

**WORLD TRADE ORGANISATION**

*Submission to the Panel*

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

**REQUEST FOR A PRELIMINARY PROCEDURAL RULING IN  
RELATION TO THE CONSISTENCY OF NEW ZEALAND'S PANEL  
REQUEST WITH ARTICLE 6.2 OF THE *DSU***

**WRITTEN SUBMISSION OF NEW ZEALAND**

**7 April 2008**

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## I. INTRODUCTION

This submission responds to Australia’s request for a preliminary ruling filed on 13 March 2008.<sup>1</sup> For the reasons outlined in this submission, New Zealand considers that the arguments presented by Australia with regard to New Zealand’s request for the establishment of a panel<sup>2</sup> (panel request) are without merit.<sup>3</sup> New Zealand’s panel request is fully consistent with Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, and New Zealand requests that the Panel make preliminary findings accordingly. In New Zealand’s view, the Panel should be in a position to reach a decision on this issue on the basis of the written submissions of the parties.

## II. NEW ZEALAND’S PANEL REQUEST IS CONSISTENT WITH ARTICLE 6.2 OF THE *DSU*

2.1 The relevant part of Article 6.2 of the *DSU* provides:

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.

2.2 The Appellate Body has clarified that Article 6.2 imposes four separate requirements, namely that 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.<sup>4</sup>

2.3 The Appellate Body has observed that a panel request must be sufficiently precise for two reasons:

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<sup>1</sup> 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*, 13 March 2008, WT/DS367 (referred to in these footnotes as “Submission of Australia”).

<sup>2</sup> Request for the Establishment of a Panel by New Zealand, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/5, 7 December 2007.

<sup>3</sup> Australia’s submission makes arguments in relation to the timeliness of its request for a preliminary ruling, and in relation to the applicability of Article 6.2 of the *DSU* to this case. See Submission of Australia, paras. 12 – 17 and 18 – 20. New Zealand does not contest these arguments.

<sup>4</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, (*Korea – Dairy*), para. 120.

[F]irst, 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.<sup>5</sup>

2.4 The Appellate Body has explained 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.”<sup>6</sup> The jurisprudence also establishes that “compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in light of the attendant circumstances”.<sup>7</sup>

2.5 Australia claims that New Zealand’s panel request does not “identify the specific measures at issue” or “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”<sup>8</sup> New Zealand recalls that for the purposes of this preliminary ruling, Australia bears the burden of proof as the party claiming an inconsistency with Article 6.2.<sup>9</sup> New Zealand submits that Australia has not proven that the panel request in this case breaches the requirements of Article 6.2. For the reasons outlined below, New Zealand considers that the panel request is fully consistent with Article 6.2. What Australia is seeking to do in this case is to raise the bar for panel requests to an unprecedented level, substantially higher than required in, and so inconsistent with, WTO cases thus far. As a result, Australia’s claim that the New Zealand request does not comply with Article 6.2 should be rejected.

#### **A. New Zealand’s panel request identifies the specific measures at issue**

2.6 The relevant section of New Zealand’s panel request provides:

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

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<sup>5</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, (*EC – Bananas III*), para. 142.

<sup>6</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, (*Thailand – H-Beams*), para. 88.

<sup>7</sup> Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, adopted 19 December 2002, (*US – Carbon Steel*), para. 127.

<sup>8</sup> Submission of Australia, para. 2.

<sup>9</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, pg. 14.

inconsistent with the obligations of Australia under the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“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: [...]

2.7 The panel request then goes on to specify in detail the measures of particular concern to New Zealand. The measures are grouped under four headings: three relating to pest or disease type (fire blight, European canker, and apple leafcurling midge) and one relating to general requirements.

2.8 Australia argues that New Zealand’s panel request does not identify “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”.<sup>10</sup> New Zealand disagrees, submitting 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.

2.9 The formulation of the New Zealand request is in large part a consequence of the nature of the *Final Import Risk Analysis for Apples from New Zealand* (Final IRA) prepared by Australia. New Zealand considers that the Final IRA as a whole is inconsistent with Australia’s obligations under the *SPS Agreement*. That is the essence of New Zealand’s Article 8 and Annex C(1)(a) claim. However, the Final IRA does not contain a discrete section that consolidates and summarises in one place the various SPS requirements (or “measures”) applying to apples from New Zealand. The Final IRA, which amounts to some 600 pages divided into three volumes, contains a section entitled “Risk management and operational framework”, but this does not include a consolidated list of the applicable measures, which in relation to pest-specific requirements are dispersed throughout the Final IRA.

2.10 In these circumstances, it was necessary for New Zealand to examine the Final IRA carefully to identify the measures of particular concern to New Zealand which are scattered throughout it. Thus, given the nature of the Final IRA, New Zealand sought to provide clarity in its request by referring not just to the Final IRA as a whole, but also to the measures of particular concern. In this regard New Zealand finds odd the Australian contention that

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<sup>10</sup> Submission of Australia, para. 31.

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.<sup>11</sup>

2.11 For these reasons, New Zealand considers that its panel request more than meets any standard of information required to identify the specific measures at issue in this case.

2.12 New Zealand draws support from the panel report in *EC – Trademarks and Geographical Indications*. The panel requests in that case identified the measure in the following terms:

The measure at issue is Council Regulation (EEC) No. 2081/92 of 14 July 1992 *on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*, any amendments thereto (including Council Regulation (EC) No. 692/2003 of 8 April 2003, published in the *Official Journal of the European Union* No. L99 of 17 April 2003), and related implementing and enforcement measures (“the EC measure”). The EC measure lays down and implements rules on the protection of designations of origin and geographical indications for agricultural products and foodstuffs, excluding wines and spirits.<sup>12</sup>

2.13 The European Communities, as the respondent in that case, argued that “[t]he unspecific reference to Regulation 2081/92 made in the Panel requests does not permit the EC to understand *which specific aspects among those covered by Regulation 2081/92* the complainants intend to raise in the context of the present proceedings.”<sup>13</sup> The Panel responded to this argument in the following terms:

The Panel considers the ordinary meaning of the terms of the text in Article 6.2 of the *DSU*, read in their context and in the light of the object and purpose of the provision, to be quite clear. They require that a request for establishment of a panel “identify the specific measures at issue”. They do not require the identification of the “specific aspects” of these “specific measures.”<sup>14</sup>

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<sup>11</sup> Submission of Australia, para. 37.

<sup>12</sup> See Request for the Establishment of a Panel by Australia, *European Communities – Protection of Trademarks and Geographical Indications For Agricultural Products and Foodstuffs*, WT/DS290/18, 19 August 2003.

<sup>13</sup> Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, adopted 20 April 2005, (*EC - Trademarks and Geographical Indications*), para. 7.2- 25 (italics added by the Panel).

<sup>14</sup> Panel Report, *EC - Trademarks and Geographical Indications*, para. 7.2- 26.

In line with the Panel’s reasoning, New Zealand submits that there is no precedent that would require a Member to specify in its panel request every aspect of every measure that it intends to challenge.

2.14 The European Communities also objected to the reference in the panel request to “related implementing and enforcement measures”, claiming that it did not meet the requirement to identify the specific measures at issue. In rejecting this allegation the Panel noted that “...all of the Regulation’s implementing and enforcement measures form a group of specific measures which, although they may be a large group, are identified in Australia’s request.”<sup>15</sup>

2.15 New Zealand supports the Panel’s finding in *EC – Trademarks and Geographical Indications* and was mindful of it in developing its panel request in this case. New Zealand’s panel request not only identifies the Final IRA, it further identifies the aspects of the Final IRA of particular concern to New Zealand. The panel request therefore clearly meets, if not exceeds, what is required under Article 6.2 of the *DSU* with respect to identifying “the specific measures at issue”.

2.16 Indeed, Australia appears to concede this point in paragraph 37 of its submission when it states:

Had New Zealand’s panel request referred only to “the measures specified in and required by Australia pursuant to” the Final IRA, 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.

2.17 In New Zealand’s view, if a general reference to the measures specified in and required by the Final IRA is sufficient to meet the requirement to identify the specific measures at issue, then providing additional detail on the measures of particular concern to New Zealand can only better assist Australia in beginning to prepare its defence in this case, and certainly cannot prevent it from doing so.

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<sup>15</sup> Panel Report, *EC - Trademarks and Geographical Indications*, para. 7.2- 28.

2.18 Australia places emphasis on the decision of the Panel in *Canada – Wheat Exports and Grain Imports*<sup>16</sup> to support its argument that New Zealand’s panel request does not identify the specific measures at issue. It does this on the basis that *Canada – Wheat Exports and Grain Imports* was decided “in similar circumstances” to the present case.<sup>17</sup> However, a comparison of the factual circumstances, and in particular the manner in which the “measures” are identified, demonstrates significant differences between the two cases. These differences support a finding that New Zealand’s panel request is consistent with Article 6.2 of the *DSU*.

2.19 In *Canada – Wheat Exports and Grain Imports* the panel request made reference only to “the laws, regulations, and actions of the Government of Canada and the CWB related to exports of wheat.”<sup>18</sup> The panel request did not specify the relevant laws and regulations “by name, date of adoption, etc.”<sup>19</sup> The Panel concluded that this in itself “does not necessarily render the panel request inconsistent with Article 6.2.”<sup>20</sup> Rather, it reasoned:

[I]n the absence of an explicit identification of a measure of general application by name, as in the present case, sufficient information must be provided in the request for establishment of a panel itself that effectively identifies the precise measures at issue.<sup>21</sup>

The Panel continued that,

[i]n light of the foregoing and in the absence of an explicit reference to the laws and regulations at issue, we proceed now to examine whether, in the absence of an explicit reference to the laws and regulations at issue, the information provided by the United States in its panel request is sufficient to inform Canada, as the responding party in this case, of the specific measures at issue.<sup>22</sup>

2.20 The first point to note is that the analysis by the Panel in *Canada – Wheat Exports and Grain Imports* relates to a panel request that did *not* specify the particular “laws, regulations and actions” at issue. As New Zealand’s panel request *does* specify the Final IRA

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<sup>16</sup> Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted, as modified by the Appellate Body, 27 September 2004, (*Canada – Wheat Exports and Grain Imports*).

<sup>17</sup> Submission of Australia, para. 42.

<sup>18</sup> Request for the Establishment of a Panel by the United States, *Canada – Wheat Exports and Grain Imports*, WT/DS276/6, 7 March 2003.

<sup>19</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 19.

<sup>20</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 19.

<sup>21</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 20.

<sup>22</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 21.



by name and date of adoption, the analysis in *Canada – Wheat Exports and Grain Imports* is not directly relevant.<sup>23</sup>

2.21 The second point is that the generality of the description of the measures at issue in *Canada – Wheat Exports and Grain Imports* is in stark contrast to the specificity of New Zealand’s identification of the measures at issue in the present dispute. The Panel in *Canada – Wheat Exports and Grain Imports* found that “the United States’ panel request, by creating considerable uncertainty as to the identity, number and content of the laws and regulations which it is challenging, does not provide adequate information on its face to identify the specific measures at issue.”<sup>24</sup> In contrast, the present case concerns a single “Import Risk Analysis”, applied against a single nation’s exports (New Zealand) to a single product (apples). Moreover, the Final IRA was identified by name and date of adoption in New Zealand’s panel request.

2.22 For these reasons New Zealand submits that the panel request identifies “the specific measures at issue”, and Australia’s claims to the contrary should be rejected.

**B. New Zealand’s panel request provides a brief summary of the legal basis of its complaint sufficient to present the problem clearly**

2.23 The relevant section of New Zealand’s panel request provides:

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.

2.24 Australia argues that New Zealand has failed to sufficiently identify the legal basis of the complaint on two grounds: i) the mere listing of treaty provisions alleged to have been breached; and ii) failure to connect the challenged measures with the provisions alleged to have been breached.<sup>25</sup> New Zealand disagrees, submitting on the first ground that its panel request provides more detail than the mere listing of treaty provisions – detail that carefully takes account of relevant jurisprudence on the content of panel requests and exceeds the standard found to be acceptable in other comparable panel requests. Moreover, in respect of

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<sup>23</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 19-21.

<sup>24</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 24.

<sup>25</sup> Submission of Australia, para. 46.

Article 5.5, Australia appears to be asking New Zealand to supply its arguments as well as its claims, which New Zealand should not be obliged to do in its panel request. On the second ground, New Zealand submits that its panel request adequately connects the challenged measures with the provisions alleged to be breached, satisfying any standard deducible from the relevant jurisprudence.

### **1. The listing of treaty provisions**

2.25 Australia argues that New Zealand’s panel request breaches Article 6.2 because it “merely lists the provisions alleged to have been breached”.<sup>26</sup> Australia relies on the Appellate Body’s findings in *Korea – Dairy* to assert that “New Zealand has merely attempted to satisfy ‘a *necessary* “minimum prerequisite”’ for compliance with Article 6.2.”<sup>27</sup> In Australia’s view, the jurisprudence establishes that “*in most cases*, a complainant will need to do more than merely list the relevant provisions alleged to have been violated”.<sup>28</sup>

2.26 In making this argument Australia misrepresents both the precision of New Zealand’s panel request, and the legal standard set out by the Appellate Body in *Korea – Dairy*. In that case the Appellate Body stated:

Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.<sup>29</sup>

2.27 It is not possible to deduce from this jurisprudence, as Australia has attempted to do, that “in most cases” the “mere listing of treaty provisions” will not meet the requirements of Article 6.2. Rather, as the Appellate Body made clear, “...whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on

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<sup>26</sup> Submission of Australia, para. 45.

<sup>27</sup> Submission of Australia, para. 52.

<sup>28</sup> Submission of Australia, para. 49. Emphasis added.

<sup>29</sup> Appellate Body Report, *Korea – Dairy*, para. 124.

a case-by-case basis.”<sup>30</sup> While the “simple listing of treaty provisions” will in some circumstances suffice to meet the requirements of Article 6.2, “it may not always be enough.”

2.28 In any event, New Zealand’s panel request goes further than the “mere listing of treaty provisions”. The Appellate Body’s jurisprudence in *Korea – Dairy* was directed at a situation where the complainant had simply listed the WTO treaty articles it claimed had been violated (namely, Articles 2, 4, 5 and 12 of the Safeguards Agreement, and Article XIX of the GATT) without specifying the *sub-provisions* (that is, the paragraphs and sub-paragraphs) under which the claims were made. The equivalent in the present case would be a panel request that merely referred to Articles 2, 5, 8 and Annex C of the *SPS Agreement*.<sup>31</sup> In contrast, the approach taken by New Zealand was to cite the relevant provisions not just at the article level, but at the paragraph and (where possible) sub-paragraph level.<sup>32</sup> In fact, where appropriate, New Zealand’s panel request also identifies the relevant sentences within those sub-provisions.<sup>33</sup>

2.29 Australia argues that the (sub-)provisions identified in New Zealand’s panel request contain “two or more obligations”, and that “[f]or 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.”<sup>34</sup> Australia’s submission continues:

There is no attempt (beyond the 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.<sup>35</sup>

These statements are demonstrably wrong, not least because, in the case of Articles 2.3, 5.5 and 8, New Zealand’s panel request carefully singles out that part of the provision on which it intends to make claims. With the exception of Article 2.2, in respect of the other provisions

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<sup>30</sup> Appellate Body Report, *Korea – Dairy*, para. 127.

<sup>31</sup> New Zealand notes that some panel requests in cases concerning SPS measures have taken this article-level approach to identifying the legal basis of the complaint. See, for example, Request for the Establishment of a Panel by Canada, *Australia – Measures Affecting the Importation of Salmon*, WT/DS18/2; and Request for the Establishment of a Panel by the United States, *Japan – Measures Affecting Agricultural Products*, WT/DS76/2.

<sup>32</sup> The only exception is the reference to Article 8, due to the fact that Article 8 has only one paragraph.

<sup>33</sup> It is interesting to note that even in the absence of identifying sub-provisions, the Appellate Body in *Korea – Dairy* found, at para. 131, that Korea “failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings.” New Zealand returns to this below.

<sup>34</sup> Submission of Australia, para. 52. Emphasis added.

<sup>35</sup> Submission of Australia, para. 53.

cited in New Zealand’s panel request Australia provides no argumentation as to why it considers they contain “two or more obligations”.

2.30 Turning to the specific arguments raised by Australia, its submission states that Article 2.2 of the *SPS Agreement* “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 scientific evidence.” Then Australia asserts that “it is unclear to Australia which of these obligations in the provisions are alleged to have been violated”.<sup>36</sup>

2.31 In New Zealand’s view, the panel request does not give rise to any uncertainty in this regard. Where the intention was to limit a claim to certain aspects of a sub-provision, this intention was clearly expressed on the face of the panel request. For example, the reference to Article 5.5 is expressly limited to the “first sentence” of that paragraph, and the reference to Article 8 applies only “in relation to Annex C”. Where a sub-provision is referenced with no such express limitation, there is a clear inference that New Zealand intends to make claims with respect to the sub-provision in its entirety.

2.32 Many of the *SPS Agreement* paragraphs at issue in the present case were considered by the Panel in *EC – Approval and Marketing of Biotech Products*.<sup>37</sup> New Zealand agrees with the reasoning of the Panel in that case, and took its findings into account in formulating the panel request in these proceedings, indeed going beyond the level of detail considered by the Panel in that case to be adequate. On the other hand, Australia criticises the Panel’s findings in relation to the respondent’s Article 6.2 claim, ostensibly on the basis that “the panel... failed to give due consideration to the important objectives to be fulfilled by panel requests and the consequent requirements imposed by Article 6.2.”<sup>38</sup> In New Zealand’s view, Australia’s submission fails to adequately substantiate this claim, and its arguments are insufficient to warrant dismissing what is a highly relevant case.

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<sup>36</sup> Submission of Australia, para. 52.

<sup>37</sup> The preliminary ruling of the Panel in that case is reproduced in the final panel report adopted by the Dispute Settlement Body. Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (*EC – Approval and Marketing of Biotech Products*), para. 7.47.

<sup>38</sup> Submission of Australia, para. 61.

2.33 While the panel report in *EC – Approval and Marketing of Biotech Products* is not binding on the current Panel, the Appellate Body has made the following observation with regard to the status of adopted panel reports:

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.<sup>39</sup>

New Zealand considers that, given the similarity of the legal provisions at issue, the panel report in *EC – Approval and Marketing of Biotech Products* is relevant to this dispute and should be taken into account by the Panel.

2.34 The Panel in *EC – Approval and Marketing of Biotech Products* began by dividing the claims being considered into two categories. The first category consisted of claims which could in principle have been more precisely cited in that they referred to provisions that contained further sub-divisions not referenced in the panel requests. In the present case, New Zealand’s panel request does not include any claims that fall within this first category. The second category consisted of claims that could not be further specified at the paragraph or sub-paragraph level, but that nevertheless “contain two or more distinct obligations”.<sup>40</sup> The “category two” provisions specifically considered by the Panel in *EC – Approval and Marketing of Biotech Products* included *SPS Agreement* Articles 2.2, 2.3, 5.5, and 8.

2.35 In general terms, with respect to the second category of measures, the Panel observed that:

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

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<sup>39</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8,10,11/AB/R, adopted 1 November 1996, pg. 14. In New Zealand’s view, the principle embodied by the Appellate Body’s observations in that case applies equally to all adopted GATT and WTO panel reports.

<sup>40</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47- 68.

the nature of the obligation at issue to meet the minimum standard of precision required under Article 6.2.<sup>41</sup>

2.36 With respect to Article 2.2 the Panel found:

Article 2.2 of the *SPS Agreement* appears to set out three different “basic” obligations: (1) that SPS measures must be applied only “to the extent necessary” to protect life or health, (2) that they must be “based on scientific principles” and (3) that they must not be “maintained without sufficient scientific evidence”. The three obligations contained in Article 2.2 are further spelt out and applied in different provisions of the *SPS Agreement*, namely, Articles 5.1, 5.2 and 5.6. We note that all Complaining Parties have listed Articles 5.1, 5.2 and 5.6 in their panel requests as separate legal bases. In the light of this, we consider that it is sufficiently clear from the Complaining Parties’ panel requests that each of the obligations contained in Article 2.2 is at issue in the three complaints. Accordingly, we find that, in the circumstances of this case, referring to Article 2.2 is sufficient to meet the minimum requirements of Article 6.2.<sup>42</sup>

2.37 In the present case, New Zealand’s panel request lists Articles 5.1, 5.2 and 5.6 of the *SPS Agreement* in addition to Article 2.2. New Zealand therefore considers that referring to Article 2.2 is sufficient to meet the requirements of Article 6.2 of the *DSU*.

2.38 With respect to Article 2.3 the Panel found:

Article 2.3 of the *SPS Agreement* stipulates that SPS measures must not arbitrarily or unjustifiably discriminate between Members and that they must not be used in a manner which would constitute a disguised restriction on trade. In addressing the sufficiency of a listing of Article 2.3, we find relevant the fact that all Complaining Parties have also listed Articles I:1, III:4 and XI:1 of the GATT 1994 as legal bases of their complaints. Articles I:1 and III:4 of the GATT 1994 prohibit certain forms of discrimination against foreign products, whereas Article XI:1 of the GATT 1994 prohibits quantitative import restrictions. We think it can be inferred from the references to these GATT 1994 provisions that both obligations set out in Article 2.3 – i.e., the obligation to avoid arbitrary or unjustifiable discrimination and the obligation not to apply SPS measures in a manner which would constitute a disguised restriction on trade – are at issue in the three complaints. We therefore find that, in the circumstances of this case, referring to Article 2.3 is sufficient to meet the minimum requirements of Article 6.2.<sup>43</sup>

2.39 In the present case, it is not necessary to “infer” that both obligations are at issue, as New Zealand’s panel request expressly provides that both sentences of Article 2.3 form part

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<sup>41</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47-79.

<sup>42</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47-82.

<sup>43</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47-83.

of its legal claims. New Zealand therefore considers that referring to “Article 2.3 (both sentences)” is sufficient to meet the requirements of Article 6.2 of the *DSU*.

2.40 With respect to Article 5.5 the Panel found:

Article 5.5 of the *SPS Agreement* obligates Members (1) to avoid arbitrary or unjustifiable distinctions in the levels of sanitary or phytosanitary protection which they consider to be appropriate in different situations and (2) to co-operate in the Committee on Sanitary and Phytosanitary Measures to develop guidelines to further the practical implementation of that article. None of the three panel requests suggests that the European Communities is being challenged in respect of a failure to cooperate with a view to developing certain guidelines...Thus, it is clear that the obligation at issue in the three panel requests is the obligation to avoid arbitrary or unjustifiable distinctions in the levels of sanitary or phytosanitary protection. Therefore, we consider that the reference in the Complaining Parties’ panel requests to Article 5.5 is sufficient to meet the minimum requirements of Article 6.2.<sup>44</sup>

2.41 In the present case, New Zealand’s panel request expressly provides that only the first sentence of Article 5.5 forms part of its legal claims. New Zealand therefore considers that referring to “Article 5.5 (first sentence)” is sufficient to meet the requirements of Article 6.2 of the *DSU*.

2.42 With respect to Article 8 the Panel found:

Article 8 of the *SPS Agreement* requires Members to observe the provisions of Annex C in the operation of control, inspection and approval procedures and to otherwise ensure that their procedures are not inconsistent with the *SPS Agreement*. Here, too, it seems clear that the Complaining Parties cannot be understood to allege violations of *all* provisions of Annex C, given that they have specified particular provisions of Annex C which they consider to have been violated.<sup>45</sup>

2.43 In the present case, New Zealand’s panel request expressly provides that its claim with respect to Article 8 applies “in relation to” its Annex C claim. Given that New Zealand has specified a particular provision of Annex C which it considers has been violated, New Zealand submits that referring to “Article 8 (in relation to Annex C)” is sufficient to meet the requirements of Article 6.2 of the *DSU*.

2.44 Of the provisions in New Zealand’s panel request not addressed by the Panel in *EC – Approval and Marketing of Biotech Products*, New Zealand submits that *SPS Agreement* Articles 5.1, 5.2 and 5.6 do not contain multiple obligations. It is notable that the respondent

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<sup>44</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47-84.

<sup>45</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47-86.

in *EC – Approval and Marketing of Biotech Products* did not make preliminary claims with respect to Articles 5.1, 5.2 or 5.6. Indeed, as noted by the Panel in that case, these paragraphs contain elaborations of the requirements in Article 2.2. Thus, if a reference to Article 2.2 can be deemed consistent with Article 6.2 of the *DSU* by virtue of additional references to Articles 5.1, 5.2, and 5.6, it follows that the references to Articles 5.1, 5.2, and 5.6 must themselves be consistent with the requirements of Article 6.2.

2.45 With respect to New Zealand’s claim under Annex C, this is expressly limited to subparagraph 1(a), namely the obligation to undertake and complete procedures without undue delay and in no less favourable manner for imported products than for like domestic products.

2.46 Regarding New Zealand’s claims under Articles 2.3 and 5.5, Australia indicates that it requires notice of “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.”<sup>46</sup> In New Zealand’s view Australia’s assertions in this regard are based on a suggestion that has already been rejected by the Appellate Body, namely, that a complaining party must summarise its legal arguments in its panel request. The Appellate Body in *EC – Bananas III* noted that:

...there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel’s terms of reference under *DSU* Article 7, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.<sup>47</sup>

2.47 In New Zealand’s view Australia is requesting in the present case that New Zealand provide its arguments to support its claims under Articles 2.3 and 5.5, and not merely the claims themselves. Australia appears to concede as much in paragraph 56 of its submission, where it criticises New Zealand’s failure to identify which measures it seeks to compare with the measures in the Final IRA “... in order to *substantiate* its claims under Article 2.3 and 5.5”.<sup>48</sup> In New Zealand’s view, a requirement to “substantiate” a claim in a panel request amounts to a requirement to provide the legal arguments that will be used in support of that claim.

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<sup>46</sup> Submission of Australia, para. 55.

<sup>47</sup> Appellate Body Report, *EC – Bananas III*, para. 141.

<sup>48</sup> Submission of Australia, para. 56. Emphasis added.



2.48 Finally, New Zealand recalls the United States’ panel request in the *Japan – Apples* case,<sup>49</sup> which identified the claims of the United States at the sub-paragraph level but not at the sentence level (as New Zealand has done, where appropriate). New Zealand submits that, in cases addressing substantially the same subject matter, it would be inappropriate for different standards to be required of the panel requests.

**2. Connecting the challenged measures with the provisions alleged to have been breached**

2.49 Australia claims that “New Zealand’s panel request also fails to plainly connect each challenged ‘measure’ with the provisions in the *SPS Agreement* claimed to have been infringed”.<sup>50</sup> Australia claims that it is “unclear whether New Zealand is asserting that each challenged ‘measure’ violates each obligation in each treaty provision listed”.<sup>51</sup>

2.50 In New Zealand’s view, no such ambiguity exists in the panel request. Indeed, New Zealand has been at pains in its panel request to follow a similar structure to other cases in which the connection between the measure(s) and the alleged breach(es) has been deemed adequate.

2.51 The relevant section of New Zealand’s panel request provides:

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*.

From this it is clear 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.<sup>52</sup>

2.52 Australia places emphasis in its submission on the report in *US – Oil Country Tubular Goods Sunset Reviews*,<sup>53</sup> and in particular the Appellate Body’s statement that:

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<sup>49</sup> Request for the Establishment of a Panel by the United States, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/2, 8 May 2002.

<sup>50</sup> Submission of Australia, para. 57.

<sup>51</sup> Submission of Australia, para. 58.

<sup>52</sup> There is no requirement for a Member to pursue claims in respect of all the provisions identified in its panel request. See, for example, the *Japan – Apples* case, where the United States did not proceed with claims under Articles 2.3 and 5.3 of the *SPS Agreement*, although it had identified these provisions in its panel request.

...in 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.<sup>54</sup>

2.53 Going behind the Appellate Body’s dicta, it is submitted that the context for the Appellate Body’s observation in that case was substantially different from the present case. In the relevant part of the report in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body was not examining whether Argentina had established a satisfactory connection between a particular claim and a particular measure, but rather whether the United States should have known that it was to prepare a defence against an “as such” challenge to United States statutes; in other words, whether Argentina had adequately established the existence of an “as such” challenge in the claims in its panel request.

2.54 Australia also attempts to derive support for its argument from *Korea – Dairy*.<sup>55</sup> However, the issue of connecting the challenged measures with the legal provisions did not arise in that case as only one measure was challenged. New Zealand has already shown that the direct relevance of the findings in *Korea – Dairy* (as opposed to the Appellate Body’s general guidance on the interpretation of Article 6.2) is limited as in that case the panel request was framed in terms of article-level obligations, not paragraph- and sub-paragraph-level obligations. It is unclear to New Zealand how referring to *Korea – Dairy* supports Australia’s claim that New Zealand failed to connect the challenged measures with the obligations claimed to be breached.

2.55 In New Zealand’s view the panel decisions in *Canada – Wheat Exports and Grain Imports*, *EC – Approval and Marketing of Biotech Products*, and *EC – Trademarks and Geographical Indications* are more relevant on this point, and New Zealand has taken them carefully into consideration in structuring its panel request. In the first of these cases, Canada argued that the United States’ panel request did not make clear which laws, regulations or actions resulted in the violation of which of the two obligations in GATT Article XVII:1(b). Despite the fact that the reference to “laws, regulations and actions” was ultimately deemed

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<sup>53</sup> Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, (*US – Oil Country Tubular Goods Sunset Reviews*).

<sup>54</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

<sup>55</sup> Submission of Australia, para. 59.

to be too vague to identify the specific measures at issue, the Panel found that the use of the words “*and* actions” as opposed to “*or* actions” suggested that the complainant “may have wished to claim... that each of the three categories of measures identified – laws, regulations and actions – is inconsistent with both obligations of Article XVII:1(b).”<sup>56</sup> The Panel concluded:

This way of presenting the Article XVII claim does not, in our view, have as a consequence that Canada does not know what case it has to answer and so cannot begin to prepare its defence, or that the third parties are uninformed as to the legal basis of the complaint and thus lack an opportunity effectively to respond to the United States’ complaint. We do not consider, therefore, that this aspect of the presentation of the Article XVII claim compels the conclusion that the United States’ panel request falls short of the requirements of Article 6.2.<sup>57</sup>

2.56 In *EC – Approval and Marketing of Biotech Products*, the three panel requests each set out the different EC measures at issue and then went on to state that “[t]hese measures appear to be inconsistent with the following provisions [...]”.<sup>58</sup> The Panel found that:

Thus, similar to the situation in *Canada – Wheat Exports and Grain Imports*, the wording of the panel requests in the present case suggests that each of the measures at issue in the three requests is inconsistent with each of the provisions identified in the three requests...

The European Communities has noted that if the panel requests are read to mean that each of the measures identified is alleged to violate each of the provisions listed, the European Communities might have to begin to prepare a defence against a large number of claims. We agree. However, we do not think that this fact supports a different reading of the panel requests. Nor do we think that this means that the legal standard of clarity against which these panel requests must be measured is higher than it would have been had the panel requests identified fewer claims.<sup>59</sup>

2.57 The Panel in *EC – Trademarks and Geographical Indications* dealt with a similar issue in the following way:

The European Communities further contends that it is entitled to know which provision or aspect of Regulation No. 2081/92 is supposed to violate certain obligations and in which way such a violation is deemed to occur. In the Panel’s view, the European Communities is seeking the arguments, rather than just the claims, of Australia. That being said, the Panel wishes to assure the European Communities that it is fully entitled to know the arguments of Australia *during the course of the proceedings*. Those arguments must be set out and may be clarified in Australia’s

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<sup>56</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 29.

<sup>57</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10- 29.

<sup>58</sup> Emphasis added. See, for example, the United States’ panel request, WT/DS291/23, 8 August 2003.

<sup>59</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47- 98 and 101.

submissions. However, Article 6.2 of the *DSU* does not require those arguments to be set out in the request for establishment of a panel.<sup>60</sup>

2.58 In New Zealand’s view, 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 these previous cases. New Zealand considers that it has clearly and unambiguously connected the challenged measures with the provisions alleged to have been breached.

### **C. Australia has not demonstrated prejudice**

2.59 In New Zealand’s view, as the panel request identifies the specific measures at issue and provides a brief summary of the legal basis of its complaint sufficient to present the problem clearly, Australia cannot have suffered any prejudice in this case. It is, therefore, unnecessary for the Panel to consider separately the question of prejudice.<sup>61</sup>

2.60 In the event that the Panel does look at this issue, however, New Zealand does not consider that Australia has proven prejudice in the circumstances of this case. It is clear from the jurisprudence that even where some uncertainty exists in either the identification of the specific measures, or the legal basis of the complaint, it is still necessary for the respondent to demonstrate that it has actually suffered prejudice as a result. For example, the Appellate Body in *Korea – Dairy* stated that:

In assessing whether the European Communities’ request met the requirements of Article 6.2 of the *DSU*, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities’ request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant’s submission nor at the oral hearing. We, therefore, deny Korea’s appeal relating to the consistency of the European Communities’ request for the establishment of a panel with Article 6.2 of the *DSU*.<sup>62</sup>

From this it is clear that the burden is on Australia to provide “supporting particulars” that it has suffered actual prejudice in the proceedings to date.

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<sup>60</sup> Panel Report, *EC – Trademarks and Geographical Indications*, para. 7.2- 40.

<sup>61</sup> This approach was taken by the Panel in *EC – Trademarks and Geographical Indications*, para. 7.2- 44.

<sup>62</sup> Appellate Body Report, *Korea – Dairy*, para. 131.

2.61 Australia puts forward a “notion of prejudice”<sup>63</sup> whereby “failure to fulfil the due process objective of Article 6.2 results in prejudice to the respondent and any third parties.”<sup>64</sup> In New Zealand’s view, while there is undoubtedly a close relationship between due process and prejudice, this does not obviate the necessity of Australia providing “supporting particulars” that it has in fact suffered prejudice. It is tautological to suggest that “failure to fulfil the due process objective of Article 6.2 *results in* prejudice to the respondent and any third parties.”<sup>65</sup> Recalling the allocation of the burden of proof on this matter, the key point is that proof of prejudice supplied by the respondent *is evidence towards establishing* that the due process objective of Article 6.2 has not been met.

2.62 Australia cites with approval the recent panel decision in *Japan – DRAMs (Korea)*, specifically parts of the following passage:

In our view, the due process objective of the second sentence of Article 6.2 of the *DSU* may only properly be upheld if panels apply that provision on the basis of the text of the Request for Establishment. We believe that consideration of an actual prejudice suffered during the panel process undermines that due process objective, since it allows a Member to correct any lack of clarity in its request during the panel proceedings, even though the request may not have been sufficiently clear for the respondent to begin preparing its defence at the beginning of the panel process.<sup>66</sup>

2.63 The Panel in that case was responding specifically to Korea’s argument that the Panel ought to take a “a prejudice-based approach” to *DSU* Article 6.2 whereby “Korea interprets the Appellate Body [in *Korea – Dairy*] to mean that *DSU* Article 6.2 must always be applied at the end of the panel proceedings, in light of whether or not the respondent actually suffers prejudice during the course of the proceedings.”<sup>67</sup> It is not clear to New Zealand what the Panel meant by the words quoted above. However, if the Panel can be interpreted as *conflating* the concept of prejudice and the due process objective of Article 6.2, then New Zealand respectfully disagrees with the Panel.

2.64 In New Zealand’s view, consideration of “actual prejudice suffered” does not “undermine the due process objective”, nor does it “allow a Member to correct any lack of

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<sup>63</sup> Submission of Australia, para. 28.

<sup>64</sup> Submission of Australia, para. 28.

<sup>65</sup> Submission of Australia, para. 28.

<sup>66</sup> Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories From Korea*, WT/336/R, adopted 17 December 2007, as modified by Appellate Body Report, (*Japan – DRAMs (Korea)*), para. 7.9. This issue was not considered on appeal.

<sup>67</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.6.

clarity in its request during the panel proceedings”. Rather, evidence of the existence of actual prejudice is an important element to consider in determining whether the due process objective has been undermined in the first place.<sup>68</sup> This is true whether the procedural claims are heard prior to the first submissions (as in the present proceedings), or later during the panel or appellate proceedings. In New Zealand’s view, simply disregarding prejudice as a factor to consider under Article 6.2 would be contrary to Appellate Body jurisprudence on this matter.<sup>69</sup>

2.65 Australia simply asserts that its “ability to prepare its defence in a meaningful way” has been prejudiced due to the “considerable uncertainty as to the precise identity of the measures at issue and also as to the legal claims being made by New Zealand”.<sup>70</sup> But the burden is on Australia to demonstrate that it is actually suffering such inability to prepare its defence, and therefore that the prejudice it alleges has in fact occurred. Australia has not attempted to discharge this burden in its submission.

2.66 In this regard Australia seeks to rely, once again, on the finding of the Panel in *Canada – Wheat Exports and Grain Imports*, claiming that the considerable uncertainty faced by Canada as the respondent in that case is analogous to the “considerable uncertainty” faced by Australia in this case.<sup>71</sup> New Zealand has already highlighted the significant differences between the generality of the description of the measures in the *Canada – Wheat Exports and Grain Imports* and the specificity of the description of the measures in this case.<sup>72</sup>

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<sup>68</sup> Appellate Body Report, *US – Carbon Steel*, para. 127.

<sup>69</sup> See, for example, Appellate Body Report, *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/67/68/AB/R, adopted 22 June 1998, paragraph 70; Appellate Body Report, *Canada – Dairy*, para. 131; Appellate Body Report, *US – Carbon Steel*, para. 127. Regarding the status of its previous findings, the Appellate Body has observed that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same”: Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

<sup>70</sup> Submission of Australia, para. 63.

<sup>71</sup> New Zealand notes that para. 64 of the Submission of Australia states that “[t]he Appellate Body upheld the panel’s decision [in *Canada – Wheat Exports and Grain Imports*] as to the inconsistency of the panel request”. While that statement is true, it is worth noting that the Appellate Body only considered the issue of the timeliness of the request for a preliminary ruling; it expressly did *not* consider whether the panel request adequately identified the specific measures at issue: see para. 202 of the Appellate Body Report in that case. As has been noted by the Appellate Body “a Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal”: Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* WT/DS31/AB/R, adopted 30 July 1997, footnote 28.

<sup>72</sup> It is worth noting here that the Panel in *Canada – Wheat Exports and Grain Imports* considered and dismissed two further allegations by Canada that other aspects of the panel request in that case violated DSU Article 6.2. In relation to the United States’ claims regarding rail car allocation the Panel found that the panel request

New Zealand disputes that the panel request in these proceedings creates *any* uncertainty, let alone uncertainty of the magnitude present in *Canada – Wheat Exports and Grain Imports*.<sup>73</sup>

2.67 New Zealand submits that Australia has provided no evidence of actual prejudice in the circumstances of this case.

### **III. CONCLUSION**

For the reasons outlined in this submission, New Zealand requests the Panel to reject Australia’s arguments as to the inconsistency of New Zealand’s panel request with Article 6.2 of the *DSU*.

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adequately informed Canada of the specific measures under challenge, even though the “description of the measures at issue does not specify any laws, regulations, or other legal instrument” (para. 36). The other related to the United States’ claims regarding TRIMs.

<sup>73</sup> See arguments in paragraphs 2.18 – 2.21 of this submission.