

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 in response to New
Zealand's submission:**

**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, 14 April 2008

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Cases cited in this submission

Short Title	Full Case Title and Citation
<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 – 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 – Bed Linen</i>	<i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141
<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 – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<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>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs</i> , WT/DS290/R, adopted 20 April 2005
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Apples</i>	<i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245
<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>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

Short Title	Full Case Title and Citation
<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 – Continued Zeroing</i>	<i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350
<i>US – Corrosion Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Stainless Steel (Mexico)</i>	<i>United States - Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344
<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
<i>US – Zeroing (EC)</i>	<i>United States - Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294
<i>US – Zeroing (Japan)</i>	<i>United States - United States - Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322

A. Introduction

1. Australia considers that New Zealand's submission¹ has not rebutted Australia's *prima facie* case that New Zealand's panel request² fails to meet the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

2. This submission challenges certain assertions of New Zealand³ and provides additional clarification of Australia's arguments on particular issues in response to New Zealand's submission. Australia does not propose to rehearse the arguments made in its previous submission to the Panel, all of which Australia maintains.⁴

3. Australia is particularly concerned that New Zealand has attempted to use its submission to introduce a new claim into this dispute. That is, New Zealand now seeks to challenge the *Final Import Risk Analysis Report for Apples from New Zealand*⁵ (Final IRA Report), *in and of itself*, as a measure at issue in this dispute.⁶ The receipt of New Zealand's submission is the first time that Australia has been made aware of such a claim. Australia submits that such a claim is not open to New Zealand on the face of its panel request and seeks a ruling by the Panel to this effect.

4. Australia also requests the Panel to bear in mind the general principle that "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."⁷

¹ Written Submission of New Zealand, *Request for a preliminary procedural ruling in relation to the consistency of New Zealand's panel request with Article 6.2 of the DSU*, WT/DS367, 7 April 2008 ("New Zealand's submission").

² New Zealand, *Request for the Establishment of a Panel by New Zealand*, WT/DS367/5 (7 December 2007) ("New Zealand's panel request").

³ Australia has not explicitly addressed each of New Zealand's arguments made in its submission. For those arguments that Australia has not addressed, the Panel should not interpret this as an acceptance by Australia of the merit of such arguments.

⁴ 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*, WT/DS367, 13 March 2008 ("Australia's previous submission").

⁵ Biosecurity Australia, *Final Import Risk Analysis Report for Apples from New Zealand* (November 2006).

⁶ New Zealand's submission, para. 2.9.

⁷ Appellate Body Report, *US – Carbon Steel*, para. 127. (emphasis added; footnote omitted)

B. New Zealand’s submission has compounded the confusion as to the “measures at issue” in this dispute

5. New Zealand has submitted that “the panel request identifies the specific measures at issue as clearly as the circumstances of the case allow, and as clearly as Article 6.2 requires.”⁸ Australia maintains that the panel request is unclear on its face as to the identity of the measures at issue in this dispute.⁹ But New Zealand’s submission also states that “New Zealand considers that the Final IRA as a whole is inconsistent with Australia’s obligations under the *SPS Agreement*.”¹⁰ New Zealand appears to be seeking to introduce the Final IRA Report “as a whole” as a “measure at issue” in this dispute,¹¹ even though no fair reading of the panel request could suggest such an interpretation. As a result, New Zealand’s arguments in its submission have only served to increase the uncertainty as to the precise identity of the “measures at issue”.

6. On the basis of the text of the panel request and New Zealand’s submission, there are now three different but mutually inconsistent characterisations of the “measures at issue” being challenged by New Zealand:

- (i) the Final IRA Report “as a whole”, itself, including but not limited to the 17 listed “measures” (or “aspects of measures”¹²);
- (ii) all of the “measures specified in and required by Australia pursuant to” the Final IRA Report, including but not limited to the 17 listed “measures” (but not the Final IRA Report “as a whole”, itself); or
- (iii) only the 17 “measures” listed in the panel request.

7. The first potential characterisation is clearly not open to New Zealand in this dispute on the basis of the panel request, an argument that will be elaborated below. The panel request is

⁸ New Zealand’s submission, para. 2.8.

⁹ Australia’s previous submission, paras. 35-41.

¹⁰ New Zealand’s submission, para. 2.9.

¹¹ New Zealand also refers to the Final IRA Report as a “measure” at: New Zealand’s submission, paras. 2.10, 2.15, 2.20, 2.21.

¹² In New Zealand’s submission, New Zealand alternates between referring to the 17 “measures” listed in its panel request, as “measures” and “aspects”. (See: New Zealand’s submission, paras. 2.7, 2.10, 2.13, 2.15.) However, the panel request does not refer to “aspects” of measures at all, and clearly refers to the 17 listed “measures” as “measures” only.

unclear as to the second and third potential characterisations.¹³ Faced with this ambiguity, Australia adopted the third characterisation, *in good faith*, which it considers has the clearest support in the text of the panel request, and began preparing its defence on the basis that the “measures at issue” are limited to the 17 listed “measures”.

(1) New Zealand cannot introduce further “measures at issue” into this dispute via its submission

8. New Zealand submits that “the Final IRA as a whole is inconsistent with Australia’s obligations under the *SPS Agreement*”.¹⁴ New Zealand argues that its panel request “clearly meets”¹⁵ the requirement in Article 6.2 to identify the specific measures at issue¹⁶ on the basis that “the Final IRA [is specified] by name and date of adoption”.¹⁷ Australia disagrees. New Zealand cannot treat a *reference* to the Final IRA Report in its panel request as equivalent to identifying the Final IRA Report “as a whole” as a “measure at issue”.

9. 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”.¹⁸ Thus, it is not enough to simply identify characteristics of a measure, for example, its full name and date of adoption, as New Zealand asserts. A clear *allegation of inconsistency* on the face of the panel request is essential to notify the respondent that a measure is being challenged.¹⁹

10. In this case, the language and syntax of paragraph 2 of the panel request clearly indicate that the measures that are the object of challenge are those “measures” *set out in* the Final IRA Report, rather than the Final IRA Report *itself*. Paragraph 2 of the panel request states:

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 *Agreement*

¹³ See: Australia’s previous submission, paras. 35-42.

¹⁴ New Zealand’s submission, para. 2.9.

¹⁵ New Zealand’s submission, para. 2.15.

¹⁶ New Zealand’s submission, para. 2.22.

¹⁷ New Zealand’s submission, paras. 2.20 & 2.21.

¹⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

¹⁹ See: Appellate Body Report, *EC – Selected Customs Matters*, para. 130. Also see: Appellate Body Report, *EC – Bananas III*, para. 143: “Article 6.2 of the DSU requires that the *claims* ... 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.”

on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”).²⁰

The use of the terms “specified in” and “pursuant to” denote the location or origin of the “measures”. These terms demonstrate that the report is not a measure itself but merely the document in which the measures at issue are contained or on which they are based. Furthermore, the grammatical structure of the sentence – “the measures specified in ... the Final import risk analysis report ... are inconsistent with the obligations ... under the SPS Agreement” – also clearly indicates that the *object of the challenge*, and hence the alleged source of inconsistency, are the measures *set out within* the Final IRA Report rather than the report itself.

11. New Zealand makes three references to “measures” in its panel request which it connects with claims of inconsistency.²¹ By doing so, New Zealand demonstrates that it is aware of the need to clearly allege inconsistency to validly establish a claim. Its failure to do so in respect of the Final IRA Report lends further weight to Australia’s submission that New Zealand did not identify the Final IRA Report as a measure at issue.

12. There can be no doubt that the panel request fails to specify the Final IRA Report as a measure at issue. An interpretation so artificial that it would require Australia to ignore the plain language of the panel request to arrive at a conclusion that the Final IRA Report itself is being challenged cannot meet the due process purpose of Article 6.2. Consequently, New Zealand should be precluded from making any claims with respect to the Final IRA Report itself.²²

²⁰ New Zealand’s panel request, para. 2. It is clear that New Zealand has adopted the language of Biosecurity Australia Policy Memorandum (BAPM) 2007/07 in the construction of its panel request. BAPM 2007/07 advises the policy determination made by the Director of Quarantine permitting the importation of New Zealand apples “subject to the Quarantine Act 1908, and the application of phytosanitary measures as specified in the Final import risk analysis report for apples from New Zealand, November 2006”.

²¹ New Zealand’s panel request: second paragraph (“New Zealand considers that the measures specified in and required by Australia ... are inconsistent with ...”); third paragraph (“In particular, New Zealand considers that the following measures are, both individually and as a whole, inconsistent ...”); and fourth-last paragraph (“New Zealand considers that the above measures are inconsistent ...”).

In making this argument, Australia is not conceding that mere allegations of inconsistency are sufficient for New Zealand to discharge its obligation under Article 6.2. In Australia’s view, mere claims of “inconsistency” do not render a panel request necessarily consistent with the obligation in Article 6.2 of the DSU to “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”

²² A legal claim must connect the measure at issue with the provision of the agreement alleged to have been violated. A failure to properly specify the measure at issue therefore automatically excludes any claim in relation to that measure. Appellate Body Report, *Korea – Dairy*, para 139: “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.” (original emphasis)

13. It is clear from Article 6.2 and Article 7 of the DSU that “panels are inhibited from addressing legal claims falling outside their terms of reference”²³ and that “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.”²⁴

14. New Zealand’s purported introduction of a claim in its submission with respect to the Final IRA Report *itself* goes beyond an attempt to cure the defects in its panel request. It amounts to an attempt to expand its claim beyond the legitimate ambit of the panel request. As the Appellate Body has noted, “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.”²⁵ Accordingly, the Final IRA Report “as a whole” must fall outside the Panel’s terms of reference.

(2) Australia’s claim that New Zealand’s panel request creates uncertainty as to the specific measures at issue remains valid

- a. *New Zealand’s assertion that the “nature” of the Final IRA Report prevented it from more clearly identifying the measures at issue is baseless*

15. New Zealand claims that “given the nature of the Final IRA, New Zealand sought to provide clarity [in its panel request] by referring not just to the Final IRA as a whole, but also to the measures of particular concern.”²⁶ In its submission, New Zealand stated that:

New Zealand finds odd the Australian contention that reference without qualification to the measures in an opaque document like the Final IRA would provide sufficient clarity, but that providing precision by referring to particular measures produces a lack of clarity.²⁷

16. Australia did not contend that reference to the “measures specified in and required” pursuant to the Final IRA Report, without reference to the 17 listed “measures”, would have provided “sufficient clarity”, as New Zealand claims.²⁸ Rather, Australia submitted that the

²³ Appellate Body Report, *EC – Hormones*, para. 156.

²⁴ Appellate Body Report, *India – Patents (US)*, para. 89. (original emphasis)

²⁵ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120. Also, see: Appellate Body Report, *India – Patents (US)*, para. 93.

²⁶ New Zealand’s submission, para. 2.10.

²⁷ New Zealand’s submission, para. 2.10. (footnote omitted)

²⁸ Australia’s previous submission, para. 35.

panel request lacks clarity precisely because it is not clear whether New Zealand is challenging all of the “measures specified in and required” by the Final IRA Report, or whether it is only challenging the 17 “measures” listed in bullet point form.²⁹ It was in this context that Australia referred to the panel’s decision in *Canada – Wheat Exports and Grain Imports*. New Zealand suggests that the panel decision in that case supports a finding that its panel request is consistent with Article 6.2.³⁰ However, New Zealand focussed largely on the issue of whether a measure was formally described, for example, “by name, date of adoption etc.”³¹

17. Australia’s arguments about the relevance of that decision do not, however, relate to this aspect of the panel’s reasoning. The source of Australia’s uncertainty is different. As noted in Australia’s submission, the source of uncertainty is the *scope* of New Zealand’s request, and whether it seeks to encompass all the measures specified in or required by the Final IRA Report, or whether it is confined to the 17 listed “measures”.³² This is the “considerable uncertainty” that constitutes a failure to fulfil the requirements of Article 6.2.³³

18. Australia also rejects New Zealand’s suggestion that the “measures” are not readily identifiable within the Final IRA Report, and the assertion that the manner of identification of the measures at issue in the panel request is “in large part a consequence of the nature” of the Final IRA Report.³⁴ On the contrary, the recommended risk management measures are readily identifiable in the Final IRA Report. They are set out in separate sections addressing each pest or disease, and then summarised in the final section of Part B of the report entitled “Risk management and operational framework”. Australia notes that the Appellate Body and a previous panel have recognised the constraints on complainants attempting to identify measures at issue where, for example, the respondent has refused to provide them with the necessary information,³⁵ or where there is no formal expression of a measure.³⁶ New Zealand faced no such difficulties in this dispute.

²⁹ Australia’s previous submission, paras. 35-42.

³⁰ New Zealand’s submission, paras. 2.18-2.21.

³¹ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 19 of para. 6.10.

³² Australia’s previous submission, para 41.

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

³⁴ New Zealand’s submission, para. 2.9 – 2.10.

³⁵ For example: Appellate Body Report, *Thailand – H-Beams*, para. 91.

³⁶ For example: Panel Report, *EC – Biotech Products*, sub-para. 22 of para. 7.47.

b. New Zealand cannot now re-characterise the 17 listed “measures” as “aspects of measures”

19. In some parts of its submission, New Zealand appears to suggest that the Final IRA Report is the “measure” and that the risk management measures therein are mere “aspects” of that measure.³⁷ However, the language of the panel request supports neither the inference that the Final IRA Report is a measure (as argued above), nor that the SPS requirements therein are mere aspects of that general measure. The panel request clearly refers to the 17 listed requirements as “measures”.

20. New Zealand’s reliance on the panel report in *EC – Trademarks and Geographical Indications* to support its argument of consistency with Article 6.2 is misplaced. The reference to the Final IRA Report in the present dispute is not analogous to the reference to Council Regulation (EEC) No. 2081/92 in that dispute. The reference to the Council Regulation in that request was immediately preceded by the words “[t]he measure at issue is...”³⁸, and hence the Council Regulation was held to be “a specific measure”.³⁹ Furthermore, the use of the word “related” in that panel request (i.e. “and related implementing and enforcement measures”) is qualitatively and contextually different from New Zealand’s use of “in particular” in its panel request. The *EC – Trademarks and Geographical Indications* panel request makes it clear that the *entirety* of the particular set of measures was subject to challenge. The panel upheld the request and found that the use of the word “related” created no “uncertainty” as to the identification of the measures to implement or enforce, in the context of that case, because they formed a clearly defined group.⁴⁰ By contrast, the use of “in particular” in New Zealand’s panel request actually creates confusion as to the *scope* of the request when read in conjunction with the preceding paragraph of the panel request which refers more generally to the “measures specified in and required” pursuant to the Final IRA Report.

c. New Zealand’s panel request should be limited to the 17 listed “measures”

³⁷ New Zealand’s submission, para. 2.15.

³⁸ Australia, *Request for the Establishment of a Panel by Australia*, WT/DS290/18 (19 August 2003).

³⁹ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, sub-para. 24 of para. 7.2.

⁴⁰ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, sub-para. 28 of para. 7.2.

21. Australia maintains that it is unclear what specific measures are at issue on the face of the panel request. On balance, Australia submits that the better interpretation for the Panel to adopt regarding the specific measures at issue in this dispute, as set out in the panel request, is that they *should be limited* to the 17 listed “measures”⁴¹.

22. New Zealand’s description of the 17 “measures” listed in bullet point form as “measures of particular concern”⁴² might suggest that New Zealand regards the 17 “measures” as merely illustrative of a larger number of measures at issue, and that the 17 “measures” should not be read as an exhaustive list. However, New Zealand’s request does not use language such as “including but not necessarily limited to”.

23. Panel requests are to be read as a whole.⁴³ As the panel in *Canada – Wheat Exports and Grain Imports* observed, “as always when interpreting portions of a text, it is important to take account of the relevant context.”⁴⁴ The context of the second paragraph of New Zealand’s panel request includes the third paragraph of that request along with the 17 “measures” listed in bullet point form. It is not open to New Zealand to place more weight on the reference to the Final IRA Report, in contrast to the 17 listed “measures”, than is clear on the face of the panel request.

24. New Zealand has confirmed that it meant to “provid[e] precision”⁴⁵ by referring to the 17 “measures” in its request. Furthermore, New Zealand’s panel request supports the view that the measures at issue should be limited to the 17 listed “measures”:

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...⁴⁶

The words “both individually and as a whole” refer only to the 17 listed “measures” because they appear in the third paragraph, directly preceding the list of 17 listed “measures”, rather than in the second paragraph where the reference is made to the “measures specified in and required” pursuant to the Final IRA Report.

⁴¹ See above, para. 7.

⁴² New Zealand’s submission, para. 2.7.

⁴³ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁴⁴ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 23 of para. 6.10.

⁴⁵ New Zealand’s submission, para. 2.10.

⁴⁶ New Zealand’s panel request, third paragraph. (emphasis added)

25. In view of these considerations, if the Panel upholds New Zealand’s panel request, Australia submits it should do so only in respect of the 17 listed “measures”.

C. The panel request does not set out the legal basis of New Zealand’s complaint so as to “present the problem clearly”

26. New Zealand disagrees with Australia’s claim that the panel request fails to meet the requirement to “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.⁴⁷ New Zealand asserts that “its panel request provides more detail than the mere listing of treaty provisions”.⁴⁸ New Zealand also asserts that its panel request “adequately connects the challenged measures with the provisions alleged to be breached” on the basis that each of the “measures” at issue are in violation of each of the provisions referred to in the panel request, and also on the basis that its panel request is purportedly sufficiently similar to certain other panel requests from previous disputes.⁴⁹ New Zealand has not addressed Australia’s alternative claim⁵⁰ that the *cumulative* impact of the manner in which the panel request merely lists the provisions allegedly violated, and the failure to connect the challenged measure(s) with the provision(s) allegedly violated, renders the panel request insufficiently clear to fulfil the requirements of Article 6.2 of the DSU.

27. New Zealand has also not directly addressed how its panel request “present[s] the [legal] problem clearly.” In *EC – Selected Customs Matters*, the Appellate Body explained that a panel request needs to explain “how or why” a particular measure at issue violates a particular provision. The Appellate Body stated that:

[T]he 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.⁵¹

⁴⁷ New Zealand’s submission, para. 2.24.

⁴⁸ New Zealand’s submission, para. 2.24.

⁴⁹ New Zealand’s submission, paras. 2.24, 2.51, 2.55 & 2.58.

⁵⁰ Australia’s previous submission, paras. 47, 59 & 62.

⁵¹ Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (original emphasis)

28. Even if the Panel agrees with New Zealand that it has done more than merely list the provisions allegedly violated and that it has connected the provision(s) to the measure(s), the panel request does not explain “how or why” any particular “measure” is considered by New Zealand to violate any particular provision or obligation and therefore it fails to fulfil the requirements of Article 6.2 of the DSU. New Zealand has not addressed this argument.⁵²

(1) Identification of the obligation allegedly violated is not sufficient

29. In support of its assertion that “New Zealand’s panel request goes further than the ‘mere listing of treaty provisions’”⁵³, New Zealand has explained that, where possible and appropriate, it identified the treaty provisions at issue at the “sub-provision level”,⁵⁴ and that it also specified the relevant sentence(s) within a provision.⁵⁵ New Zealand also relied upon the panel’s reasoning in *EC – Biotech Products* in relation to whether it was sufficiently clear in that case as to which obligations were contested where a provision (or sub-provision) imposes multiple obligations.⁵⁶ Taking New Zealand’s arguments together, Australia understands New Zealand to be asserting that it has adequately identified the particular *obligations* that it claims Australia has violated (however Australia recognises that this is not explicit in New Zealand’s submission). In Australia’s view, merely identifying the specific obligation at issue does not satisfy the Article 6.2 requirement to “present the problem clearly” to the respondent, third parties or a panel.

30. In Australia’s view, identifying the obligation allegedly violated is akin to the threshold obligation to identify the treaty provision at issue.⁵⁷ Australia accepts that identification of the particular obligation(s) allegedly violated may, in certain circumstances, provide more clarification than merely identifying the treaty provision(s). However, Australia submits that doing so is merely a *minimum* prerequisite in circumstances where a particular treaty provision

⁵² New Zealand suggested that Australia “misrepresent[ed] ... the legal standard set out by the Appellate Body in *Korea – Dairy*.” (New Zealand’s submission, para. 2.26.) New Zealand appears to suggest that Australia sought to rely on the Appellate Body decision in *Korea – Dairy* for its argument that “in most cases, a complainant will need to do more than merely list the relevant provisions alleged to have been violated”. (Australia’s previous submission, para. 49.) In fact, Australia made no reference to the decision in *Korea – Dairy* in the paragraph in which it made that statement in its previous written submission. Australia refers only to the Appellate Body decision in *EC – Selected Customs Matters*.

⁵³ New Zealand’s submission, para. 2.28.

⁵⁴ New Zealand’s submission, paras. 2.28 & 2.45.

⁵⁵ New Zealand’s submission, paras. 2.28, 2.31, 2.39, 2.41.

⁵⁶ New Zealand’s submission, paras. 2.33-2.45.

⁵⁷ See: Appellate Body Report, *Korea – Dairy*, para. 124.

in question establishes multiple obligations, and therefore it does not necessarily establish compliance with the requirement to “present the problem clearly”. In *Korea – Dairy*, the Appellate Body referred to a provision that established multiple obligations as an *example only* of circumstances in which mere identification of the provisions claimed to have been violated may be insufficient.⁵⁸ It should not be inferred from the Appellate Body’s statement that mere identification of the distinct *obligations* at issue necessarily satisfies the requirements of Article 6.2 of the DSU to “present the problem clearly”.

a. *The Panel is not bound by the reasoning of the panel in the EC – Biotech Products dispute*

31. Panel requests are clearly highly specific to the facts and circumstances of a particular dispute, and therefore it is not appropriate to transport the reasoning from one case to another as to the sufficiency of a particular panel request in the circumstances of a different dispute.

32. New Zealand has placed heavy reliance⁵⁹ upon the decision of the panel in the *EC – Biotech Products* dispute. Although New Zealand explicitly acknowledges that the decision by the panel in *EC – Biotech Products* “is not binding on the current Panel”⁶⁰, it goes on to treat the specific findings of that panel as dispositive of the issues in this dispute, without providing any supporting argumentation as to why the panel’s approach in that case was correct and should be adopted in this dispute, beyond pointing to the “similarity” of the legal provisions at issue.

b. *Australia is not seeking New Zealand’s arguments in relation to Article 2.3 and Article 5.5 of the SPS Agreement*

33. New Zealand has not addressed the substance of Australia’s concern in relation to New Zealand’s claims under Article 2.3 and Article 5.5 of the *SPS Agreement*.⁶¹ New Zealand has asserted that Australia is asking it to set out its arguments, and not merely its claims.⁶² This is not the case.

⁵⁸ See: Appellate Body Report, *Korea – Dairy*, para. 124.

⁵⁹ New Zealand’s submission, paras. 2.33-2.45.

⁶⁰ New Zealand’s submission, para. 2.33.

⁶¹ See: New Zealand’s submission, paras. 2.46-2.47; Australia’s previous submission, paras. 55-56.

⁶² New Zealand’s submission, paras. 2.46-2.47.

34. For the statement of a particular legal claim to be sufficient to meet the requirements of Article 6.2 of the DSU, that statement must, at a minimum, provide enough information so that a respondent can “begin preparing its defence at the beginning of the panel process.”⁶³ Applying this principle to Article 2.3 and Article 5.5, New Zealand should at least have *identified the basis of comparison* that it relies upon in asserting a violation in its panel request. The element of comparison is central to both provisions.

35. Under the first sentence of Article 2.3, for example, a hypothetical “claim” might be that certain SPS measures discriminate between Member A and Member B. An “argument” in support of this claim might be that Australia has given preferential treatment to Member A’s market access request over a similar request made by Member B. Where the obligations in a provision turn on a comparison of certain treatment in different situations, for example between Member A and Member B, then a claim under that provision is only partially stated if Member A and not Member B is identified. It is not possible for Australia to commence preparation of its defence under either Article 2.3 or Article 5.5 without knowing the bases for comparison that New Zealand considers relevant.

(2) New Zealand’s assertion that all of the measures at issue are inconsistent with all of the provisions listed does not absolve it of the obligation to set out the problem clearly

- a. *A complainant must be forthcoming about the specific claims it intends to pursue from the very beginning*

36. New Zealand claims that “it is clear [from its panel request] that it is open to New Zealand to claim that *every* measure preceding the list of *SPS Agreement* provisions in its panel request is inconsistent with *each of* the provisions referred to.”⁶⁴ By contrast, the text of New Zealand’s panel request does not use language such as “*all of* the above measures are inconsistent with *each of* the obligations”. It is well established that a complainant may not “cure” any deficiencies in its panel request through subsequent submissions or statements.⁶⁵

⁶³ Panel Report, *Japan – DRAMs (Korea)*, para. 7.9.

⁶⁴ New Zealand’s submission, para. 2.51. (emphasis added)

⁶⁵ Appellate Body Report, *EC – Bananas III*, para. 143.

37. Further, New Zealand’s claim is made in the context of the accompanying footnote, which states: “There is no requirement for a Member to pursue claims in respect of all the provisions identified in its panel request.”⁶⁶ This suggests to Australia that New Zealand may not intend to pursue all of the claims it now claims to be “open” to it.

38. Australia acknowledges that complainants may choose not to continue to pursue certain claims during the course of panel proceedings. But this does not remove the obligation to “engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute”, pursuant to Article 3.10 of the DSU. Furthermore, Article 3.7 of the DSU clearly states that “[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these [dispute settlement] procedures would be fruitful.”⁶⁷ This also suggests an obligation that complainants should exercise judgement at the outset as to whether particular claims would be fruitful. Australia concurs with the following Appellate Body statement in *India – Patents (US)*:

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.⁶⁸

39. Australia does not agree with New Zealand that the relevance of the Appellate Body’s statement in *US – Oil Country Tubular Goods Sunset Reviews* as to the requirement to “plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed”⁶⁹, should be limited to circumstances where it is unclear whether an “as such” challenge is being made.⁷⁰ The Appellate Body made the statement in question at the outset of its explanation of the obligations imposed generally by Article 6.2 of the DSU, and before it began an examination of what is required where an “as such” challenge is asserted. Australia notes that New Zealand did not otherwise rebut the substance of the Appellate Body’s reasoning.

- b. *New Zealand has not demonstrated the relevance of panel requests in other cases on which it seeks to rely*

⁶⁶ New Zealand’s submission, fn. 52.

⁶⁷ See: Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

⁶⁸ Appellate Body Report, *India – Patents (US)*, para. 94. (emphasis added)

⁶⁹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

⁷⁰ See: New Zealand’s submission. para. 2.53.

40. New Zealand has claimed that “the wording of the panel request in the present case is similar to, and follows the construction of, the wording in the panel requests in” three previous WTO disputes: *Canada – Wheat Exports and Grain Imports*, *EC – Biotech Products* and *EC – Trademarks and Geographical Indications*.⁷¹ New Zealand has not provided any explanation as to why it considers its panel request to be “similar to” the panel requests in those disputes on this particular issue. It has merely set out some of the circumstances and findings made in relation to the panel requests in those disputes.

41. New Zealand has not addressed the substance of Australia’s arguments as to why the Panel in this case should not be guided by the panel’s reasoning in *EC – Biotech Products* on this particular issue.⁷² Nor has New Zealand rebutted Australia’s arguments that the panel’s reasoning in relation to the panel request in *Canada – Wheat Exports and Grain Imports* is not applicable to either the *EC – Biotech Products* case or the present dispute⁷³, which New Zealand has not rebutted. Australia reaffirms the points made in its previous submission on these matters.

42. With respect to New Zealand’s reliance⁷⁴ upon a particular statement by the panel in *EC – Trademarks and Geographical Indications*, Australia notes again that the 17 listed “measures” are identified as “measures” in the panel request, not “aspects” of measures. Australia has not argued that New Zealand was obliged to set out which *aspects* of measures violated certain obligations in its panel request. Australia is saying no more than that a panel request should set out which *measures* (rather than *aspects* of those measures) violate which obligations.

(3) Australia is not seeking to “raise the bar for panel requests”

43. New Zealand asserts that “Australia is seeking to ... raise the bar for panel requests to an unprecedented level, substantially higher than required in, and so inconsistent with, WTO cases thus far.”⁷⁵ Australia rejects this assertion, noting that it is not borne out by the panel requests relied upon by New Zealand.

⁷¹ New Zealand’s submission, paras. 2.55-2.58.

⁷² Australia’s previous submission, para. 61 & fn 52 & 53.

⁷³ Australia’s previous submission, fn 52.

⁷⁴ See: New Zealand’s submission, para. 2.57.

⁷⁵ New Zealand’s submission, para. 2.5.

44. New Zealand asserts a similarity between its panel request and that in the *Japan – Apples* dispute, as a basis for arguing that its panel request meets the requirements of Article 6.2 of the DSU.⁷⁶ However, the adequacy of the panel request in that case was never challenged and therefore no weight should be attributed to New Zealand’s argument.

45. New Zealand implies that its panel request should not be subject to the full rigours of the requirements of Article 6.2 because *Japan – Apples* allegedly “address[ed] substantially the same subject matter”.⁷⁷ In this regard, Australia recalls that there have been numerous WTO disputes under the *Anti-Dumping Agreement* relating to the alleged “zeroing” procedures used by the United States.⁷⁸ Notwithstanding the potential similarity of subject matter between those disputes, Australia submits that the complainants involved in those disputes have still felt obliged to set out their claims in panel requests so as to “present the problem clearly” as required by Article 6.2 of the DSU, rather than rely on a flawed presumption that the respondent, third parties and a panel were already familiar with the precise nature of the claims that will be made in any particular “zeroing” dispute.

46. For example, in *US – Stainless Steel (Mexico)*, Mexico’s 2006 panel request set out its challenge to the United States’ use of “zeroing”, and how its use allegedly violated certain WTO provisions, thereby clearly linking the measures and the claims. In its first-listed “as such” claim, Mexico claimed WTO-inconsistency:

With respect to original investigations and periodic reviews: Article 1 of the Anti-Dumping Agreement and Article VI:1 and VI:2 of the GATT 1994 as regards the zeroing methodology and the consequent imposition and collection of anti-dumping duties.⁷⁹

Similarly, in the 2007 panel request for *US – Continued Zeroing*, following an explanation of the measures at issue, the European Communities alleged inconsistency with “Article 2.1 of the [*Anti-Dumping Agreement*] and Articles VI:1 and VI:2 of the GATT 1994, because the [United States] did not determine a dumping margin for the product as a whole”⁸⁰, *inter alia*.

⁷⁶ New Zealand’s submission, para. 2.48.

⁷⁷ New Zealand’s submission, para. 2.48.

⁷⁸ For example: *EC – Bed Linen*, DS141; *US – Zeroing (EC)*, DS294; *US – Zeroing (Japan)*, DS322; *US – Stainless Steel (Mexico)*, DS344; *US – Continued Zeroing*, DS350.

⁷⁹ Mexico, *Request for the Establishment of a Panel by Mexico*, WT/DS344/4 (16 October 2006), page 3.

⁸⁰ European Communities, *Request for the Establishment of a Panel by the European Communities*, WT/DS350/6 (11 May 2007), page 3.

47. These panel requests show how complainants are taking into account the guidance of previous panels and the Appellate Body in meeting their obligations under Article 6.2 of the DSU. The ability to provide sufficient information in a panel request in order to “present the problem clearly” is not limited to trade remedies disputes. In *Brazil – Retreaded Tyres*, the European Communities also clearly explained its legal claims, for example:

Brazil has acted inconsistently with Article XI:1 of GATT 1994 by instituting and maintaining a prohibition and restriction other than a duty, tax or other charge on the importation of a product of the territory of another Member, made effective through import licences and other measures.⁸¹

48. As Australia noted in its previous submission and as the above requests demonstrate, it is possible to set out claims clearly and yet briefly, in accordance with the requirements of Article 6.2 of the DSU.

D. Australia continues to suffer prejudice due to the uncertainty of New Zealand’s claims in its panel request

49. New Zealand claims that Australia has not demonstrated it has suffered prejudice in the present case.⁸²

50. Australia’s position on prejudice is clear. Australia considers that “prejudice is the disadvantage that accrues to a respondent arising from deficiencies on the face of a panel request.”⁸³ Those deficiencies in the present case arise from New Zealand’s failure to properly identify the specific measures at issue and to provide a brief summary of the legal basis of its complaint sufficient to present the problem clearly in its panel request.

51. The deficiencies in New Zealand’s panel request have created significant uncertainty as to the identity of the precise measures at issue and also as to the legal claims being made by New Zealand. Australia should not be required “to make assumptions about the scope and nature of New Zealand’s claims”⁸⁴ and to commit the finite resources it has available for this case on that

⁸¹ European Communities, *Request for the Establishment of a Panel by the European Communities*, WT/DS332/4 (18 November 2005), page 2.

⁸² New Zealand’s submission, paras. 2.60, 2.65, 2.67.

⁸³ Australia’s previous submission, para. 65.

⁸⁴ Australia’s previous submission, para. 63.

basis. This uncertainty has prejudiced “Australia’s ability to prepare its defence in a meaningful way”.⁸⁵

52. The Appellate Body has made clear that “[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” and that “[t]his requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings”.⁸⁶

53. The text of Article 6.2 of the DSU itself provides no guidance on the issue of prejudice.

54. New Zealand has attempted to rely on Appellate Body decisions in *US – Carbon Steel* and *Korea – Dairy* to assert that Australia has not met its burden under Article 6.2.⁸⁷ However, the panels in those cases were called on to address the adequacy of panel requests at later stages in their proceedings than the present case.⁸⁸ Respondents had made written submissions and could have been expected to point to how those submissions had been handicapped by the alleged inadequacy of the panel requests in question. By contrast, Australia has acted at the earliest possible stage to ask the Panel to address New Zealand’s failure to meet its obligations under Article 6.2.

55. The difference in circumstances between both *Korea – Dairy* and *US – Carbon Steel* and the present case bears directly on the question of the nature of Australia’s burden to establish inconsistency under Article 6.2. Australia considers the approaches of the panels in *Japan – DRAMs (Korea)* and *Canada – Wheat Exports and Grain Imports* to be more pertinent in the present circumstances.

56. In this case, Australia has yet to file its first written submission. In these circumstances, it cannot cite a submission that has not been filed to show how that submission has been handicapped by the inadequacy of New Zealand’s panel request. Indeed, the purpose of Australia’s claim under Article 6.2 of the DSU is to avoid having its first written submission compromised in this manner.

⁸⁵ Australia’s previous submission, para. 63.

⁸⁶ Appellate Body Report, *Thailand – H-Beams*, para. 88.

⁸⁷ New Zealand’s submission, paras. 2.60, 2.63-2.64.

⁸⁸ See: Appellate Body Report, *US – Carbon Steel*, paras. 120-123; Panel Report, *Korea – Dairy*, para. 7.1.

57. Notwithstanding this, Australia has already been able to point to specific manifestations of prejudice arising from New Zealand’s deficient panel request. As previously noted, Australia has been preparing its case in relation to the 17 “measures” listed in bullet point form in the panel request *only*. Significant prejudice would accrue to Australia should the scope of New Zealand’s claims be broadened. Another example is Australia’s inability to commence preparations to defend itself in relation to any claims from New Zealand under Article 2.3 and Article 5.5 of the *SPS Agreement*. Australia cannot reasonably be expected to meet a higher evidentiary burden at this stage of the proceedings.

E. Conclusion

58. In determining its response to Australia’s claims, it is important for the Panel to bear in mind the way the parties have sought to address their differences over the adequacy of the panel request in this dispute.

59. Australia has engaged in these proceedings in good faith, in accordance with Article 3.10 of the DSU. Australia registered its concerns with New Zealand at the earliest opportunity, outlining the uncertainty arising from the terms of the panel request, and requesting clarification. Australia notified the Panel at the earliest opportunity of its concerns, and demonstrated a desire to be flexible in addressing them.⁸⁹ Through its timeliness, Australia has sought to ensure that the Panel’s consideration of its procedural objections does not result in any delay to the substantive determination of New Zealand’s claims.

60. Australia’s requests for clarification met with no response from New Zealand. In fact, New Zealand’s recent submission to the Panel is its first engagement on the issue, and comes nearly three months after panel establishment, when Australia first registered its concerns.

61. Moreover, as explained above, its submission suggests that New Zealand is now seeking to expand the ambit of its challenge to cover the Final IRA Report “as a whole”, itself, as opposed to the “measures specified in and required” pursuant to the Final IRA Report, or the 17 listed “measures”. If New Zealand’s claim is accepted in this respect, the Panel would be permitting New Zealand to do much more than “cure” its defective panel request (which itself is

⁸⁹ Australia’s previous submission, paras. 6, 16-17.

not permissible⁹⁰). It would be allowing New Zealand to effectively make a new and much broader challenge than is available on the face of its panel request, three months after panel establishment. Australia considers that such an outcome would be inconsistent with the “letter and the spirit”⁹¹ of Article 6.2.

62. As previously advised, Australia would be pleased to assist the Panel by participating in an oral hearing on this matter.

⁹⁰ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁹¹ Appellate Body Report, *EC – Bananas III*, para. 142.