing exercise, the request makes no attempt to “plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed”.⁵¹

(iii) *Concluding remarks*

61. In the *EC – Biotech Products* dispute, the panel dismissed the respondent’s claim that the panel requests were inconsistent with Article 6.2 of the DSU. In Australia’s view, the panel in that case failed to give due consideration to the important objectives to be fulfilled by panel requests and the consequent requirements imposed by Article 6.2.⁵² In any case, Australia notes

⁵⁰ Appellate Body Report, *Korea – Dairy*, para. 131.

⁵¹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

⁵² With respect to the decision by the panel in *EC – Biotech Products*, Australia questions the panel’s view, and subsequent reliance upon its view, that the panel requests in that case were similar to the original panel request in *Canada – Wheat Exports and Grain Imports*. The panel in *EC – Biotech Products* relied upon this alleged “similarity” to conclude that each of the measures at issue was inconsistent with each of the legal provisions identified in the request, and that accordingly, the legal claims were sufficiently clear (Panel Report, *EC – Approval & Marketing of Biotech Products*, sub-paras. 96-98 of para. 7.47).

However, in significant contrast to the panel requests in *EC – Biotech Products* and indeed the present dispute, in *Canada – Wheat Exports and Grain Imports* there were only three provisions alleged to have been breached; the panel request did more than merely list the provisions alleged to have been violated; and furthermore it linked the measures at issue with the provisions allegedly violated (Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-paras. 29 & 51 of para. 6.10).

that “compliance with the requirements of Article 6.2 must be determined on the merits of each case”.⁵³

62. In summary, not only has New Zealand merely listed the provisions alleged to have been violated, all of which contain multiple obligations, it has failed to connect the challenged measures with the provisions claimed to have been violated. In these circumstances, New Zealand’s panel request fails to “present the problem clearly”, and this lack of clarity prevents Australia from knowing what case it has to answer, thereby impairing the preparation of its defence. Again, Australia considers it to be a matter of fundamental importance that this issue be clarified as soon as possible.

G. Australia has suffered prejudice

63. New Zealand’s panel request has created considerable uncertainty as to the precise identity of the measures at issue and also as to the legal claims being made by New Zealand. As a result of this uncertainty, Australia has effectively been forced to make assumptions as to the scope and nature of New Zealand’s claims. Having to proceed on this basis clearly prejudices Australia’s ability to prepare its defence in a meaningful way.⁵⁴ Again, Australia is not arguing that New Zealand should have elaborated its arguments in its panel request. It is arguing that New Zealand should have properly presented its claims in that request.

64. Such “considerable uncertainty” was found to constitute sufficient prejudice to the respondent’s due process rights in *Canada – Wheat Exports and Grain Imports* so as to render part of the panel request in that case inconsistent with the requirements of Article 6.2.⁵⁵ The Appellate Body upheld the panel’s decision as to the inconsistency of the panel request in that case.⁵⁶

⁵³ Appellate Body Report, *US – Carbon Steel*, para. 127.

Furthermore, Australia considers that the assessment of New Zealand’s panel request is distinguishable from the assessment of the requests in *EC – Biotech Products* and so does not inform the Panel as to how Article 6.2 of the DSU should be applied in this dispute. The substantial similarity between the three complainants’ separate panel requests in *EC – Biotech Products* arguably provided the respondent with a consistency of message sufficient for it to be able to reliably inform itself as to the measures at issue and the legal basis of the complaint.

⁵⁴ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 28 of para. 6.10. Also, see: Appellate Body Report, *Thailand – H-Beams*, para. 88.

⁵⁵ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-paras. 24, 28 & 32 of para. 6.10.

⁵⁶ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 213.

65. In Australia’s view, prejudice is the disadvantage that accrues to a respondent arising from deficiencies on the face of a panel request. The prejudice arises because the problem is not “raised with sufficient clarity [in the panel request], such that [the respondent] is able to know the case it has to answer and begin preparing its defence”⁵⁷ in a meaningful way. As the Appellate Body stated in *Thailand – H-Beams*:

The fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself.⁵⁸

Such disadvantage may accrue before panel proceedings on the merits have taken place, or it may only become apparent during the course or towards the end of proceedings.

66. As a matter of due process, panels are obliged to address any prejudice that may accrue to a party as a result of a deficient panel request, and Article 6.2 requires that panels do so on the basis of the text of the panel request. Australia’s view in relation to prejudice is consistent with the Appellate Body’s statement in *US – Carbon Steel* that “compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel [and that] [d]efects in the request for the establishment of a panel cannot be ‘cured’ in the subsequent submissions of the parties during the panel proceedings.”⁵⁹ Further, in this regard, the panel in *Japan – DRAMs (Korea)* opined that:

... 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 [of the panel].⁶⁰

Australia submits that the Panel in the present dispute should be guided by the approach of the panel in *Japan – DRAMs (Korea)* as to whether the due process objective has been met and therefore whether or not the respondent has been prejudiced.

67. As submitted above, New Zealand’s panel request does not meet the requirements of Article 6.2 of the DSU, and the due process rights of Australia and the third parties have accordingly been compromised, resulting in prejudice. Accordingly, Australia seeks the rulings and relief outlined below.

⁵⁷ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 51 of para. 6.10.

⁵⁸ Appellate Body Report, *Thailand – H-Beams*, para. 95.

⁵⁹ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁶⁰ Panel Report, *Japan – DRAMs (Korea)*, para. 7.9.

H. Rulings and relief sought by Australia

68. Australia requests the Panel to find that New Zealand's panel request is inconsistent with Article 6.2 of the DSU because it:

- (i) fails to identify the specific measures at issue; and/or
- (ii) fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

69. Australia requests the Panel to find that New Zealand's panel request fails to fulfil the requirements of Article 6.2 of the DSU, and therefore that the Panel should refrain from considering the substance of New Zealand's claims in this dispute.

70. Australia is willing to explore options for addressing the deficiencies of New Zealand's panel request in order to expedite the resolution of this matter.

Attachment A

Dispute Settlement Body – 21 January 2008

Agenda Item 3: Australia – Measures Affecting the Importation of Apples from New Zealand (DS367)

Statement by Australia

Thank you Chair,

Australia is disappointed that New Zealand has decided to make a second request for the establishment of a panel in this dispute.

Australia reiterates its view that the measures set out in the *Final Import Risk Analysis Report for Apples from New Zealand* are consistent with its WTO obligations.

Australia appreciates the importance New Zealand attaches to the apples issue but remains convinced that bilateral channels are the most effective way to resolve this matter. Australia understands that New Zealand, in fact, shares our desire for a bilateral solution.

Australia acknowledges that a panel will be established at this meeting. However, we consider that New Zealand's panel request fails to satisfy the requirements of Article 6.2 of the *Dispute Settlement Understanding*. We have raised the substance of our concerns with New Zealand and, therefore, do not intend to discuss the issue at this meeting.

Australia reserves its right to bring these procedural deficiencies to the attention of the Panel, should these proceedings progress to that stage.

Thank you Chair.

Attachment B

21 January 2008

Dear Ambassador Falconer

I refer to your letters of 6 December 2007 and 10 January 2008 to the Chairman of the Dispute Settlement Body requesting the establishment of a panel in *Australia – Measures affecting the importation of apples from New Zealand* (DS367).

In Australia's view, New Zealand's panel request fails to satisfy the requirements of Article 6.2 of the *Dispute Settlement Understanding*. In particular, Australia considers that the panel request does not adequately: (i) identify the specific measures at issue; or (ii) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

For example, it is unclear whether New Zealand's panel request is challenging all of the measures specified in and required by Australia pursuant to the *Final Import Risk Analysis Report for Apples from New Zealand*, or whether it is only challenging those measures set out in the bullet point list in the panel request. Further, by way of example, New Zealand's panel request fails to present the legal basis of its complaint clearly because it does not plainly connect any measures with the obligations of the *SPS Agreement* alleged to have been breached.

The lack of precision in New Zealand's panel request has created significant uncertainty about the case Australia has to answer and this is impairing the preparation of Australia's defence. This has resulted in ongoing prejudice to Australia. Accordingly, Australia requests that New Zealand take the necessary steps to remedy the deficiencies in its panel request as soon as possible.

Australia reserves its right to bring this matter to the attention of the Panel, should these proceedings progress to that stage. In the meantime, Australia would welcome the chance to discuss its concerns with New Zealand at the earliest available opportunity.

Yours sincerely

[Head of Australian Mission]