WORLD TRADE ORGANIZATION

WT/DS434/15

27 October 2014

(14-6237)

Page: 1/14

Original: English

AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING

COMMUNICATION FROM THE PANEL

The following communication, dated 22 October 2014, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body (DSB).

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On 7 May 2014, Australia submitted to the Panel a request for a preliminary ruling concerning the consistency of Ukraine's request for the establishment of a Panel (WT/DS434/11) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

On 19 August 2014, the Panel issued the attached preliminary ruling to the parties and third parties.

After consulting the parties to the dispute, the Panel decided to inform the Dispute Settlement Body (DSB) of the content of its preliminary ruling. Therefore, I would be grateful if you would circulate this letter and the attached preliminary ruling to the Members of the DSB.

PRELIMINARY RULINGS BY THE PANEL

1 PROCEDURAL BACKGROUND

1.1. On 7 May 2014, Australia submitted to the Panel a request for a preliminary ruling concerning the consistency of Ukraine's panel request with the DSU.

1.2. Australia requested that the Panel make a preliminary ruling on these matters as early as possible (and in particular, that the Panel issue its preliminary ruling before the filing of first written submissions by the parties). Australia also requested the opportunity to respond to any submissions made by Ukraine in relation to this preliminary ruling request.

1.3. On 11 June 2014, Ukraine responded to Australia's requests. Also on 11 June 2014, the Panel provided the third parties with an opportunity to comment on Australia's preliminary ruling request. On 17 June 2014, the Panel received comments from the European Union. On 18 June 2014, the Panel received comments from Argentina, Brazil, Canada, the Dominican Republic, Guatemala, and Honduras.

1.4. On 1 July 2014, the Panel received comments from Australia on Ukraine's response to Australia's request for a preliminary ruling. On 8 July, the Panel received from Ukraine comments on Australia's comments.

2 AUSTRALIA'S REQUEST FOR A PRELIMINARY RULING

2.1. Australia requests the Panel to make a preliminary ruling that Ukraine's panel request is inconsistent with the requirements of the DSU with respect to Ukraine's claim under Article I of the GATT 1994. Australia makes this argument on two alternative bases:

a. Ukraine's claim under Article I was not included in Ukraine's consultations request, and its inclusion in the panel request amounts to an improper expansion of the scope of the dispute.

b. Alternatively, Ukraine's panel request does not provide a brief summary of the legal basis of this complaint sufficient to present the problem clearly, contrary to the requirements of Article 6.2 of the DSU.

2.2. Australia also argues that, if Ukraine's panel request purports to include a most-favoured-nation claim under Article 2.1 of the TBT Agreement, this claim should also be excluded from the Panel's terms of reference.

2.3. We consider first Australia's request for a ruling in respect of the introduction of new claims in Ukraine's panel request, and then its request for a ruling based on whether Ukraine's panel request presents the problem clearly, in accordance with Article 6.2 of the DSU.

3 INTRODUCTION OF NEW CLAIMS IN THE PANEL REQUEST

3.1. Australia first argues that Ukraine's most-favoured nation (MFN) claims under Article I of the GATT 1994 and under Article 2.1 of the TBT Agreement, are not properly before the Panel because their inclusion in the panel request amounts to an improper expansion of the scope of the dispute.

3.2. We first describe the arguments of the parties and third parties, before proceeding with our assessment of Australia's request.

3.1 Main arguments of the parties

3.1.1 Australia

3.3. Australia submits that, as a responding party, it is entitled to know the case it is required to answer. Australia submits that the deficiencies in Ukraine's panel request have prejudiced, and continue to prejudice, the preparation of Australia's defence, thereby violating Australia's "fundamental right to due process in these proceedings".[1]

3.4. Australia submits that Ukraine's panel request "raises a fundamentally new claim that was not identified in its request for consultations".[2] It observes that "Ukraine now claims in its panel request that Australia's measure is inconsistent with Article I of the GATT 1994 – the most-favoured-nation obligation".[3] Australia also submits that "[i]t is unclear whether Ukraine's panel request also purports to claim that Australia's measure is inconsistent with the most-favoured-nation requirement in Article 2.1 of the TBT Agreement (particularly given Ukraine has not made a parallel most-favoured-nation claim under Article 4 of the TRIPS Agreement)".[4] Australia notes that, "[i]n its consultations request, Ukraine had delimited its claim under Article 2.1 of the TBT Agreement to the alleged inconsistency of Australia's measure with 'the *national treatment* requirement set out in [Article 2.1] by not providing equal competitive opportunities to imported tobacco products and foreign trademark right holders as compared to like domestic tobacco products and trademark right holders'".[5] Australia also notes that "in Ukraine's statements before the Dispute Settlement Body when requesting the establishment of a panel in this matter, Ukraine explicitly referred to its national treatment claim but made no mention of any complaint with respect to Australia's most-favoured-nation obligations."[6]

3.5. Australia argues that Ukraine's addition of a most-favoured-nation claim in its panel request "took Australia by surprise"[7] because Ukraine did not raise any concerns in relation to most-favoured-nation obligations with Australia during the formal consultations held on 12 April 2012. In the almost 18-month period from April 2011, when Australia notified its measure to the WTO, to August 2012, when Ukraine filed its panel request, Ukraine did not raise with Australia any concerns that the tobacco plain packaging measure was inconsistent with Australia's most-favoured-nation obligations.[8] Australia argues that it was not afforded any opportunity to consult

[1] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 4.
[2] Australia's request for a preliminary ruling in relation to Ukraine's panel request, paras. 11-13.
[3] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 13.
[4] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 13.
[5] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 13 (citing Ukraine's request for consultations). (emphasis original)
[6] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 13 (citing Ukraine's statements at the meeting of the Dispute Settlement Body on 31 August 2012 (WT/DSB/M/321, 7 November 2012, para. 78) and on 28 September 2012 (WT/DSB/M/322, 23 November 2012, para. 67)).
[7] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 14.
[8] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 14 (citing Notification by Australia to the *Committee on Technical Barriers to Trade*, 8 April 2011, G/TBT/N/AUS/67).

with Ukraine on its most-favoured-nation claim, or to assess whether it could be the subject of a mutually agreed solution, before Ukraine resorted to further dispute settlement action.

3.6. Australia argues that Ukraine has attempted to introduce its "new" most-favoured-nation claim in its panel request "by conflating it with Ukraine's original claim in the consultations request that Australia's measure is inconsistent with its national treatment obligations". Australia argues that the inclusion of this fundamentally new legal claim "clearly expands the scope of this dispute and changes the essence of the complaint Ukraine raised in consultations".[9] Australia observes that, not only are the most-favoured-nation and national treatment obligations distinct, but they form separate pillars of the multilateral trading system and are directed towards addressing fundamentally or essentially different behaviour.[10] In addition, Australia argues that essentially different evidentiary and legal issues arise in a claim of less favourable treatment as *between* products imported from "certain countries" compared with "other countries", than in a claim of less favourable treatment of products imported from a complainant compared with *domestic* products.[11]

3.7. Australia notes that it does not contend that Ukraine's consultations request and its panel request must share a "precise and exact identity", but rather that "Ukraine's inclusion in its panel request of a new most-favoured-nation claim not raised in its consultations request, or during the course of consultations, improperly expands the scope of this dispute and changes the essence of the complaint against Australia raised in consultations".[12] Australia requests that "the Panel exclude from its terms of reference Ukraine's new legal claim that Australia's measure is inconsistent with its most-favoured-nation obligation under Article I of the GATT 1994" in order to "guard against frustration of the objects and purpose of the DSU, and to ensure that due process is followed in this dispute". Australia also requests for the same reasons that, if Ukraine's panel request purports to include a most-favoured-nation claim under Article 2.1 of the TBT Agreement, this also be removed from the Panel's terms of reference.[13]

3.8. Australia notes that Ukraine argues that the addition of MFN claims to its panel request "simply evolved from", and has not changed the essence of, Ukraine's *national treatment* claims.[14] Australia responds that Ukraine seeks to obscure the fact that MFN and national treatment obligations constitute separate and legally distinct obligations. While both proscribe discriminatory treatment, Australia argues that it is clear that each obligation has a different nature or "essence" because these obligations proscribe different forms of discriminatory treatment, and claims of violation are determined on different legal and factual bases by reference to different points of comparison.[15]

3.9. Australia argues that "the fundamental purpose of the national treatment obligation is to avoid protectionism" and that consequently, the "essence" of a national treatment claim under the GATT 1994 and the TBT Agreement concerns the extent to which a Member discriminates between imported products and like domestic products so as to favour domestic production. Australia submits that the legal and factual basis of a national treatment claim under these agreements therefore requires a comparison of the treatment accorded to imported products and that accorded to like domestic products to determine whether less favourable treatment has been accorded to imported products *vis-à-vis* domestic products. Australia endorses the European Union's submission that the "essence" of a national treatment claim is the substantive difference between the treatment accorded to each group of products, not either comparator considered in isolation.[16]

3.10. Australia argues that the fundamental purpose of the MFN obligation is, by contrast, to avoid preferential treatment to certain trading partners over others, and that consequently, the essence of an MFN claim under the GATT 1994 and the TBT Agreement concerns the extent to

[9] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 15.
[10] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 16.
[11] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 17.
[12] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 18.
[13] Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 18.
[14] Australia's comments on responses to Australia's requests for preliminary rulings, para. 8.
[15] Australia's comments on responses to Australia's requests for preliminary rulings, para. 9 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.79).
[16] Australia's comments on responses to Australia's requests for preliminary rulings, para. 10 (citing the European Union's comments on Australia's requests for preliminary rulings, para. 18).

which a Member discriminates between its trading partners in respect of like products so as to favour products from a particular country. Australia submits that the legal and factual basis of an MFN claim under these agreements therefore requires a comparison of the treatment accorded to products from one Member and the treatment accorded to products from any other country to determine whether less favourable treatment has been accorded to the products of a Member *vis-à-vis* those of another trading partner. Australia states that the "essence" of an MFN claim is the substantive *difference between* the treatment accorded to each group of products; not either comparator considered in isolation.[17]

3.11. Australia agrees with the European Union's explanation that whilst a national treatment claim and an MFN claim might have one comparator in common (that is, the treatment afforded to imported products from the complaining Member), it does not follow that the essence of the claims are the same.[18] Australia notes that, in the context of this dispute, it is not clear whether Ukraine's national treatment claims and its new MFN claims would have even this comparator in common (that is, the treatment afforded to products imported from Ukraine), given that Ukraine does not export tobacco products to Australia.[19]

3.12. Australia also argues that, contrary to Ukraine's suggestion, "the distinct nature of the national treatment and MFN obligations is plain notwithstanding that both obligations are contained within Article 2.1 of the TBT Agreement".[20] While this does not mean that a single measure cannot give rise to violations of both obligations, such a concurrent breach "can *only* arise in circumstances where a measure accords less favourable treatment to certain imported products than that accorded to like domestic products *and* to like products originating in other countries".[21] That is, because of the "essential" differences between these two obligations, determining whether a measure violates the national treatment obligation is both legally and factually a separate and distinct exercise from determining whether a measure violates the MFN obligation – a breach of one obligation neither presupposes nor establishes a breach of the other. Consequently, disputes commonly concern only *one* of these obligations, including disputes with respect to Article 2.1 of the TBT Agreement.[22]

3.13. Australia adds that, contrary to Appellate Body authority, "a finding in Ukraine's favour would mean that any complainant intending to bring both national treatment and MFN claims would only ever need to indicate *one* of these claims in a consultations request, allowing the subsequent addition of the other claim to the panel request without any opportunity for consultations on this new claim".[23]

3.1.2 Ukraine

3.14. Ukraine asks the Panel to reject Australia's request and to find that all claims presented in Ukraine's panel request are properly within the Panel's terms of reference. Ukraine argues that its panel request does not expand the scope of the matter before the panel beyond what was provided for in the request for consultations.

3.15. Ukraine observes that, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel, not the request for consultations.[24] Ukraine notes that, although it is important that consultations are held on the matter addressed in

[17] Australia's comments on responses to Australia's requests for preliminary rulings, para. 11 (citing the European Union's comments on Australia's requests for preliminary rulings, para. 19).
[18] Australia's comments on responses to Australia's requests for preliminary rulings, para. 12 (citing the European Union's comments on Australia's requests for preliminary rulings, para. 20).
[19] Australia's comments on responses to Australia's requests for preliminary rulings, para. 12.
[20] Australia's comments on responses to Australia's requests for preliminary rulings, para. 13.
[21] Australia's comments on responses to Australia's requests for preliminary rulings, para. 14 (referring to Appellate Body Report, *US—Tuna II (Mexico)*, para. 299). (emphasis original)
[22] Australia's comments on responses to Australia's requests for preliminary rulings, para. 14.
[23] Australia's comments on responses to Australia's requests for preliminary rulings, para. 16.
[24] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 4 (citing Appellate Body Report, *US – Carbon Steel*, para. 124).

a panel request, it is well established that there is no need for a precise and exact identity between the claims identified in the request for consultations and the request for establishment.[25]

3.16. Ukraine also argues that, pursuant to Article 4.4 of the DSU, a request for consultations "only needs to identify the measure at issue and provide 'an indication' of the legal basis of the complaint", and that the important point is that the measure identified in the request for establishment is "essentially the same as the measure on which consultations were held".[26] In Ukraine's view, the claims made in a request for establishment need not be limited to those identified in the request for consultations, as long as the essence of the complaint has not been changed by expanding the scope of the dispute.[27] Ukraine submits that there is a measure of flexibility for Members when formulating complaints in panel requests subsequent to consultations.[28] As a consequence, a complainant is entitled to revise the listing of treaty provisions with which the measure is alleged to be inconsistent, including by adding new provisions to the request for establishment that were not present in the request for consultations.[29] In addition, Ukraine submits that it is precisely one of the goals of consultations to better understand the measure and its legal and practical implications, such that it is "only natural that the legal basis of the complaint may evolve beyond that of the request for consultations".

3.17. Ukraine argues that the reference to Article I of the GATT 1994 and to the MFN aspect of Article 2.1 of the TBT Agreement has not changed the essence of its complaint or expanded the scope of the dispute. Instead, Ukraine submits, these claims evolved from the non-discrimination claims contained in the request for consultations. Ukraine submits that the essence of its claim, as reflected in both Ukraine's request for consultations and its panel request, is (*inter alia*) that the Australian measures violate the non-discrimination requirement of the GATT 1994 and the TBT Agreement by not providing equal competitive opportunities to certain imported tobacco products. Ukraine argues that both Articles I and III of the GATT 1994 impose basic non-discrimination obligations on WTO Members.[30] Moreover, Article 2.1 of the TBT Agreement (to which Ukraine referred in both its request for consultations and its panel request), includes "both types" of non-discrimination (i.e. MFN and national treatment obligations). Moreover, Ukraine notes that Article 2.1 of the TBT Agreement is a general "non-discrimination" obligation[31] and that, in *US - Tuna II (Mexico)*, the Appellate Body did not specify whether the detriment caused by the measure at issue was with respect to domestic products, other imported products or both.[32]

3.18. Ukraine argues that, as a consequence, Ukraine "has simply clarified the nature of its non-discrimination claim and has not changed the essence of its complaint of discrimination as a result of less favourable treatment accorded to certain imported products". Ukraine submits that the MFN claims in the panel request "naturally evolved from and are intrinsically related to" the claims that were already included in the request for consultations and that were the subject of the consultations.[33]

3.19. Ukraine further notes that Australia does not dispute that the measures identified in the request for consultations and the panel request are the same, and that it cannot be disputed that

[25] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 4 (citing Appellate Body Report, *US – Upland Cotton*, para. 293).
[26] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 5 (citing Appellate Body Report, *Brazil – Aircraft*, para. 132).
[27] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 6 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138; Panel Reports, *China – Publications and Audiovisual Products*, para. 7.115; *EC – Fasteners (China),* para. 7.24; and *China – Broiler Products*, para. 7.223).
[28] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 5 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 136).
[29] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 6 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138).
[30] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 7 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.82).
[31] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 8 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 93).
[32] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 8 (citing Appellate Body Report, *US – Tuna II (Mexico*), para. 298).
[33] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 9.

Ukraine included less favourable treatment claims in both its request for consultations and its panel request, including with reference to Article 2.1 of the TBT Agreement. Ukraine therefore submits that it added only a clarifying reference to Article I of the GATT 1994 in its panel request, and that it has neither expanded the scope nor changed the essence of the complaint. Ukraine argues that Australia is asking the Panel to impose an "unduly rigid approach" to the panel request, which would effectively turn the request for consultations "into the document that governs the terms of reference of the dispute". Ukraine argues that such an approach is not supported by Articles 6 or 7 of the DSU, or by WTO jurisprudence.[34]

3.2 Main arguments of the third parties

3.20. **Argentina** submits that, "as a general rule", panel requests should not include provisions of covered agreements which were not included in the corresponding request for consultations and which were therefore not the subject of consultations. Argentina submits that by including Article I:1 of the GATT 1994, Ukraine is introducing "a totally new issue which … should have been the subject of consultations", because "the provision … does not contain a more detailed elaboration of another rule previously invoked, but is a central and substantive provision of the multilateral trading system which would have deserved proper consideration in the consultation process".[35] Argentina adds that, although a panel request may contain certain legal provisions not identified in the request for consultations as part of the "natural evolution of the consultation process", such a natural process must be limited by the need to protect the responding party's right to due process and its defence rights.[36]

3.21. **Brazil**[37] submits that in order to fulfill the substantive conditions of Article 6.2 of the DSU, the panel request must identify the measures targeted in the dispute, and must provide a brief summary and legal basis of the claims. These two requirements set the limits of the WTO adjudicating bodies' jurisdiction, but also provide the parties and third parties with sufficient information concerning the claim in order to allow them an opportunity to respond to the complainant's case. Brazil adds that after better understanding the functioning of the measure at issue, the complainant may add new claims to the panel request provided such claims do not change the essence of the dispute.[38]

3.22. **Canada** argues that the panel must exercise caution in its approach to determining whether a panel request improperly expands the scope of the dispute or changes the essence of the complaint raised in consultations. A narrow interpretation of what constitutes an expansion of the dispute or a change in the essence of the complaint could lead to complainants citing an unnecessarily long list of provisions in consultation requests, and could result in consultations being reduced to a perfunctory exercise that would frustrate the opportunity to define and delimit the scope of the dispute. Canada also argues that an overly broad interpretation of what constitutes an expansion of the dispute or a change in the essence of the complaint could result in complainants withholding claims from the consultation request only to include them in the panel request in order to obtain a strategic advantage over the responding party. Such a result would undermine due process. Canada asks that the panel carefully examine how best to balance the interests at play and preserve the flexibility that is necessary for the proper functioning of the dispute settlement process.[39]

3.23. The **Dominican Republic** agrees with Ukraine that its MFN claims represent the reasonable evolution of the national treatment claims in its consultations request, given the shared fundamental objective of both types of non-discrimination obligation. The Dominican Republic notes the Appellate Body's comment that "Articles I:1 and III:4 [of the GATT 1994] … [are each] concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4, equality of competitive opportunities for imported products and like

[34] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 10.
[35] Argentina's third-party comments on Australia's requests for preliminary rulings, paras. 28-29.
[36] Argentina's third-party comments on Australia's requests for preliminary rulings, para. 30.
[37] Brazil's third-party comments on Australia's requests for preliminary rulings, para. 2.
[38] Brazil's third-party comments on Australia's requests for preliminary rulings, paras. 3-8.
[39] Canada's third-party comments on Australia's requests for preliminary rulings, para. 9.

domestic products".[40] As a consequence, the Dominican Republic considers it logical that Ukraine would, after consultations with Australia, consider that they also affect the equality of competitive opportunities among like imported products, in addition to causing disparate competitive opportunities between imported products and like domestic products. The Dominican Republic also notes that, given the fundamental similarities in the nature of these claims, it cannot be said that the inclusion of MFN claims "chang[es] the essence" of Ukraine's complaint.[41]

3.24. The Dominican Republic also notes that Article 4.6 of the DSU protects the confidentiality of consultations, and that, as such, the Panel should resolve the preliminary objections raised by Australia without reference to the content of the consultations in the respective disputes.[42]

3.25. The **European Union** submits that, with regard to Article I of the GATT 1994 and Article 2.1 of the TBT Agreement (with respect to MFN) and the relationship between the consultation request and the panel request, "Ukraine's position … depends on characterising what has happened as an 'evolution' that does not change the 'essence' of the matter".[43]

3.26. The European Union observes that in a national treatment discrimination claim, the measure at issue is the substantive difference between the treatment afforded to national products and the treatment afforded to imported products. The measure at issue is not the treatment afforded to national products in isolation; nor the treatment afforded to imported products in isolation. Thus, the "essence" of the matter is the substantive difference; not either comparator considered in isolation.[44] In an MFN claim, the essence of the matter is the substantive difference between the treatment afforded to products from one Member and the treatment afforded to products from another Member; not either comparator considered in isolation.[45] Thus, in the European Union's view, whilst a national treatment claim and an MFN claim might have one comparator in common (notably, the treatment afforded to imported products from the complaining Member), it does not follow that the essence of the claims are the same (and the justifications put forward for such measures might be very different). The European Union also observes that, if Ukraine is correct, it would mean that, between a consultation request and a panel request, any national treatment claim under any covered agreement could "evolve" into any MFN claim under the same or any other covered agreement, and vice versa.[46]

3.27. Moreover, the European Union observes that Ukraine's claim appears to be a *de facto* claim and, while it is possible for complaining Members to advance claims of *de facto* breach of Article I of the GATT 1994 and Article 2.1 of the TBT Agreement, such claims should not be lightly made or accepted. The European Union therefore cautions against a general assumption that *de facto* claims or claims against unwritten measures may be deemed to "evolve" from other claims under other provisions.[47] The European Union also makes several observations in support of the contention that the question of whether or not a national treatment claim in a consultation request could "evolve" into an MFN claim in a panel request is something that may depend on all the factual circumstances surrounding a particular case.[48] In this particular case, the European Union does not express a view on whether or not such circumstances are present. Instead it submits that, if the Panel were to agree with Australia, the Panel may be in a position to exercise judicial economy with respect to whether Ukraine identifies the legal basis of the complaint.[49]

3.28. **Guatemala** observes that Ukraine did not in its request for consultations refer to "non-discrimination" obligations in general, but in fact, limited its claims to the issue of national

[40] The Dominican Republic's third-party comments on Australia's requests for preliminary rulings, para. 27 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.82, and *US – Clove Cigarettes*, para. 93).
[41] The Dominican Republic's third-party comments on Australia's requests for preliminary rulings, para. 28.
[42] The Dominican Republic's third-party comments on Australia's requests for preliminary rulings, para. 29.
[43] The European Union's third-party comments on Australia's requests for preliminary rulings, para. 16.
[44] The European Union's third-party comments on Australia's requests for preliminary rulings, paras. 17-18.
[45] The European Union's third-party comments on Australia's requests for preliminary rulings, para. 19.
[46] The European Union's third-party comments on Australia's requests for preliminary rulings, para. 21.
[47] The European Union's third-party comments on Australia's requests for preliminary rulings, para. 22.
[48] The European Union's third-party comments on Australia's requests for preliminary rulings, paras. 23-29.
[49] The European Union's third-party comments on Australia's requests for preliminary rulings, para. 32.

treatment. Guatemala states that it has difficulties understanding how a claim limited to national treatment could evolve into a claim comprising the MFN obligation given that, although national treatment and MFN obligations refer to the concept of "non-discrimination", claims under those obligations are substantially different.[50] Guatemala nonetheless submits that Australia's request for a preliminary ruling is premature, as it is difficult to assess whether Australia "has suffered prejudice" at this point in time, given the fact that Ukraine has not even had the opportunity to submit its first written communication and elaborate on its claims. Guatemala considers that it would be appropriate to defer the issuing of a ruling on this objection for later in the course of the proceedings.[51]

3.29. **Honduras** argues that Ukraine's MFN claims can be found to have reasonably evolved from the national treatment claim that was listed in Ukraine's consultations request, as there is a close substantive proximity between the national treatment and MFN obligations. Specifically, Honduras argues that both claims involve allegations of discrimination (which Honduras specifies as unwarranted distinctions between, and differential treatment of, groups of products); both claims require similar analytical steps; and the two claims are substantively so similar that the drafters of the TBT and SPS Agreements placed both claims in the same sentence in one provision (that is, Article 2.1 of the TBT Agreement and Article 2.3 of the SPS Agreement), thereby indicating that the drafters did not consider the two claims have a fundamentally different essence.[52] Honduras adds that the essence of Ukraine's claims is that the Australian measures violate the non-discrimination requirement of the GATT 1994 and the TBT Agreement, such that Ukraine merely clarified the nature of its non-discrimination claim in its panel request.[53]

3.3 Assessment by the Panel

3.30. The question we must consider here is whether Ukraine's claims under Articles I of the GATT 1994 and 2.1 of the TBT Agreement (in relation to MFN treatment) are properly before us or whether we should, as Australia requests, exclude them from consideration on the basis that they are not properly within our terms of reference, because they were not consulted on.

3.31. The basis for this part of Australia's request is the fact that these claims were not included in Ukraine's request for consultations. The question before us therefore involves the relationship between the request for consultations and the panel request. We first consider this question, and the applicable legal provisions, before turning to an assessment of Australia's request in the light of these requirements.

3.3.1 Relationship between the claims in the request for consultations and the panel request

3.32. We first note that our terms of reference, in accordance with Article 7.1 of the DSU, are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS434/11 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[54]

3.33. Our terms of reference are therefore defined with reference to Ukraine's panel request.

3.34. As described by the Appellate Body, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel, and Article 6.2 of the DSU sets forth the requirements applicable to such requests.[55] Article 6.2 in turn provides that:

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[50] Guatemala's third-party comments on Australia's requests for preliminary rulings, paras. 3.1-3.4.
[51] Guatemala's third-party comments on Australia's requests for preliminary rulings, para. 3.7
[52] Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 29-32.
[53] Honduras' third-party comments on Australia's requests for preliminary rulings, para. 33.
[54] *Constitution of the Panel established at the request of Ukraine*, Communication from the Secretariat, WT/DS434/13.
[55] See Appellate Body Report, *US – Carbon Steel*, paras. 124-125.

> 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. (Emphasis added).

3.35. We note that, although Article 6.2 requires the complainant to indicate in its panel request "whether consultations were held", it does not require the measures and claims identified in the panel request as basis for the complaint to be *identical* to those identified in the consultations request. Articles 4.4 and 6.2 both refer to the identification of the measures and claims at issue, but do not impose exactly the same requirements in this respect: a request for consultation under Article 4.4 must include an "identification of the measures at issue and *an indication of* the legal basis of the complaint", while the panel request that follows must "identify the specific measures at issue and provide *a brief summary of the legal basis of the complaint*" (emphasis added).

3.36. As described by the Appellate Body, "Articles 4 and 6 … set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[56] As the Appellate Body has also clarified, it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.[57] In this respect, we note the Appellate Body's observation in *Mexico – Anti-Dumping Measures on Rice* in respect of the term "legal basis", as used in both Articles 4.4 and Article 6.2 of the DSU:

> It does not follow from the use of the same term in both provisions, however, that the claims made at the time of the panel request must be identical to those indicated in the request for consultations. Indeed, instead of such a rigid approach, we consider that the dispute settlement mechanism, which generally requires that a panel request be preceded by consultations, allows for a measure of flexibility to Members in subsequently formulating complaints in panel requests.[58]

3.37. We also note the Appellate Body's further statement that:

> Reading the DSU … to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations - namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request *may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations*. In other words, *the addition of provisions must not have the effect of changing the essence of the complaint*.[59] (Emphasis added)

3.38. In sum, the DSU does not require "precise and exact identity"[60] between the measures or claims identified in the consultation request and those identified in the subsequent panel request, and it is legitimate for the claims forming the legal basis of the complaint to evolve as a result of the consultations. Nonetheless, claims added in the panel request must not "have the effect of changing the essence of the complaint".[61] This will not be the case if such additional claims can reasonably be said to have evolved from the legal basis identified in the request for consultations.

3.39. We note that the parties have both referred to the rulings cited above in their discussion of this issue and that, as Australia observes, the legal framework for addressing Australia's requests

[56] Appellate Body Report, *Brazil – Aircraft*, para. 131.
[57] See Appellate Body Report, *Brazil – Aircraft*, para. 132.
[58] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 136.
[59] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138. We note that this ruling was subsequently referred to by the panels in *China - Publications and Audiovisual Products* (para. 7.115), *EC - Fasteners (China)* (para. 7.24), *China – Broiler Products* (para. 7.223) and *EU – Footwear* (para. 7.61).
[60] See Appellate Body Report, *Brazil - Aircraft*, para. 132.
[61] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.

in respect of "new claims" does not appear to be disputed.[62] However, the parties disagree as to whether, in the circumstances of this dispute, Ukraine's additional claims have the effect of changing the essence of the complaint.

3.40. With these considerations in mind, we examine below whether the additional claims introduced by Ukraine in its panel request have the effect of "changing the essence of the complaint".

3.3.2 Whether Ukraine's additional claims under Articles I of the GATT 1994 and 2.1 of the TBT Agreement change the essence of the complaint

3.41. As described above, although there is no requirement under the DSU of "precise identity" between the matter identified in the consultation request and that identified in the panel request, there is an expectation that the claims identified in the panel request relate essentially to the same matter, so that the "essence of the complaint" is not modified.

3.42. Ukraine's request for consultations included the following claims:

> Article III:4 of the GATT 1994, Article 3.1 of the TRIPS Agreement, and Article 2.1 of the TBT Agreement because the measures fail to respect the national treatment requirement set out in these provisions by not providing equal competitive opportunities to imported tobacco products and foreign trademark right holders as compared to like domestic tobacco products and trademark right holders.[63]

3.43. In its panel request, Ukraine modified the formulation of the relevant paragraph, to read as follows:

> Articles *I and* III:4 of the GATT 1994, Article 3.1 of the TRIPS Agreement, and Article 2.1 of the TBT Agreement because the measures fail to respect the *non-discrimination* requirements set out in these provisions by *according less favourable treatment to products imported from certain countries than that accorded to like products of Australian origin and to like products originating in other countries, and thereby* not providing equal competitive opportunities to *all* imported tobacco products *alike,* and *to all* foreign trademark right holders *alike*, as compared to like domestic *and imported* tobacco products and trademark right holders.[64] (emphasis added)

3.44. As described above, Australia considers that the additional provisions at issue introduce new and distinct obligations in the scope of the dispute that Australia was not made aware of before the panel request. It argues that national treatment and MFN obligations are distinct, "form separate pillars of the multilateral trading system, and are directed towards addressing fundamentally or 'essentially' different behaviours". It further argues that different evidentiary and legal issues arise in a claim of less favourable treatment as between products imported from "certain countries" compared with "other countries" than in a claim relating to products imported from a complainant compared with domestic products. Ukraine responds that both Articles I and III of the GATT 1994 impose basic non-discrimination obligations on WTO Members and that, as noted by the Appellate Body in *EC – Seal Products*, despite their textual differences, each provision is concerned fundamentally with prohibiting discriminatory measures by requiring … equality of competitive opportunities…". Ukraine considers that, as a consequence, it has simply clarified the nature of its non-discrimination claim and has not changed the essence of its complaint of discrimination as a result of less favourable treatment accorded to certain imported products.[65]

3.45. The claims introduced by Ukraine in its panel request are a claim under Article I of the GATT 1994 (on MFN treatment) and a reference to MFN treatment in relation to Article 2.1 of the TBT Agreement (which covers both MFN and national treatment obligations). In respect of the TRIPS

[62] See Australia's comments on responses to Australia's requests for preliminary rulings, para. 5.
[63] Ukraine's request for consultations, WT/DS434/1, p. 3.
[64] Ukraine's request for the establishment of a panel, WT/DS434/11, p. 3.
[65] Ukraine's response to Australia's request for a preliminary ruling in relation to Ukraine's panel request, para. 9.

Agreement, Ukraine's panel request only refers to Article 3.1 of the TRIPS Agreement, on national treatment, as legal basis for this claim.

3.46. We first note that, as Ukraine correctly describes it, national treatment and MFN obligations are both "non-discrimination" obligations. While national treatment generally relates to a comparison between the treatment accorded to imported products and that accorded to domestic products, MFN generally relates to a comparison between the treatments accorded to imports of different origins. The two types of obligations therefore address different forms of discrimination.

3.47. In the GATT 1994, Articles III:4 and Article I (in paragraph 1) use different terms to define the respective obligations that they contain. The language of Article 2.1 of the TBT Agreement, which defines the obligations in respect of national treatment and MFN in the same sentence, is very similar to that of Article III:4 of the GATT 1994.[66] Ukraine's description of these claims in its panel request is based on the wording of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, rather than on the language of Article I:1 of the GATT 1994.

3.48. We note that the Appellate Body recently provided a detailed analysis, in *EC – Seal Products*, of the relationship between the obligations contained in these three provisions. In this context, it found, *inter alia*, that:

> First, although the most favoured nation (MFN) and national treatment obligations under Articles I:1 and III:4 are both fundamental non-discrimination obligations under the GATT 1994, their points of comparison, for the purposes of determining whether a measure discriminates between like products, are not the same. On the one hand, the MFN obligation under Article I:1 proscribes, with respect to measures falling within its scope of application, discriminatory treatment *between and among* like products of different origins. On the other hand, the national treatment obligation under Article III:4 proscribes, with respect to measures falling within its scope of application, discriminatory treatment of *imported* products vis-à-vis like *domestic* products.
>
> ...
>
> Finally, we observe that, notwithstanding the textual differences between Articles I:1 and III:4, each provision is concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4, equality of competitive opportunities for imported products and like domestic products. It is for this reason that neither Article I:1 nor Article III:4 require a demonstration of the *actual* trade effects of a specific measure.[67]

3.49. The Appellate Body's analysis confirms that both national treatment and MFN obligations under Articles III:4 and I:1 of the GATT 1994 can be viewed as "fundamental non-discrimination obligations" concerned with prohibiting discriminatory measures by requiring equality of competitive opportunities for imported products. It also confirms that their "points of comparison" are not the same, in that under national treatment, the comparison is between domestic and imported like products, whereas MFN claims involve a comparison between certain imported products and imports of other origins. The two sets of obligations are therefore distinct, though not unrelated. Under Article 2.1 of the TBT Agreement, the two obligations co-exist in a single provision.

3.50. Turning to a consideration of the legal basis that formed the subject of consultations in this dispute, we note that Ukraine's request for consultations referred to Article 3.1 of the TRIPS Agreement (which relates to national treatment), Article III:4 of the GATT 1994 (which also relates to national treatment) and Article 2.1 of the TBT Agreement, (which encompasses both national treatment and MFN obligations). We also note that Ukraine expressly describes that aspect of its claim as relating to "national treatment", rather than more generally to "non-discrimination". Ukraine's formulation of its claim under Article 2.1 of the TBT Agreement in its request for

[66] As clarified recently by the Appellate Body, the legal tests involved under both provisions are however distinct. See Appellate Body Reports, *EC – Seal Products,* paras. 5.84-5.126.

[67] Appellate Body Reports, *EC – Seal Products*, paras. 5.79-5.82.

consultations was therefore narrower than the scope of the relevant provision might have allowed. As a result, by its express terms, Ukraine's request for consultations would have signalled to Australia that the non-discrimination claims invoked related specifically to national treatment, to the exclusion of MFN, the other form of non-discrimination also covered by one of the provisions it invoked.

3.51. We further note that the description of the measures at issue and their operation in Ukraine's request for consultations provides no obvious indication, on its face, that would shed light on the factual basis of Ukraine's MFN claims and inform an understanding of how this issue could reasonably be considered as part of the subject-matter that formed the basis for consultations, even in the absence of express invocation at that stage of the proceedings of specific obligations in relation to MFN treatment. Ukraine has also not pointed to any such aspects, beyond the legally related nature of the obligations at issue, that would explain how, in the circumstances of this dispute, its MFN claims could in fact reasonably be seen as having "evolved" from the matter that was consulted on.

3.52. This context makes it difficult, in our view, to consider that the extension of Ukraine's GATT 1994 and TBT claims to cover MFN aspects could "reasonably be said to have evolved from the legal basis that formed the subject of consultations" in the circumstances of this dispute. If anything, the express limitation of Ukraine's initial claim under Article 2.1 of the TBT Agreement to national treatment aspects, in combination with the absence of a specific reference to factual circumstances that may shed light on the type of discriminatory treatment at issue under MFN claims, might rather have led Australia to assume in good faith that MFN claims were specifically not at issue.[68] While we accept that the legal obligations at issue are not unrelated, they are also clearly distinct. We see no basis to assume, in the circumstances of this case, that the invocation of national treatment provisions would or could be assumed *ipso facto* to lead to the invocation of MFN claims in the subsequent panel request.

3.53. In light of these elements, we find that Ukraine's MFN claims under Articles I of the GATT 1994 and 2.1 of the TBT Agreement cannot reasonably be considered to have "evolved" from the legal basis that formed the subject of consultations and that they "change the essence of the complaint".

3.54. We therefore find that these claims are not properly before us and fall outside our terms of reference in these proceedings.

4 IDENTIFICATION OF THE LEGAL BASIS OF THE COMPLAINT

4.1. Australia also argues that Ukraine's panel request fails to present the problem clearly in respect of its MFN claims under Articles I of the GATT 1994 and 2.1 of the TBT Agreement, and requests the Panel to rule that these claims are therefore not within its terms of reference.

4.2. The issue for the Panel's consideration here is whether Ukraine's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly", in accordance with Article 6.2 of the DSU, in respect of its MFN claims under Articles I of the GATT 1994 and 2.1 of the TBT Agreement.

4.3. In light of our earlier determination that these claims are not properly before us, we need not consider in addition whether Ukraine's panel request "presents the problem clearly" in relation to these claims. We therefore do not consider this issue further.

[68] We note in this respect the analogous situation considered by the panel in *China – Publications and Audiovisual Products,* in which a specific legal instrument had been expressly referred to in the panel request in relation to one set of claims, but not in relation to another. In these circumstances, the panel considered that "it was reasonable for China to reasonably infer that the exclusion … was deliberate" in view of its explicit inclusion in another part of the request. The panel therefore found that the instrument at issue was not covered by the claims in relation to which it was not expressly identified. See Panel Report, *China – Publications and Audiovisual Products*, para. 7.60.

4.4. These preliminary rulings will become an integral part of the Panel's report, subject to any modifications or elaboration of the reasoning, either in a subsequent ruling or in the Panel's report, in the light of comments received from the parties in the course of the proceedings.

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