WORLD TRADE ORGANIZATION

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INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

COMMUNICATION FROM THE PANEL

The following communication, dated 28 May 2013, 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 4 March 2013, India submitted to the Panel a request for a preliminary ruling concerning the consistency of the United States' request for the establishment of a Panel (WT/DS430/3) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

On 22 May 2013, 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.

PRELIMARY RULING

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1 PROCEDURAL BACKGROUND

1.1. On 4 March 2013, India submitted to the Panel a request for a preliminary ruling concerning the consistency of the United States' request for the establishment of a Panel (panel request)[1] with two of the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Specifically, India maintains that the panel request fails to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in respect of the United States' claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.[2]

1.2. India requested that the Panel rule on its objections regarding the panel request as early as possible and further that it grant India the opportunity to respond to any submissions made by the United States on this matter by way of an oral hearing.[3] The United States indicated that it saw no need for an oral hearing on India's preliminary ruling request.[4]

1.3. As requested by the Panel, the United States included its response to India's preliminary ruling request in its first written submission, submitted to the Panel on 10 April 2013.

1.4. The Panel provided third parties with an opportunity to comment on the preliminary ruling request one week after the United States' first written submission and therefore before the date specified in the Panel's Working Procedures for third party submissions. Argentina, Australia, Brazil, the European Union, and Guatemala submitted to the Panel their comments on India's preliminary ruling request on 17 April 2013.

[1] WT/DS430/3.

[2] India's request for a preliminary ruling, para. 79. Other claims included in the panel not covered by India's request are Articles 2.2, 3.1, 5.1, 5.2, 6.1, 6.2, 7 and Annex B of the SPS Agreement, and Article XI of the GATT 1994.

[3] India's request for a preliminary ruling, para. 4.

[4] United States' letter to the Panel of 5 March 2013, para. 2.

1.5. Having carefully considered India's request, the written submissions of the United States and of the above-mentioned third parties thereon, the Panel determines that it is in a position at this time to issue a preliminary ruling with respect to some of the matters raised by India, but that it is premature to do so with respect to other matters. In line with prior proceedings[5] and with a view to avoiding further delays, the Panel considers that it is not necessary to hold an oral hearing on India's preliminary objections.

1.6. Our preliminary ruling is set out below, following our analysis of the parties' arguments and the legal considerations.

2 MAIN ARGUMENTS OF THE PARTIES AND THE THIRD PARTIES

2.1 Main arguments of the parties

2.1.1 India

2.1. India requests the Panel to find, by means of a preliminary ruling, that the panel request is inconsistent with Article 6.2 of the DSU because it fails to identify the specific measures at issue, and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[6] India therefore requests the Panel to: (i) "limit the challenge of" S.O. 1663(E)[7] to the prohibition on importation of products expressly listed in paragraph 3 of the panel request from countries reporting High Pathogenic Notifiable Avian Influenza (HPNAI) and Low Pathogenic Notifiable Avian Influenza (LPNAI)[8]; (ii) rule that related measures, implementing measures, orders, and expired measures fall outside the Panel's terms of reference[9]; and (iii) refrain from considering "the substance of" the United States claims under Articles 2.3, 5.5 and 5.6.[10] India further requests that the Panel provide its ruling "as early as possible" and that the parties be granted an oral hearing before the ruling is made.[11]

2.2. India submits that the United States has failed to identify the specific measures at issue and that the lack of precision renders the panel request inconsistent with both the "due process and jurisdictional objectives" underlying Article 6.2 of the DSU.[12] India claims that this lack of precision creates "significant uncertainty" for India because it is unclear whether the United States is challenging the prohibition on imports of products that are expressly identified and listed in paragraph 3 of the panel request, or whether it is challenging S.O. 1663(E) in its entirety, "as well as" other undefined orders and related or implementing measures.[13] India posits that this lack of clarity hinders its ability to prepare its defence.[14]

2.3. India further submits that the panel request does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, leaving India uncertain of "what case it has to answer".[15] India argues that in order to sufficiently present the problem clearly, the United States must plainly connect the challenged measures with the provisions of the agreement alleged to be infringed and in doing so the United States must explain succinctly how or why the measure at issue is considered to be in violation of the WTO obligation.[16] India contends that the requirement of clarity is especially relevant for "as such" claims that, it argues, should state unambiguously the specific measure and the legal basis for the allegation that the measure is not

[5] Most recently, *US – Countervailing Measures (China)*, WTO/DS437/4, para. 1.4.
[6] India's request for a preliminary ruling, para. 79.
[7] S.O. 1663(E) is annexed to India's request for a preliminary ruling as Annex-A. *See also* Exhibit US-80, p. 2.
[8] India's request for a preliminary ruling, para. 79. The Panel notes that the parties have referred to the High Pathogenic Notifiable Avian Influenza (HPNAI) and Low Pathogenic Notifiable Avian Influenza (LPNAI); and High Pathogenic Avian Influenza (HPAI) and Low Pathogenic Avian Influenza (LPAI) interchangeably. In this preliminary ruling, the Panel reflects the language used by the parties in referring to either HPNAI/LPNAI or HPAI/LPAI with respect to each of the arguments made.
[9] India's request for a preliminary ruling, para. 79.
[10] India's request for a preliminary ruling, para. 79.
[11] India's request for a preliminary ruling, para. 4.
[12] India's request for a preliminary ruling, para. 18.
[13] India's request for a preliminary ruling, para. 21.
[14] India's request for a preliminary ruling, para. 21.
[15] India's request for a preliminary ruling, para. 42.
[16] India's request for a preliminary ruling, paras. 43-44.

consistent with particular provisions of the covered agreements.[17] India argues that if a party fails to present the problem clearly in its panel request, the claim in question is outside the Panel's jurisdiction and cannot be heard.[18] India limits its challenge that the panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, to the United States' claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.[19]

2.1.2 United States

2.4. The United States contests India's allegations and submits that its panel request "not only satisfies, but goes beyond" the minimum requirements of Article 6.2 of the DSU[20] because it: (i) clearly explains that this dispute challenges Indian measures restricting the importation of agricultural products from countries reporting HPAI and LPAI[21]; (ii) lists the products currently covered by the measure; (iii) explains the articles of the SPS Agreement and the GATT 1994 that India's measures breach and how the measures breach specific disciplines in those articles; and (iv) with respect to some disciplines, it goes further, providing illustrative examples of how the United States would argue that India is in breach.[22]

2.5. Furthermore, the United States argues that in assessing the panel request's compliance with Article 6.2 of the DSU, the Panel should consider certain "attendant circumstances", which include India's failure to respond to the United States' request for additional information pursuant to Article 5.8 of the SPS Agreement.[23] The United States posits that even though the panel request "fully satisfies Article 6.2 of the DSU standing on its own, it is also relevant to consider whether India should profit from its own non-compliance with the transparency obligation contained in Article 5.8 of the SPS Agreement".[24]

2.6. In response to India's allegation that the panel request does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, the United States submits that India confuses the concept of "the legal basis of the complaint" with the arguments put forth by a party in support of its claims.[25] The United States considers that it is under no obligation to provide arguments in the panel request.[26] It refers to the Appellate Body Report in *Korea – Dairy* to argue that Article 6.2 of the DSU demands only a summary, and it may be a brief one, of the legal basis of the complaint[27] and that there is no obligation to set out "detailed arguments" as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.[28] Moreover, the United States refers to the Appellate Body report in *Australia – Apples*, a case where the panel request, after the listing of 17 specific measures at issue, "simply listed in a single sentence the Articles of the SPS Agreement under which it was raising claims".[29] The United States contends that the Appellate Body Report in *Australia – Apples* supports the view that, in the context of an SPS dispute, Article 6.2 of the DSU does not impose any additional requirement that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue causes the violation of, or can violate, the relevant obligation.[30] The United States further argues that its panel request not only satisfies Article 6.2, but also that it: (i) provides more detail than the one submitted in *Australia – Apples*; (ii) describes how India's avian influenza measures breach each cited provision; (iii) explains the specific obligations each

[17] India's request for a preliminary ruling, para. 46.
[18] India's request for a preliminary ruling, para. 46.
[19] India's request for a preliminary ruling, para. 48.
[20] United States' first written submission, para. 198.
[21] United States' first written submission, para. 199. Concerning the use of this terminology by the parties, *see* footnote 8 above.
[22] United States' first written submission, para. 199.
[23] United States' first written submission, paras. 200 and 201.
[24] United States' first written submission, para. 201.
[25] United States' first written submission, para. 213 (quoting Appellate Body Report, *US – Anti Dumping Measures on Oil Country Tubular Goods*, para. 162).
[26] United States' first written submission, para. 213.
[27] United States' first written submission, para. 214 (citing Appellate Body Report, *Korea – Dairy*, para. 120).
[28] United States' first written submission, para. 214 (quoting Appellate Body Report, *EC – Bananas III*, para. 141).
[29] United States' first written submission, para. 215.
[30] United States' first written submission, para. 214 (citing Appellate Body Report, *Australia – Apples*, para. 423).

measure breaches; and (iv) while not required, even provides key arguments with respect to some obligations, two of which India claims lack sufficient explanation.[31]

2.2 Main arguments of the third parties

2.7. Following the Panel's invitation to the third parties to comment on India's request for a preliminary ruling, five third parties, namely, Argentina, Australia, Brazil, the European Union and Guatemala, submitted comments on 17 April 2013. No comments were received from China, Colombia, Ecuador, Japan or Viet Nam.

2.2.1 Argentina

2.8. Argentina's comments do not specifically address India's contentions but rather discuss a panel's role when examining the consistency of a panel request with Article 6.2 requirements. In this respect, Argentina submits that the main task of a panel when establishing whether the requirements of Article 6.2 have been fulfilled is to ensure that the respondent's right of defence is not violated due to the absence of these basic requirements.[32] Concerning the requirement to identify the measures at issue, Argentina submits that, where the challenged measures are not expressly identified in a panel request, the description of such measures must allow their precise identification.[33] With respect to the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, Argentina considers that, while all claims must be identified in the panel request, no single format is prescribed to achieve this.[34]

2.2.2 Australia

2.9. Similar to Argentina, Australia makes no comments directly in relation to India's specific arguments in its request for a preliminary ruling. However, Australia expresses its general view that due process requires that responding parties receive details about the complaint that are sufficient to enable them to frame their response, particularly in the light of the tight timeframes associated with panel processes.[35]

2.2.3 Brazil

2.10. Brazil considers that all the issues raised in India's request for a preliminary ruling pertain to the issue of "specificity", be it of measures or claims.[36] As regards the measures, Brazil considers that the United States' reference to "implementing" or "related" measures in the panel request "would not, in principle, render the claim obscure".[37] In Brazil's view, such a reference aims to encompass legislative and bureaucratic frameworks that may be part of the challenged measure. This ensures that the panel has jurisdiction over all legal or administrative acts adopted over time by a responding party "to guarantee the efficacy" of the challenged measure.[38]

2.11. With respect to India's challenge of the United States' description of its claims in the panel request, Brazil relies on the Appellate Body's findings in *EC – Selected Customs Matters* to argue that it suffices that the panel request sets out the claims with enough precision to allow the responding party to understand with clarity the alleged violations presented against it.[39] Further, Brazil considers that the use of the term "for example" in the United States' panel request merely illustrates an instance of an alleged violation and should not be interpreted to narrow the scope of the challenged measures.[40] Moreover, Brazil asserts that Article 6.2 of the DSU does not impose a

[31] United States' first written submission, para. 216.
[32] Argentina's third party comments on India's request for a preliminary ruling, para. 6.
[33] Argentina's third party comments on India's request for a preliminary ruling, para. 10.
[34] Argentina's third party comments on India's request for a preliminary ruling, para. 14.
[35] Australia's third party comments on India's request for a preliminary ruling, para. 3.
[36] Brazil's third party comments on India's request for a preliminary ruling, para. 3.
[37] Brazil's third party comments on India's request for a preliminary ruling, para. 5.
[38] Brazil's third party comments on India's request for a preliminary ruling, para. 5.
[39] Brazil's third party comments on India's request for a preliminary ruling, para. 4 (citing Appellate Body Report, *EC – Selected Customs Matters*, para. 130).
[40] Brazil's third party comments on India's request for a preliminary ruling, para. 6.

"stringent" obligation on the complaining party to develop in the panel request the legal arguments that support its claims.[41]

2.2.4 European Union

2.12. With respect to the United States' reference to "related" and "implementing" measures in the panel request, the European Union considers that the question whether such a reference meets the specificity requirement in Article 6.2 of the DSU should be assessed on a case-by-case basis. The European Union supports its view by relying on the Appellate Body's statement in *US – Carbon Steel* and *Korea - Dairy* that "compliance with Article 6.2 must be determined on the merits of each case, having considered the panel request as whole, and in light of attendant circumstances".[42] The European Union provides as examples the panel requests in *EC – Bananas III* and *Canada – Wheat Exports and Grain Imports* to illustrate instances where panels found the respective panel requests to have satisfied the specificity requirement of Article 6.2 despite these panel requests not explicitly listing the relevant law, regulations or other legal instrument at issue.[43]

2.13. The European Union further argues that India's failure to respond to the United States' request under Article 5.8 of the SPS Agreement should be considered by the panel as attendant circumstances that explain the United States' inability to list explicitly the related or implementing measures. Indeed, the European Union considers that finding the United States' panel request too vague on account of the reference to "related" and "implementing" measures would allow a party that is not complying with the transparency requirements under the SPS Agreement to profit from its own failure to do so.[44]

2.14. As regards the United States' use of the term "orders" rather than "notifications"[45], the European Union is of the view that "the fact that an improper name is used for a measure should not affect its specificity, where it is clear from the context to which kind of measure it refers".[46]

2.15. With respect to the United States' use of the expression "for example" in its panel request in its description of its claims under Articles 2.3 and 5.5 of the SPS Agreement, the European Union considers that in all instances where the expression is used, the text added after this expression is more than what is required under Article 6.2 of the DSU, as the claims are clearly stated before the use of the expression.[47] The European Union agrees with India's argument that simply reproducing the text of an article of a covered agreement does not, in principle, bring any added value to the sufficiency of the panel request. However, the European Union considers that such reproduction may present an added value where multiple obligations are contemplated within the text of the same legal provision, as is the case with Article 2.3 of the SPS Agreement. In any event, the European Union points out that the United States' panel request contains more than a mere reproduction of the text of Article 2.3, as there is also an indication of the country (India) and the measures.[48]

2.16. With respect to India's request for a preliminary ruling in relation to the United States' claim under Article 5.6 of the SPS Agreement, the European Union agrees with India that the United States has merely copied the text of that Article. However, the European Union relies on the Appellate Body report in *EC – Bananas III* to argue that the simple listing of articles may be

[41] Brazil's third party comments on India's request for a preliminary ruling, para. 7.
[42] European Union's third party comments on India's request for a preliminary ruling, paras. 12 and 13 (citing Appellate Body Reports, *US – Carbon Steel*, para. 127; and *Korea – Dairy*, para. 124).
[43] European Union's third party comments on India's request for a preliminary ruling, paras. 14 and 15 (citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).
[44] European Union's third party comments on India's request for a preliminary ruling, paras. 17-19 (citing Panel Reports, *EC – Bananas III*, para. 7.27; and *Canada – Wheat Exports and Grain Imports*, para. 6.10).
[45] *See* Section 3.2.5 below where the alleged deficiency is discussed.
[46] European Union's third party comments on India's request for a preliminary ruling, para. 21.
[47] European Union's third party comments on India's request for a preliminary ruling, paras. 31 and 34.
[48] European Union's third party comments on India's request for a preliminary ruling, paras. 29 and 30.

enough in order to provide a brief summary of the legal basis sufficient to present the problem clearly.[49]

2.17. As regards the relationship between Articles 2.3 and 5.5 of the SPS Agreement, the European Union's view differs partially from that of India. India argues that, due to the general linkage between these two claims, the differing descriptions of the two claims in the United States' panel request renders the claims imprecise.[50] The European Union argues that Article 2.3 is broader in scope, while Article 5.5 is confined to risk management. It relies on the Appellate Body report in *Australia – Salmon* to point out that while a violation of Article 5.5 of the SPS Agreement would automatically trigger a violation of Article 2.3 of the SPS Agreement, the reverse is not necessarily true.[51]

2.2.5 Guatemala

2.18. Like Brazil, Guatemala considers that India's request for a preliminary ruling challenges the "degree" of specificity of the panel request with respect to both measures and claims.[52] That said, Guatemala confines its comments to India's challenge that the United States' reference to "implementing" and "related" measures creates uncertainty and falls short of the requirements of Article 6.2 of the DSU.

2.19. Guatemala disagrees with India's view and asserts that there is no obligation under Article 6.2 of the DSU to include information about the "identity, number and content" of the related or implementing measures. Instead, relying on the Appellate Body's findings in *US – Continued Zeroing*, Guatemala maintains that a panel request need only be framed with "sufficient particularity" so as to indicate the nature of the measure and the gist of what is at issue.[53] Guatemala's reading of the panel request is that the United States identified the import restrictions due to avian influenza maintained through S.O. 1663(E) as the measure at issue in this dispute. Thus, all "related" or "implementing" measures would be restricted to those that are related to or implement the defined import restrictions. According to Guatemala, this frames the panel request with "sufficient particularity".[54]

3 EVALUATION BY THE PANEL

3.1 Introduction

3.1. The Panel is tasked with determining whether the panel request fails to comply with two of the requirements in Article 6.2 of the DSU; in particular, the Panel must decide whether the panel request fails to (i) identify the specific measure at issue, and (ii) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[55]

3.2. As recapped by the Appellate Body in *China – Raw Materials*, Article 6.2 of the DSU serves a "pivotal function" in WTO dispute settlement and sets out "two key requirements" that a complainant must satisfy in its panel request, namely the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint, i.e. the claims.[56] Both key requirements are at issue here. As the Appellate Body observed, a panel request forms the basis for the terms of reference of panels, in accordance with Article 7.1 of the DSU. In fact, according to the Appellate Body, the two key requirements constitute together "the *matter* referred to the DSB".[57] This means that if either of them is not properly identified, the matter

[49] European Union's third party comments on India's request for a preliminary ruling, para. 40 (citing Appellate Body Report, *EC – Bananas III*, para. 141).
[50] India's request for a preliminary ruling, paras. 68-70.
[51] European Union's third party comments on India's request for a preliminary ruling, paras. 35-37 (citing Appellate Body Report, *Australia – Salmon*, para. 252).
[52] Guatemala's third party comments on India's request for a preliminary ruling, para. 3.
[53] Guatemala's third party comments on India's request for a preliminary ruling, paras. 10 and 11 (citing Appellate Body Report, *US – Continued Zeroing*, paras. 168-169).
[54] Guatemala's third party comments on India's request for a preliminary ruling, para. 12.
[55] India's request for a preliminary ruling, para. 79.
[56] Appellate Body Report, *China – Raw Materials*, para. 219. Article 6.2 of the DSU also requires that the panel request be in writing and to indicate whether consultations were held.
[57] Appellate Body Report, *China – Raw Materials*, para. 219 (emphasis original).

would not be within the panel's terms of reference. Hence, as the Appellate Body made clear, fulfilment of these requirements is "not a mere formality".[58]

3.3. We also note that, in addition to forming the basis of a panel's terms of reference, a panel request serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case. The Panel shares the concerns of India and of those third parties who contributed comments on India's preliminary ruling request about safeguarding the due process rights of the parties and especially the due process rights of the respondent.[59] We agree that due process is an essential feature of the WTO dispute settlement system[60] and are mindful of the Appellate Body's clarification that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".[61] The Panel also agrees with India that due process considerations inform the inquiry into the sufficiency of the panel request in that the request must serve to allow the respondent to "begin" preparing its defence.[62] However, as stated by the panels in *Australia – Apples* and *China – Electronic Payment Services*, the requirement that a complainant submit a panel request that will allow a respondent to "begin" preparing its defence does not amount to "a requirement for allowing the defendant to fully develop its defence on the sole basis of the complainant's request", for such an interpretation would wipe out the distinction between claims and arguments and would reduce to futility the subsequent phases of WTO dispute settlement.[63]

3.4. The identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly are therefore central to defining the scope of the dispute to be addressed by the Panel.[64] India's allegations of the failure to comply with Article 6.2 requirements are of a serious nature because such failure would affect the terms of reference of this Panel. Indeed, the vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.[65] Furthermore, a defective panel request may impair our ability to perform our adjudicative function within the strict timeframes contemplated in the DSU and thus may have implications for the prompt settlement of this dispute in accordance with Article 3.3 of the DSU.[66]

3.5. We now proceed to examine the panel request to ascertain its conformity with the two key requirements of Article 6.2 of the DSU. There is substantial guidance in past panel and Appellate Body reports on how we should proceed with such an examination. In the light of this guidance, we will examine the fulfilment of each requirement in turn[67], bearing in mind that, overall, this examination requires us to carefully scrutinize the language used in the panel request[68] to ensure its compliance with both the letter and the spirit of Article 6.2 of the

[58] Appellate Body Report, *China – Raw Materials*, paras. 219, 220 and 233 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *US – Carbon Steel*, paras. 125 and 126; *Australia – Apples*, para. 416; *Guatemala – Cement I*, paras. 72 and 73; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *EC and certain member States – Large Civil Aircraft*, para. 786).

[59] India's request for a preliminary ruling, paras. 3 and 14 *et seq.*; Argentina's third party comments on India's request for a preliminary ruling, paras. 5 and 13; Brazil's third party comments on India's request for a preliminary ruling, para. 4; European Union's third party comments on India's request for a preliminary ruling, para. 10; and Guatemala's third party comments on India's request for a preliminary ruling, para. 2.

[60] Indeed, "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute". Appellate Body Report, *US – Continued Suspension*, para. 433.

[61] Appellate Body Report*, EC and certain member States – Large Civil Aircraft*, para. 640. *See also* Appellate Body Report, *China – Raw Materials*, para. 233.

[62] Appellate Body Report, *Thailand – H-Beams*, para. 88.

[63] Panel Reports, *Australia – Apples*, para. 7.929 and *China – Electronic Payment Services*, para. 7.4 incorporating WT/DS413/4, para. 12.

[64] Appellate Body Report, *China – Raw Materials,* para. 219.

[65] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36 (referring to Appellate Body Report, *US – 1916 Act*, para. 54).

[66] Appellate Body Report, *China – Raw Materials*, para. 220.

[67] The Appellate Body has explained that questions pertaining to the identification of the "measures at issue" and the "claims" relating to alleged violations of WTO obligations set out in a panel request should be addressed separately, because the requirements under Article 6.2 of the DSU are conceptually different and should not be confused. Appellate Body Report, *EC – Selected Customs Matters*, para. 131.

[68] Appellate Body Report, *EC – Fasteners (China)*, para. 562.

DSU.[69] We also understand that such scrutiny must be carried out on a case-by-case basis, considering the panel request "as a whole, and in the light of attendant circumstances".[70]

3.6. We further take note that compliance with the requirements of Article 6.2 must be demonstrated "on the face of the [panel] request".[71] Finally, we understand that, while defects in the panel request cannot be "cured" in the subsequent submissions of the parties, these submissions, particularly the first written submission of the complainant, may be consulted in order to confirm the meaning of the words used in the panel request.[72]

3.7. We commence by examining India's claims that the panel request fails to adequately identify the specific measures at issue. Once we have done so, we will examine India's allegations that the panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3.2 Whether the panel request fails to identify the specific measures at issue

3.2.1 The issues before the Panel

3.8. India claims that the United States failed to identify the specific measures at issue in its panel request. In particular, India is asking us to rule on a number of issues pertaining to the identification of the measures at issue in this dispute, namely: (i) whether the identification of S.O. 1663(E) as a measure at issue is sufficiently precise[73]; (ii) whether the "related measures" and "implementing measures" mentioned in the panel request are included in the Panel's terms of reference[74]; (iii) the implications of the use of the word "orders" as opposed to "notifications" in the panel request[75]; and (iv) the alleged inclusion of expired measures within the Panel's terms of reference.[76]

3.9. As was observed by Brazil and Guatemala, the issues before this Panel relate to the "degree" of specificity of the panel request.[77] As discussed above, the degree of specificity required must be assessed on a case-by-case basis, having considered the panel request as a whole and in the light of attendant circumstances.[78] In undertaking this assessment, we must bear in mind that India's ability to defend itself, in other words India's due process rights, depends upon whether the measure at issue has been sufficiently identified in the panel request.[79]

3.2.2 Description of the measures at issue in the panel request

3.10. Before examining each of the issues raised by India concerning the identification of the measures at issue, we commence by looking at the text of the panel request itself. Our task requires us to "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".[80]

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[69] Appellate Body Report, *EC – Bananas III*, para. 142.

[70] Appellate Body Report, *US – Carbon Steel*, para. 127; *See also* Appellate Body Report, *Korea – Dairy*, paras. 124-127.

[71] Appellate Body Report, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 562, in turn referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642; Appellate Body Report, *EC – Bananas III*, para. 143; and Appellate Body Report *US – Carbon Steel*, para. 127).

[72] Appellate Body Report, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 562, in turn referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642; Appellate Body Report, *EC – Bananas III*, para. 143; and Appellate Body Report *US – Carbon Steel*, para. 127.

[73] India's request for a preliminary ruling, paras. 22-28.

[74] India's request for a preliminary ruling, paras. 29–35.

[75] India's request for a preliminary ruling, paras. 36–37.

[76] India's request for a preliminary ruling, paras. 38–41.

[77] Brazil's third party comments on India's request for a preliminary ruling, para. 3; and Guatemala's third party comments on India's request for a preliminary ruling, para. 3.

[78] Appellate Body Report, *US – Carbon Steel*, para. 127. *See also* Appellate Body Report, *Korea – Dairy*, paras. 124-127; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, subpara. 14.

[79] Appellate Body Report, *EC – Computer Equipment*, para. 70; and Panel Report, *US – Zeroing (Article 21.5 – EC)*, paras. 8.20-8.32.

[80] Appellate Body Report, *EC – Fasteners (China)*, para. 562.

3.11. In its panel request, the United States refers at the outset to its request for consultations with India concerning "measures that India imposes on the importation of various agricultural products from the United States purportedly because of concerns related to avian influenza". After noting that the consultations were unsuccessful in resolving the dispute, it continues as follows:

> India's avian influenza measures prohibit the importation of various agricultural products into India from those countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza). India maintains its avian influenza measures through the following legal instruments:
>
> – the Indian Livestock Importation Act, 1898 (9 of 1898) ("Livestock Act"); and
>
> – orders issued by India's Department of Animal Husbandry, Dairying, and Fisheries ("DAHD") pursuant to the Livestock Act, most recently S.O. 1663(E), which was published in the Gazette of India on July 19, 2011,
>
> as well as amendments, related measures, or implementing measures in force as of the date of this request.
>
> Legal instrument S.O. 1663(E) imposes import restrictions on the following products:
>
> (a) domestic and wild birds (including poultry and captive birds);
>
> (b) day old chicks, ducks, Turkey, and other newly hatched avian species;
>
> (c) un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry;
>
> (d) hatching eggs;
>
> (e) egg and egg products (except Specific Pathogen Free eggs);
>
> (f) un-processed feathers;
>
> (g) live pigs;
>
> (h) pathological material and biological products from birds;
>
> (i) products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and
>
> (j) semen of domestic and wild birds including poultry.
>
> India's measures have adversely affected exports of these products from the United States to India.[81]

3.12. Following this, the panel request sets out the provisions under the SPS Agreement[82] and the GATT 1994[83] that the United States considers India's measures to have violated, together with a narrative accompanying each cited provision. We will examine this latter part of the panel request below and hence do not reproduce it here.

3.13. The Panel now turns to the first issue, i.e. whether the identification of S.O. 1663(E) as a measure at issue is sufficiently precise.

[81] WT/DS430/3.
[82] Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 6.1, 6.2, 7 and Annex B of the SPS Agreement.
[83] Article XI of the GATT 1994.

3.2.3 Whether the identification of S.O. 1663(E) as a measure at issue is sufficiently precise

3.14. India contends that the panel request has created significant uncertainty for India as to the identity of the precise measures at issue because it is unclear whether United States is challenging the prohibition on imports of products that are expressly identified and listed in paragraph 3 of the panel request, or whether it is challenging S.O 1663(E) in its entirety.[84] India posits that as the prohibition on products from countries reporting HPNAI and LPNAI is only one aspect of S.O. 1663(E), the fact that the United States' panel request refers only to this aspect of the measure "is suggestive of an intention on the part of the United States to limit its challenge specifically to sub-clauses (a) to (j) of clause 1(ii) of S.O. 1663(E) and not to extend to S.O. 1663(E) as a whole".[85] India argues, on the one hand, that the reference to "these products" in paragraph 4 of the panel request, which immediately follows the listing of specific products in sub-paragraphs (a) through (j) in paragraph 3, "is further suggestive of an intention on the part of the United States to limit its challenge to these product specific measures and not to other product specific measures mentioned in S.O. 1663(E)".[86] On the other hand, India argues that "the reference simply to S.O. 1663(E) in paragraph[s] 3 and 4 of the panel request without mention of clause 1 (ii) of S.O 1663(E) gives an impression that the panel request may not be limited to clause 1 (ii) (a) to (j) of S.O 1663(E) and is a source of significant uncertainty for India in preparing its [defence]".[87]

3.15. The United States contests India's allegations and submits that "the panel request makes clear that India's import restrictions due to avian influenza maintained through S.O. 1663(E) is the measure at issue in this dispute".[88] For the United States, the factual listing of products in paragraph 3 of its panel request does not, "on its face", modify the measure identified.[89] The United States further argues that India's request for a preliminary ruling suggests that India is uncertain only as to whether (i) "S.O. 1663(E)'s complete ban on the import of wild birds into India", and (ii) "conformity assessment requirements for the import of processed poultry meat from countries reporting NAI form a part of the dispute".[90] The United States submits that, "[b]ecause [its] panel request identified the import restrictions imposed through S.O. 1663(E), India's ban on the importation of wild birds, and its requirement of a 'conformity assessment' for the importation of processed poultry meat, imposed through that instrument fall within the Panel's terms of reference".[91]

3.16. India's argument essentially raises two questions. The first question is whether only sub-paragraphs (a) to (j) of paragraph (1)(ii) of S.O. 1663(E) form part of the measures at issue in this dispute. The second question is whether the reference to "these products" in paragraph 4 of the panel request, which immediately follows the listing of specific products in paragraph 3 of the panel request, means that the United States intended to limit its challenge to the products listed therein.

3.17. We commence by examining the text of the panel request on its face and as a whole.[92] As explained in Section 3.2.2 above, the panel request refers at the outset to India's avian influenza measures, which the panel request describes as measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI] (both [HPNAI] and [LPNAI])".

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[84] India's request for a preliminary ruling, para. 21.

[85] India's request for a preliminary ruling, para. 26 (footnotes omitted). We observe that India, in its request for a preliminary ruling, refers to the term "clause" in reference to the provisions of S.O. 1663(E). However, the Panel notes that the text of S.0. 1663(E) refers to the provisions as "paragraphs". Thus, except where the Panel is referring to India's arguments, the provisions of S.0. 1663(E) shall be referred to as "paragraphs" and "sub-paragraphs" as appropriate.

[86] India's request for a preliminary ruling, para. 27.

[87] India's request for a preliminary ruling, para. 28.

[88] United States' first written submission, para. 202.

[89] United States' first written submission, para. 203.

[90] United States' first written submission, para. 204.

[91] United States' first written submission, para. 205.

[92] *See* footnote 71 above. *See also* Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, para. 169; *EC – Export Subsidies on Sugar*, para. 143; *EC – Selected Customs Matters*, para. 168; *US – Continued Zeroing*, para. 161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108; *EC and certain member States – Large Civil Aircraft*, para. 641; and *EC - Fasteners (China)*, para. 562.

This description is followed by a list of the "legal instruments" through which "India maintains its avian influenza measures". S.O. 1663(E) is included among those instruments.

3.18. Continuing with our examination of the panel request as a whole, we note that in the section setting out the specific claims put forward by the United States, namely those under Articles 2.2, 2.3, 5.1, 5.6, 6.1, 6.2, 7 and Annex B of the SPS Agreement, refers to the relevant alleged violations in terms of the role therein played by India's "avian influenza measures". We further note that none of those claims refers specifically to S.O. 1663(E). The wording of those claims therefore suggests that the scope of the claims extends to violations allegedly caused by measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI]".

3.19. Based on these considerations, the Panel is of the view that the narrative description of India's avian influenza measures, i.e. measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI]", delimits the scope of the measures the United States seeks to challenge in this dispute.

3.20. We also observe that, according to the panel request, "India maintains its avian influenza measures through" legal instruments that include S.O. 1663(E). We read this text of the panel request to mean that the measures at issue are India's avian influenza measures, which are measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI]" and are maintained through legal instruments that include S.O. 1663(E).

3.21. As we have observed above, the narrative description of India's avian influenza measures operates to circumscribe the scope of the measures at issue in this dispute to those that can be considered as prohibiting the importation of various agricultural products from those countries reporting NAI. The Appellate Body has clarified that a panel may consult submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, in order to confirm the meaning of the words used in the panel request.[93] Our understanding of the meaning of the panel request is confirmed by the United States' first written submission, where it is indicated that "the measures at issue are those that constitute and support an *import ban* of various agricultural products, purportedly on account of NAI".[94] This corroborates our reading of the panel request that the measures at issue are India's avian influenza measures, which are maintained through legal instruments that include S.O. 1663(E). Hence we agree with the United States that S.O. 1663(E) has been identified as one of the specific measures at issue in this dispute.

3.22. However, the question remains whether the entirety of S.O. 1663(E) falls within the description of "India's avian influenza measures" as used in the panel request. We do not consider that the mere listing of S.O. 1663(E) necessarily means that all aspects of this instrument, including those that may not relate to the import prohibition, are included in the Panel's terms of reference. Indeed, as was concluded by the panel in *China – Publications and Audiovisual Products*, the "mere reference to the legislative instruments in which the disputed requirements were contained" is not sufficient to conclude that the aspects of the legal instruments that were not included in the description in that panel request fall within the panel's terms of reference.[95]

3.23. We turn now to examine the text of S.O. 1663(E).[96] We observe that S.O. 1663(E) was published by the DAHD, Ministry of Agriculture, in the Gazette of India on 20 July 2011 and is dated 19 July 2011.

3.24. As India points out, the text of S.O. 1663(E) contains more than just the products listed in paragraph 3 of the panel request, which are found in sub-paragraphs (a) to (j) of paragraph 1(ii) of S.O. 1663(E). S.O. 1663(E) begins with a *chapeau*, which reads, in relevant part:

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[93] Appellate Body Report, *US – Carbon Steel*, para. 127, citing Appellate Body Reports, *Korea – Dairy*, para. 127; and *Thailand – H Beams*, para. 95.

[94] United States' first written submission, para. 88 (emphasis added). *See also* United States' first written submission, paras. 89-92, referring to G/SPS/N/IND/73, 11 October 2011.

[95] Panel Report, *China – Publications and Audiovisual Products*, para. 7.104.

[96] Exhibit US-80, p. 2; Annex A to India's request for a preliminary ruling.

> In exercise of the powers conferred by sub-section (1) of Section 3 and Section 3A of the Livestock Importation Act, 1898 (9 of 1898), and in supercession of the notification of the Government of India in the Ministry of Agriculture (Department of Animal Husbandry, Dairy and Fisheries) published in the Gazette of India, …, except as respects things done or omitted to be done before such supercession, the Central Government hereby *prohibits*, with effect from the date of publication of this notification in the Official Gazette, namely:[97]

3.25. The wording of the *chapeau* indicates to us that S.O. 1663(E) is an instrument published pursuant to certain powers conferred by the Livestock Act and is also concerned with a "prohibition".

3.26. Paragraph (1)(i) of S.O. 1663(E) provides:

> (i) the import into India from all countries in view of [NAI] (both [HPNAI] and [LPNAI]), of wild birds except those reared and bred in captivity;

3.27. Paragraph (1)(ii) of S.O. 1663(E), which is partially reproduced in paragraph 3 of the panel request, prohibits the importation of the 10 categories of products specifically listed in the panel request.[98] Prior to listing these products, paragraph (1)(ii), which comes after the *chapeau* reproduced above, reads as follows:

> (ii) the import into India from the countries reporting [NAI] (both [HPNAI] and [LPNAI]), the following livestock products, namely:

3.28. After listing the 10 categories of products and right before paragraph (2), S.O. 1663(E) includes the following text:

> Provided that the Central Government may allow the import of processed poultry meat after satisfactory conformity assessment of the exporting country.

3.29. We observe, as does India, that S.O. 1663(E) also refers to products with respect to which the import prohibition in paragraph (1) does not apply. Specifically, paragraph (2) of S.O. 1663(E) states:

> The prohibition specified in paragraph (1) shall not be applicable to the import of –
>
> (i) processed pet food containing ingredients of meat and meat products from birds intended for use in animal feeding.
>
> (ii) the import of pathological materials and biological products for use in research purposes exclusively used by the National Referral Laboratories.

3.30. Our review of S.O. 1663(E) on its face enables us to conclude that it prohibits, with effect from the date of publication, i.e. 20 July 2011, in view of NAI, imports into India from all countries of wild birds except those reared and bred in captivity. It also permits us to conclude that, with effect from 20 July 2011, importation into India of 10 categories of named products from countries reporting NAI (both HPNAI and LPNAI) is prohibited. Likewise, it is clear from the text of S.O. 1663(E) that the import prohibition is not applicable to certain pet food or to pathological materials and biological products for use in research by certain laboratories. Therefore, upon an examination of S.O. 1663(E) on its face, we can conclude that S.O. 1663(E) is primarily concerned with the prohibition of importation into India of various agricultural products from those countries reporting NAI.

3.31. Nevertheless, questions remain about the meaning of some aspects of S.O. 1663(E). Specifically, we do not know, nor has it been explained at this stage of the proceedings, what is intended by the exception in the *chapeau* "as respects things done or omitted to be done before

[97] Emphasis added.
[98] *See* para. 3.11. above.

such supercession".[99] We are also unsure, at this stage of the proceedings, whether there is any overlap between the "wild birds" referred to in paragraph (1)(i) and the "wild birds" referred to in paragraph (1)(ii). Similarly, it is not clear to us whether the text in S.O. 1663(E) immediately after the listing of the tenth category of products in paragraph (1)(ii)(j) and referring to "processed poultry meat" and "satisfactory conformity assessment", falls within paragraph (1)(ii). Furthermore, we do not yet have sufficient information on how to interpret the terms "processed poultry meat" and "satisfactory conformity assessment". In our view, these terms may be relevant in interpreting the provisions specifically listed in the panel request and in deciding whether the conformity assessment operates in connection with or as part of an import ban. Finally, we are not yet sufficiently versed in the products excepted under paragraph (2) of S.O. 1663(E) to understand how this aspect of S.O. 1663(E) affects, or does not affect, the other aspects.[100]

3.32. These uncertainties derive from the text of S.O. 1663(E) itself rather than from the panel request. The question arises, therefore, whether the description of S.O. 1663(E) in the United States' panel request is nevertheless sufficiently precise as to the particular measures the United States sought to challenge, to allow India to begin preparing its defence.[101] We recall that Article 6.2 of the DSU requires the identification of the specific measure(s) at issue. We also recall the Appellate Body's explanation that the "assessment of whether a complaining party has identified the specific measures at issue may depend on the particular context in which those measures exist and operate" and that such assessment involves "a case-by-case analysis since it may require examining the extent to which those measures are capable of being precisely identified".[102]

3.33. In the present case, the panel request identifies the measures at issue as India's avian influenza measures, being those that prohibit the importation of various agricultural products from those countries reporting NAI. Furthermore, the panel request identifies S.O. 1663(E) as one of the legal instruments through which India's avian influenza measures are maintained. To determine whether this description is "sufficiently precise", we must consider the context in which the United States specified, and was capable of specifying, information identifying these measures. Given the uncertainties with respect to the text of S.O. 1663(E) as identified above, we are of the view that the degree of specificity provided in the panel request meets the requirements of Article 6.2 of the DSU in this case, bearing in mind the information available at the time the panel request was made. In this sense, we agree with the Appellate Body that Article 6.2 does not "impose a standard that renders it more difficult to challenge a measure simply because information in the public domain concerning the measure is of a general character" and that "the lack of specification in the public domain should not shield [a] measure from challenge ...".[103]

3.34. Accordingly, having examined the panel request on its face and as a whole[104], and taking into account the particular context in which the measures existed at the time the panel request was made, the Panel concludes that the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI).

3.35. The Panel now turns to examine whether the reference to "these products" in paragraph 4 of the panel request, which immediately follows the listing of categories of specific products in paragraph 3, suggests that the United States intended to limit its challenge to the products listed therein.

3.36. The Panel observes that Article 6.2 of the DSU does not require the identification of products at issue; rather it refers to the identification of the specific measure at issue.[105] Thus, only upon an examination of the measures at issue may the products at issue be properly identified.[106] Even so, it is conceivable that the absence of identification of products could render a

[99] *See* quotation in paragraph 3.23. above.
[100] Of course, some or all of these issues may be clarified in the course of the proceedings.
[101] *See* paragraph 3.3. above.
[102] Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para. 641.
[103] Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para. 648.
[104] Appellate Body Report, *US – Carbon Steel*, para. 127. *See also* Section 3.1 above.
[105] Appellate Body Report, *EC – Computer Equipment*, para. 67.
[106] Indeed, as stated by the Appellate Body in *EC – Chicken Cuts*:

panel request so vague and broad that a respondent would not be able to know the case against it and thus would not be able to begin preparing its defence.[107] We turn now to examine whether this is the case in the present dispute.

3.37. As mentioned above, the panel request includes a list of 10 categories of products that are prohibited by S.O. 1663(E). It also refers immediately following that list to India's measures having affected exports from the United States of "these products". We do not agree with India that including these words suggests an intention on the part of the United States to limit the scope of products at issue to the list of 10 categories of products. As we have already determined above, S.O. 1663(E) has been specifically identified as but one of the measures at issue in this dispute, insofar as it prohibits the importation of various agricultural products from those countries reporting NAI. We also noted that S.O. 1663(E) refers to more products than those listed in the panel request. Accordingly, we are not persuaded by India's argument that by listing the 10 categories of products in one section of its panel request and referring immediately thereafter to exports of "these products" having been affected by India's measures suggests that the United States intended to limit its challenge to those products.

3.38. On the basis of the above, the Panel concludes that the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI). We further conclude that the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request together with the reference to "these products" immediately following that listing do not suggest that the United States intended to limit its challenge to those products.

3.39. We now proceed to examine India's contention that the United States' reference in its panel request to the terms "related measures" and "implementing measures" falls short of the requirement of specificity in Article 6.2 of the DSU.

3.2.4 Whether the "related measures" and "implementing measures" mentioned in the panel request are included in the Panel's terms of reference

3.40. We now examine the second issue put forward by India in respect of its allegation that the United States has failed to identify the specific measures at issue in its panel request, contrary to the requirements of Article 6.2 of the DSU. Specifically, India requests that the Panel find that the United States' reference in its panel request to the term "related measures, or implementing measures" falls short of the requirement of specificity in Article 6.2 of the DSU.[108] In India's view, such reference is "vague and creates considerable uncertainty as to the specific instruments that the reference aims to cover".[109] As a consequence, India considers that this ambiguity has prejudiced its preparation of its defence in this dispute.[110]

3.41. In its response, the United States considers that India's suggestion that there is something ambiguous about the terms "related measures" and "implementing measures" lacks merit. The United States submits that its panel request clearly identifies the measures at issue both in narrative form and by citation to particular legal instruments.[111] The United States points out that the reference to "related measures, or implementing measures" is to be understood as referring to "'notifications', procedures, guidelines, or other instruments" giving effect to the import prohibitions laid out in S.O. 1663(E).[112] As an example of such measure, the United States cites India's requirement that "shipments of certain imported poultry and poultry products be accompanied by a veterinary certificate attesting that the country of origin is free of notifiable

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> [T]he identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather it is a consequence of the scope of application of the specific measures at issue. In other words, it is the measure at issue that generally will define the product at issue.
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> Appellate Body Report, *EC – Chicken Cuts*, para. 165. *See also* Panel Report, *EC – IT Products*, paras. 7.194-7.197.

[107] Panel Reports, *Korea – Alcoholic Beverages*, paras. 10.16; and *EC – IT Products*, paras. 7.194-7.197.
[108] India's request for a preliminary ruling, paras. 29-31 and 34.
[109] India's request for a preliminary ruling, para. 35.
[110] India's request for a preliminary ruling, para. 35.
[111] United States' first written submission, para. 206.
[112] United States' first written submission, para. 207.

avian influenza".[113] The United States further asserts that, to the extent that there is any ambiguity with respect to the "related" or "implementing" measures, such ambiguity stems from India's alleged failure to provide the response called for under Article 5.8 of the SPS Agreement. The United States asks the Panel to take this into account in its analysis, arguing that it constitutes attendant circumstances.[114]

3.42. As with the previous issue, we commence our analysis by looking at the text of the panel request. We note that the terms "related measures, or implementing measures", are found in a statement in the panel request that follows the listing under two indented points of what are referred to in the panel request as "legal instruments", specifically, the Livestock Act and S.O. 1663(E). Having listed those instruments, the panel request continues with the following language: "as well as amendments, related measures, or implementing measures in force as of the date of this request".[115] We recall the Appellate Body's explanation in *US – Continued Zeroing* that although the specificity requirement in Article 6.2 of the DSU means that the measures at issue must be defined "with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request", this does not involve an inquiry into the "precise content" of the measure.[116] Indeed, the Appellate Body clarified that the identification of a measure within the meaning of Article 6.2 need be framed "only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[117]

3.43. We note that the terms "implementing measures" and "related measures" and similar references in panel requests have been the subject of previous challenges in WTO dispute settlement. For instance, in *EC – Bananas III*, the panel request referred to "regulations and administrative measures, including those … which implement, supplement, and amend that regime".[118] In a statement upheld by the Appellate Body[119], the panel in that dispute considered that a reference in a panel request to a measure implementing, supplementing, and amending another measure may satisfy the requirements of Article 6.2 of the DSU, if such measure "refines" or "implements" another primary measure that is sufficiently identified in the panel request.[120] Along the same lines, the panel in *Japan – Film* discussed the term "related measures". In that report, which was not appealed, the panel observed that a measure not explicitly described in a panel request must have a "clear relationship" to a measure that is specifically described therein so that it can be said to be "included" in the specified measure.[121]

3.44. We also note that the panel in *Australia – Salmon (Article 21.5 – Canada)*, when facing the question of whether measures not expressly named in the panel request were part of the panel's terms of reference, considered whether the measure concerned was found to be "so closely related" to the measures named in the panel request that the respondent "can reasonably be found to have received adequate notice" of the scope of the complainant's claims.[122]

3.45. In certain circumstances, however, the reference to "related" or "implementing" measures may be insufficient for meeting the relevant criteria of Article 6.2 of the DSU. This may be the case, for example, if the "primary" measure (or measures) is rather broad in itself. This was indeed the situation in the two disputes to which India refers in its preliminary ruling request, namely *EC – Selected Customs Matters* and *China – Raw Materials.* India argues that in both instances, the terms "implementing measures and other related measures" and "related measures", respectively, were found to be vague, too broad, and not sufficiently informative as to

[113] United States' first written submission, para. 207.
[114] United States' first written submission, paras. 201 and 208 referring to Exhibit US-4.
[115] We note that India's challenge is limited to the terms "related measures, or implementing measures" and does not therefore include "amendments".
[116] Appellate Body Report, *US – Continued Zeroing*, paras. 168 and 169.
[117] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[118] The panel request referred to EC Regulation 404/93 and "subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime". *See* WT/DS27/6.
[119] Appellate Body Report, *EC – Bananas III*, para. 140.
[120] Panel Reports, *EC – Bananas III*, para. 7.27; as upheld by Appellate Body Report, *EC – Bananas III*, para. 140.
[121] Panel Report, *Japan – Film*, para. 10.8. *See also* Panel Report, *US – Carbon Steel*, para. 8.11.
[122] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 27.

what they covered.[123] For India, this failure to be sufficiently informative is also the problem with the panel request in the present dispute because of the use of the term "related measures, or implementing measures".[124]

3.46. Under the circumstances, a close examination of the two cases relied upon by India is warranted. We note, first, that the nature of the challenged measures in *EC – Selected Customs Matters*, namely the then European Communities' "Customs Code", its implementing regulations, the "Common Customs Tariff", and the "Integrated Tariff of the European Communities (TARIC)", was very broad. Consequently, the scope of "implementing measures and other related measures" in relation to those specific measures could encompass a vast body of instruments. As was stated by the Appellate Body, the reference to "implementing measures and other related measures" was too "vague and [did] not allow the identification of the specific instruments that the reference aims to cover". Thus, the Appellate Body concluded that the phrase "implementing measures and other related measures" did not "identify the specific measures at issue", as required in Article 6.2 of the DSU.[125]

3.47. Turning to *China – Raw Materials*, the panel request there included challenges to China's measures categorised as export quotas, export duties, and what were termed broadly as "additional restraints imposed on exportation".[126] Each of these categories of measures included several individual legal instruments covering several products. The panel in that dispute considered the use in the panel request of the term "among others" preceding the lists of challenged measures, as well as the following language: "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" to any of the listed measures.[127] The panel determined that it would include in its terms of reference the "implementing measures" referred to in the panel request, provided that they were taken to implement the challenged legal instruments specifically listed in the panel request.[128] However, given the breadth of the listed primary measures, the term "related measures" was found by the panel to be too broad, not allowing China to know clearly what specific measures were being challenged.[129] The panel also determined that the term "among others" was too broad as it sought to bring within the panel request measures other than those listed by bullet points in the panel requests.[130]

3.48. Focusing now on our own inquiry in this case, we recall the words of the Appellate Body in *US – Carbon Steel* that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of

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[123] India's request for a preliminary ruling, paras. 32 and 33, citing Appellate Body Report, *EC – Selected Customs Matters*, para. 152, footnote 369; and Panel Report, *China – Raw Materials*, Annex F-1, paras. 17-18.

[124] India refers as well to the panel ruling in *Canada – Wheat Exports and Grain Imports* to support its assertion that "while a panel request may identify measures by form, in the absence of an explicit identification, sufficient information must be provided in the panel request that effectively identifies the precise measures at issue". (*See* India's request for a preliminary ruling, para. 31 citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 20.) The Panel observes that this statement was not made by the panel in that dispute in the context of a determination on "related measures", or "implementing measures". Rather, it referred to a situation where the complainant, in its panel request, described the primary measures at issue in that dispute in very broad terms, namely, "laws, regulations and actions" of the Government of Canada and the Canadian Wheat Board related to exports of wheat. (See WT/DS276/6). The complete sentence to which India refers reads as follows:

> We consider that in 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. (emphasis added)

The reference by the panel in *Canada – Wheat Exports and Grain Imports*, was therefore made in the context of that panel's determination that the identification of measures of general application, i.e. use of the terms "laws" and "regulations" in the panel request did not necessarily render the panel request inconsistent with Article 6.2 of the DSU. Thus, we consider the facts and circumstances of the *Canada – Wheat Exports and Grain Imports* to be distinct from those in the present dispute and not helpful in determining the issue before us.

[125] Appellate Body Report, *EC – Selected Customs Matters*, para. 152, footnote 369.

[126] WT/DS394/7.

[127] Panel Report, *China – Raw Materials*, Annex F-1, para. 7.

[128] Panel Report, *China – Raw Materials*, para. 7.20 and Annex F-1, para. 20.

[129] Panel Report, *China – Raw Materials*, Annex F-1, paras. 17 and 18.

[130] Panel Report, *China – Raw Materials*, Annex F-1, paras. 11 and 12.

attendant circumstances".[131] Having compared *EC – Selected Customs Matters* and *China – Raw Materials* in respect of the measures at issue set out in the panel requests for those cases with the measures set out in the panel request in the present case, we find before us an instrument of an entirely different order than what was before the adjudicative bodies in the other two cases. Hence, we share the United States' view that the panel requests in those two disputes were quite dissimilar to that in the instant dispute.[132] Indeed, we observe that in the dispute before us, the two listed "primary measures", i.e. the Livestock Act and S.O. 1663(E), are not comparable in scope to the very broad measures or to the lengthy lists of measures at issue in the disputes relied upon by India. Moreover, the narrative description of the measures at issue in this case, i.e. avian influenza measures, has the effect of confining the scope of the measures at issue to those that prohibit the importation of various agricultural products into India from countries reporting NAI. Finally, the scope of the measures identified in the panel request is further limited by the term "in force as of the date of this request", which follows immediately after "related measures, or implementing measures" in the panel request.

3.49. The question remains how, if at all, the terms "related measures, or implementing measures" affect the specificity of the panel request in this dispute. The Panel observes that, with the exception of *China – Raw Materials,* questions in previous disputes as to whether a reference in a panel request to "related" or "implementing" measures or similar terminology was sufficiently precise to include a particular measure within the panel's terms of reference has typically arisen *after* the complainant sought to challenge a particular legal instrument that was not specifically referenced in the panel request, claiming that such instrument was nevertheless included in the panel's terms of reference by virtue of language similar to "related or implementing measures".[133] In the present dispute, no similar issue has arisen at this time.

3.50. Thus, the Panel considers that, in the circumstances of the present case, it is premature and indeed unnecessary to make a determination in the abstract, at this preliminary stage, as to precisely which measures fall within the Panel's terms of reference by virtue of the inclusion of the terms "related measures, or implementing measures" in the panel request. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise.[134]

3.51. This is not to say, however, that the panel request is not sufficiently precise to meet the requirements of Article 6.2 simply by virtue of the inclusion of the terms "related measures, or implementing measures". As we have explained above, the panel request makes clear that the measures at issue in this case are the avian influenza measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. Whether a particular "related" or "implementing" measure (i.e., one not specifically mentioned in the panel request)

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[131] Appellate Body in *US – Carbon Steel*, para. 127. Therefore, likewise, the reference to related or implementing measures in a panel request must be assessed in the light of the circumstances of each particular case.

[132] United States' first written submission, paras. 210 and 211.

[133] We note that there are few disputes where the panel request included this language ("related" or "implementing" measures) or similar language and that this gave rise to challenges with respect to the panel's jurisdiction to consider these measures. Among these disputes, to our knowledge, only the panel in *China – Raw Material* examined the inclusion of "related" or "implementing" measures within the panel's terms of reference in the abstract. In the other cases, the discussion typically arose when the complainant tried to challenge a measure not referenced in the panel request and the panel focused on the relationship between the "new" measure(s) and the measure(s) listed in the request. *See*, for instance, Panel Reports, *China – Publications and Audiovisual Products*, paras. 7.33–7.35 and 7.60; *Japan – Film*, paras. 10.1 and 10.20-10.21; *Thailand – Cigarettes (Philippines)*, paras. 7.57, 7.59 and 7.61–7.67.

In most cases where panels have examined whether measures not specifically referenced in the panel request formed part of a panel's terms of reference, the reference to "related" and "implementing" measures did not appear in the panel request. Again, in these cases, the discussion arose when the complainant tried to challenge a measure not explicitly referenced in the panel request. S*ee,* for instance, Panel Report, *Australia – Salmon*, paras. 8.7 and 8.17-8.19; Appellate Body Report, *Australia – Salmon*, paras. 101-105; Panel Reports, *Argentina – Footwear (EC)*, paras. 8.17-8.20, 8.23 and 8.46; *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparas. 16 and 27; *US – Section 129(c)(1) URAA*, paras. 5.2 and 6.4-6.5; *US – Carbon Steel*, paras. 8.3 and 8.11-8.12.

[134] The Panel notes that the United States has referred to "attendant circumstances" that, in its view, would justify the inclusion of related and implementing measures that are currently not specifically listed in the panel request (United States' first written submission, paras. 201 and 208, referring to Exhibit US-4). Given the Panel's decision not to make a preliminary decision in the abstract on whether specific related or implementing measures form part of its terms of reference, the Panel sees no need to address this argument here.

may be included within the panel's terms of reference is a matter that can be addressed in the course of these proceedings as the need arises.

3.2.5 Implication of the use of the word "orders" as opposed to "notifications" in the panel request

3.52. India argues that the use of the word "orders" in the panel request has created uncertainty, given that the DAHD does not issue "orders" pursuant to the Livestock Act. Rather, India points out, the DAHD issues "notifications". India thus clarifies that S.O. 1663(E) is a notification, not an order, issued by the DAHD pursuant to section 3(1) and 3A of the Livestock Act.[135]

3.53. The United States responds that the United States referred to S.O. 1663(E) as an order because, based on conversations by the United States with Indian officials, the United States understood "S.O" to stand for "special order". In the United States' view, it is perfectly clear from India's preliminary ruling request that India understands precisely what the United States was referring to when the United States referred to S.O. 1663(E) or to "orders" generically.[136]

3.54. Thus, as we understand it, the issue before us here is not that the United States failed to identify the specific measures at issue, but rather whether, by using the word "orders" instead of "notifications" in identifying the legal instruments issued by DAHD pursuant to the Livestock Act, the United States created uncertainty for India. As before, we shall commence our analysis by examining the corresponding text of the panel request, which reads as follows:

> – orders issued by India's Department of Animal Husbandry, Dairying, and Fisheries ("DAHD") pursuant to the Livestock Act, most recently S.O. 1663(E), which was published in the Gazette of India on July 19, 2011

3.55. The Panel observes that, while Article 6.2 requires the identification of the specific measure at issue, it does not require that panel requests explicitly specify measures of general application (such as "laws", or "regulations", or in the instant dispute "orders") by name. In fact, in the absence of an explicit identification of a measure of general application by name, the requirement is that "sufficient information" be provided in the panel request itself that "effectively identifies the precise measure at issue".[137]

3.56. In its panel request, the United States not only gives an example of the type of "orders" at issue, making reference to legal instrument S.O. 1663(E), but also clarifies that it is concerned only with "orders" that are issued by the DAHD pursuant to the Livestock Act. In the Panel's view, while the United States, in its panel request, may have utilised the incorrect term "orders" as alleged by India, the narrative description of such "orders", as well as the mention of the legal instrument S.O. 1663(E) as an example, provide sufficient information that effectively identifies the precise measures at issue.

3.57. Moreover, India has demonstrated that it understands what is meant by the term "orders" as used in the panel request. India points out that, as the DAHD does not issue "orders" pursuant to the Livestock Act, legal instruments including and of a similar nature to S.O. 1663(E) would be correctly identified as "notifications". Indeed, India goes further, and identifies sections 3(1) and 3A of the Livestock Act as those pursuant to which the DAHD derives its authority to issue such "notifications".[138]

3.58. In its first written submission, the United States provides a detailed description of the "notifications" challenged, a description that corresponds to India's statements to which we referred in the preceding paragraph.[139] For the Panel, this supports the conclusion that the United States' use of the term "orders" neither affected India's understanding of the measures challenged, nor prejudiced the ability of India to defend itself.

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[135] India's request for a preliminary ruling, paras. 36 and 37.
[136] United States' first written submission, para. 204, footnote 288.
[137] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, subpara. 20.
[138] India's request for a preliminary ruling, paras. 37 and 38.
[139] United States' first written submission, paras. 88–91.

3.59. Based on the foregoing, the Panel finds that that the word "orders" included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself.

3.60. India has also alleged that the use of the word "orders" in the plural renders the panel request unclear as to the types of notifications that the United States seeks to implicate in its panel request.[140]

3.61. The United States responds that its panel request refers to the word "orders" in the plural "to ensure that it captured new, replacement, or additional orders or notifications in force as of that time of which the United States was not aware".[141] The United States adds that this inclusive phrasing was particularly necessary in the present case given India's failure to respond to the United States' request pursuant to Article 5.8 of the SPS Agreement for a statement of the measures through which India maintains import restrictions based ostensibly on avian influenza.[142]

3.62. We echo our reasoning in Section 3.2.4 above on the use of the term "related measures, or implementing measures" and conclude that it is premature for us to make a determination, in the abstract, as to whether any "orders" not specifically listed in the panel request fall within the Panel's terms of reference. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise.

3.2.6 Alleged inclusion of expired measures in the Panel's terms of reference

3.63. In connection with its challenge to the United States' use of the term "orders", India also notes that this term "orders" is followed by a reference to "most recently S.O. 1663(E)" which, according to India, suggests that the United States intends to include, in its challenged measures, DAHD legal instruments that preceded S.O. 1663(E), and that have ceased to have legal effect.[143] India raises two issues in this regard: (i) that as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel[144]; and (ii) that, without prejudice to its position on expired measures aforementioned, the suggestion that the United States is challenging expired measures becomes uncertain in light of the phrase "in force as at the date of this request", which appears at the end of paragraph 3 of the panel request.[145]

3.64. As India has acknowledged, the panel request states specifically, at the end of the phrase "as well as amendments, related measures, or implementing measures", the following: "in force as of the date of this request". Moreover, the United States clarified in its first written submission that, as its panel request explains, the United States is only challenging measures in force as of the date of the panel request.[146]

3.65. Under the circumstances, in our view there can be no uncertainty on India's part at this stage of the proceedings as to whether the United States is challenging measures that were not in force as of the date of the panel request. It is clear that this is not the case and that the United States is challenging only the measures that were in force as of the date of the panel request, namely 11 May 2012.

3.2.7 Conclusion

3.66. With respect to India's allegations that the panel request fails to identify the specific measures at issue, the Panel concludes as follows:

a. the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the

[140] India's request for a preliminary ruling, paras. 29 and 35.
[141] United States' first written submission, para. 212, footnote 299.
[142] United States' first written submission, para. 212, footnote 299.
[143] India's request for a preliminary ruling, paras. 38 and 39.
[144] India's request for a preliminary ruling, para. 38, citing Appellate Body Reports, *EC – Selected Customs Matters*, para. 184; and *EC – Chicken Cuts*, para. 156.
[145] India's request for a preliminary ruling, para. 40.
[146] United States' first written submission, para. 212, footnote 299.

importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI);

b. the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request together with the reference to "these products" immediately following that listing do not suggest that the United States intended to limit its challenge to those products;

c. in the circumstances of the present case, it is premature and indeed unnecessary to make a determination in the abstract, at this preliminary stage, as to precisely which measures fall within the Panel's terms of reference by virtue of the inclusion of the terms "related measures, or implementing measures" in the panel request. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise;

d. the word "orders" included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself;

e. it is premature for us to make a determination, in the abstract, as to whether any "orders" not specifically listed in the panel request fall within the Panel's terms of reference. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise; and

f. under the circumstances, there can be no uncertainty on India's part at this stage of the proceedings as to whether the United States is challenging measures that were not in force as of the date of the panel request. The United States is challenging only the measures that were in force as of the date of the panel request, namely 11 May 2012.

3.3 Whether the panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly

3.3.1 The issues before the Panel

3.67. India alleges that the claims cited in the panel request neither fulfil the requirement of precision required of a panel request, nor do they provide a summary that is sufficient to present the problem clearly, "leaving India to wonder what case it has to answer".[147] We note that India's challenge in this regard is limited to the United States claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.[148]

3.68. As discussed in Section 3.1 above, Article 6.2 of the DSU requires that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body noted in *Korea – Dairy* that this requirement has two distinct elements: not only must "the legal basis of the complaint"[149] be summarily identified, but this identification must also "present the problem clearly".[150]

3.69. The first step in our analysis is to determine whether the United States has identified the treaty provision(s) of the covered agreement alleged to be breached by the respondent. As the Appellate Body has observed, identification of the treaty provision(s) is a "minimum prerequisite" and 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.[151] We note that, on its face, the panel request identifies the treaty provisions upon which the United States is basing its claims, *inter alia*, Articles 2.3, 5.5 and 5.6 of the SPS Agreement.

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[147] India's request for a preliminary ruling, para. 42.
[148] India's request for a preliminary ruling, paras. 42 and 47.
[149] The Appellate Body has, in past reports, referred to the "legal basis of the complaint" as "the claim". Similarly, we shall refer to these two terms interchangeably. *See* Appellate Body Reports, *Guatemala – Cement I*, para. 72; and *Korea – Dairy*, para. 139.
[150] Appellate Body Report, *Korea – Dairy*, para. 120.
[151] Appellate Body Report, *Korea – Dairy*, para. 124; and Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.30.

3.70. The second step, and indeed, what is at issue in the instant dispute, is whether the United States' identification of its claims under these three provisions of the SPS Agreement is "sufficient to present the problem clearly". Such a determination depends upon the circumstances of each case. As explained by the Appellate Body, whereas there may be situations where the "simple listing of the articles of the agreement" involved may suffice to meet the standard of clarity required in Article 6.2, there may also be situations where the mere listing of treaty articles would not satisfy such standard.[152]

3.71. India raises a variety of arguments with respect to the United States' claims under Articles 2.3, 5.5, and 5.6 of the SPS Agreement. We proceed now to examine the arguments under each claim in turn.

3.3.2 Claims under Article 2.3 of the SPS Agreement

3.72. India argues that the United States' claims under Article 2.3 of the SPS Agreement is not sufficiently precise to present the problem clearly and has created "significant uncertainty"[153] for India regarding the case it has to answer. According to India, the uncertainty arises on account of three issues: (i) uncertainty as to whether the United States intends to raise claims on only one distinct obligation or multiple distinct obligations contained in Article 2.3; (ii) uncertainty arising on account of the use of the word "example"; and (iii) failure to provide a brief summary sufficient to present the problem clearly.[154]

3.3.2.1 Alleged uncertainty as to whether the United States intends to raise claims on only one distinct obligation or multiple distinct obligations contained in Article 2.3 of the SPS Agreement

3.73. According to India, Article 2.3 contains not one but *three* distinct obligations with respect to SPS measures: (i) that a Member's SPS measures not arbitrarily or unjustifiably discriminate between Members where similar conditions prevail; (ii) that they do not discriminate between that Member's own territory and that of other Members; and (iii) that the SPS measures are not applied in a manner that constitutes a disguised restriction on international trade.[155] India submits that the brief illustration provided in the panel request under Article 2.3 pertains only to the "second specific obligation" in Article 2.3 and thus is not sufficient to present the problem clearly as regards the first and third distinct obligations contained in Article 2.3.[156] India concluded on this basis that the United States intends to limit its challenge to the "second specific obligation". India contends further that this intention is strengthened by an examination of the attendant circumstances, namely a comparison of the United States' request for consultations and its panel request. India posits that by excluding from its panel request the claim under Article I:1 of the GATT 1994 regarding MFN treatment that was included in the request for consultations, the United States "has expressed its intention" to specifically exclude from its panel request a claim under the first obligation of Article 2.3 of the SPS Agreement, as this first obligation corresponds to the MFN obligation in Article I:1 of the GATT 1994.[157] India alleges that "[c]onfusion arises" however because the panel request provides a general reference to the first and third obligations of Article 2.3 "without so much as a semblance of a summary to explain the basis of the violation underlying these distinct obligations as it has done with the illustration in the case of the second obligation".[158]

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[152] Appellate Body Reports, *Korea – Dairy*, para. 124, and *EC – Bananas III*, para. 141.

[153] India's request for a preliminary ruling, para. 48. The Panel notes that India's arguments in this paragraph relate to both its challenges of the panel request descriptions of the claims under Articles 2.3 and 5.5 of the SPS Agreement.

[154] India's request for a preliminary ruling, para. 48.

[155] India's request for a preliminary ruling, para. 50. In support of its argument, India cites the panel's finding in Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.50. However, the Panel observes that this particular finding relates to the two distinct obligations in Article 21.3 of the SCM Agreement. In that case, the panel request was found not to meet the requirements of Article 6.2 of the DSU because the panel considered that "this is one case" where it was necessary to refer in the panel request to both obligations found in Article 21.3 of the SCM Agreement. India does not make clear, nor is the Panel persuaded, that this finding is relevant for our purposes here.

[156] India's request for a preliminary ruling, para. 51.

[157] India's request for a preliminary ruling, para. 53.

[158] India's request for a preliminary ruling, para. 54.

3.74. In response, the United States submits that their claims, as described in the panel request, "made clear" that it is challenging the consistency of India's avian influenza measures with the two obligations of Article 2.3 contained in the first and second sentence of that provision.[159] According to the United States, India was thus "on notice" that both disciplines in Article 2.3 were at issue.[160]

3.75. In order to determine whether the panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly as required by Article 6.2 of the DSU, we shall examine the panel request on its face, as a whole, and in light of the attendant circumstances.[161]

3.76. The panel request, "on its face", states in relevant part:

> The United States considers that India's measures are inconsistent with India's commitments and obligations under the following provisions of the SPS Agreement and the GATT 1994:
>
> SPS Agreement
>
> ...
>
> Article 2.3 because India's avian influenza measures arbitrarily or unjustifiably discriminate between Members where similar conditions prevail, including between India's own territory and that of other Members. For example, while India applies the avian influenza measures at issue here to imported products, India does not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India. Further India, has applied its measures in a manner that constitutes a disguised restriction on international trade.

3.77. We observe that the panel request tracks closely the language of Article 2.3 of the SPS Agreement, which reads as follows:

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

3.78. Turning to the question whether Article 2.3 contains "three distinct obligations" as alleged by India, we observe that previous panel and Appellate Body reports have identified *two* (as opposed to three) primary obligations in Article 2.3.[162] The first obligation is contained in the first sentence: "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members"; the second obligation is contained in the second sentence: "Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade". Thus it appears that India separates into two the single obligation found in the first sentence of Article 2.3.[163]

3.79. Examining the panel request on its face, it is clear that the two obligations of Article 2.3 are included in the claims articulated by the United States. The panel request first refers to India's avian influenza measures as "arbitrarily or unjustifiably discriminat[ing] between Members where

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[159] United States' first written submission, para. 217.
[160] United States' first written submission, para. 217.
[161] Appellate Body Report, *US – Carbon Steel*, para. 127.
[162] Panel Report, *Australia – Salmon*, para. 8.109; Appellate Body Report, *Australia – Salmon*, para. 252.
[163] Prior panels have found that there are three cumulative elements *which are necessary to find a violation* of the obligation in the first sentence of Article 2.3, namely (i) that the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (ii) that the discrimination is arbitrary or unjustifiable; and (iii) that identical or similar conditions prevail in the territory of the Members compared. Panel Reports, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111; and *US – Poultry (China)*, para. 7.317.

similar conditions prevail, including between India's own territory and that of other Members", mirroring the language of the first obligation in Article 2.3. After setting out an example on how this first obligation has been infringed by India's avian influenza measures, the panel request goes on to state that "India, has applied its measures in a manner that constitutes a disguised restriction on international trade", thus reproducing the wording of the second obligation in Article 2.3.

3.80. India contends that the panel request does not meet the requirements of Article 6.2 of the DSU because there is only a general reference to what it refers to as the first and third obligations, without "a summary to explain the basis of the violation underlying these distinct obligations".[164] We are not persuaded by India's arguments in this respect. The Appellate Body has made clear that there is a "significant difference between the *claims* identified" in the panel request 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".[165] In our view, the panel request provides adequate notice that the United States is pursuing claims under both obligations in Article 2.3 of the SPS Agreement. It was not necessary to provide additional explanation of the violation underlying the obligation in the manner claimed by India.

3.81. A similar approach has been followed by other panels. We recall in this context that in *EC – Approval and Marketing of Biotech Products*, disputes also involving SPS provisions, the European Communities requested a preliminary ruling on the grounds that the panel requests did not provide a summary of the legal basis of the complaint sufficient to present the problem clearly, alleging that the panel requests should have described and explained "the substantive aspects or the effects of the measures which are allegedly in breach of those provisions".[166] The panel in those disputes, while observing that it would be desirable for a complainant to provide this type of information in its panel request, agreed with the Appellate Body in *EC – Bananas III* that a panel request need not set out arguments "as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".[167] Similarly, in *Australia – Apples*, the panel concurred with the finding in *EC – Approval and Marketing of Biotech Products* and found that the lack of a detailed explanation in the panel request as to how or why the 17 specifically listed measures at issue were considered to violate the provisions of the SPS Agreement invoked did not fail to meet the requirements of Article 6.2 of the DSU of providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[168]

3.82. India also alleges imprecision in the panel request based on its view that the request includes an illustration of the underlying violation with respect to what it calls the second obligation, but only a general reference without illustration of the underlying violations with respect to what it calls the first and third obligations.[169] We have just determined that it was not necessary in this case to include the type of "illustration of the underlying violation" sought by India. The question here is whether including such illustration renders the panel request unclear and hence in violation of Article 6.2 of the DSU. This leads into India's allegation related to the use of "for example" in setting out claims in the panel request, which we turn to now.

3.3.2.2 Alleged uncertainty arising due to the use of the term "for example"

3.83. India alleges that the use of the term "for example" in the description of the claims under Article 2.3 of the SPS Agreement "takes away from the requirement of precision required of claims, and consequently of panel requests".[170] India argues that using the term "for example" creates confusion because it "indicates that the explanation in the panel request is something short of the 'brief summary of the legal basis of the complaint'", and is hence unreliable as a basis on which India can become aware of the basis for the alleged violation.[171] India adds that this term leaves the door open for the United States to bring in new claims not contemplated in the

[164] India's request for a preliminary ruling, para. 54.
[165] Appellate Body Report, *EC—Bananas III*, para. 141 (emphasis original).
[166] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 89.
[167] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 102.
[168] Panel Report, *Australia – Apples*, Annex A-2, paras. 11 and 12.
[169] India's request for a preliminary ruling, para. 54.
[170] India's request for a preliminary ruling, para. 56.
[171] India's request for a preliminary ruling, para. 58.

panel request, further prejudicing India's ability to defend itself.[172] Finally, India points out that the Appellate Body and panels have disallowed phrases such as "including but not limited to" and "especially (but not exclusively)" to include claims not specifically identified in the panel request.[173]

3.84. The United States refutes India's allegations and contends that the fact that it provides an illustrative example of why it considered India's measures to breach the first sentence of Article 2.3 cannot plausibly be read to suggest that the second sentence was not at issue.[174] Further, the United States indicates that after providing the example in Article 2.3, it expressly states that India had breached the Article's second sentence.[175]

3.85. We recall that the United States' claims under Article 2.3 of the SPS Agreement in the panel request reads as follows:

> Article 2.3 because India's avian influenza measures arbitrarily or unjustifiably discriminate between Members where similar conditions prevail, including between India's own territory and that of other Members. For example, while India applies the avian influenza measures at issue here to imported products, India does not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India. Further India, has applied its measures in a manner that constitutes a disguised restriction on international trade.

3.86. As a starting point, we note that the Oxford Dictionary defines the word "example" as "a thing characteristic of its kind or illustrating a general rule".[176] The term as it appears in the United States' panel request under its Article 2.3 claims follows a description of the claim under the first sentence of Article 2.3. Thus, we understand this example to be an "illustration" of how, according to the United States, India has breached its obligations referred to in that sentence. We are not persuaded that including the example of a violation of Article 2.3 as the United States did would serve to limit the scope of its claims under Article 2.3 to what India describes as the second obligation in Article 2.3. Rather, we regard the example as merely illustrative, and concur with the United States' view that it "merely provided additional information about the [United States'] view of the dispute".[177] Moreover, immediately following the illustration, the panel request sets out another claim tracking, as we pointed out above, the second sentence of Article 2.3. To our minds, the example does not affect the description of the claim under the second sentence; it merely supplements the description of the claim under the first sentence. We therefore conclude that the use of "for example" does not lead to confusion in this case.

3.87. We are also of the view that "for example" is unlike the terms India cited as having been problematic in other panel requests. The terms "including but not limited to" and "especially (but not exclusively)" operate in precisely the opposite way as "for example" does. Thus, while "for example" is used to provide an illustration of a general rule, the other terms are used to expand the sense of the rule beyond a single term. Under the circumstances, we are not persuaded by India's argument that use of "for example" will leave the door open to the United States to bring in claims not contemplated in the panel request.

3.88. The Panel therefore dismisses India's allegation that the inclusion of the term "for example" in the United States' claims under Article 2.3 of the SPS Agreement creates such confusion as to render the summary of the legal basis of the complaint insufficient to present the problem clearly, thereby prejudicing the ability of India to defend itself.

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[172] India's request for a preliminary ruling, paras. 57-59.
[173] India's request for a preliminary ruling, para. 61.
[174] United States' first written submission, para. 218.
[175] United States' first written submission, para. 219.
[176] Oxford Dictionaries Pro, accessed 29 April 2013, <http://english.oxforddictionaries.com/definition/example;jsessionid=1DC77D106F745250DCF45643CB23DF80#m_en_gb0278520.007>.
[177] United States' first written submission, para. 219.

3.3.2.3 Alleged failure to provide a brief summary sufficient to present the problem clearly with respect to the claims under Article 2.3 of the SPS Agreement

3.89. With respect to the alleged failure to provide a brief summary sufficient to present the problem clearly, India raises two issues: (i) that the example provided with respect to the claims under Article 2.3 in the panel request does not inform India whether the United States is challenging treatment of imports *vis-à-vis* domestic like products in a situation of HPAI or LPAI; and (ii) whether the treatment of products is limited to all or some of the products listed in paragraph 3 of the panel request.[178]

3.3.2.3.1 Alleged uncertainty as to the scope of the measures covered by the claims under Article 2.3 of the SPS Agreement

3.90. The first issue is similar to the one we just analysed with respect to the inclusion of an example following the reference to the claim under the first sentence of Article 2.3 of the SPS Agreement. As we said above, the example merely serves to supplement the description of that claim and does not lead to confusion as regards the scope of the measures covered by the claims under Article 2.3.

3.91. Furthermore, we consider that the scope of the claims is defined by the measure challenged. The description of the claims under Article 2.3 in the panel request refers to "India's avian influenza measures". This informs the parties that the United States intends to challenge these measures in its claims under Article 2.3. We recall that these measures have been described in the panel request as those that prohibit the importation of various agricultural products from those countries reporting NAI (both HPNAI and LPNAI). Thus, the Panel considers that it is clear on the face of the panel request that the United States' claims under Article 2.3 cover the treatment of products from countries reporting HPAI, or from those reporting LPAI, or both. We therefore dismiss India's allegation that the United States' claims under Article 2.3 do not inform India whether the United States is challenging the treatment of imports *vis-à-vis* domestic like products in a situation of HPAI or LPAI.

3.3.2.3.2 Alleged uncertainty as to the products covered by the claims under Article 2.3 of the SPS Agreement

3.92. As regards the products covered by the United States' claims under Article 2.3 of the SPS Agreement, we recall that Article 6.2 of the DSU does not require the identification of products at issue; rather it refers to the identification of the specific measure at issue.[179] Thus, only upon an examination of the measures at issue may the products at issue be properly identified.[180] As mentioned above, the panel request includes a list of 10 categories of products that are prohibited by S.O. 1663(E). However, S.O. 1663(E) itself refers to more products than those listed in the panel request.

3.93. Furthermore, in its description of its claims under Article 2.3 in the panel request, the United States refers to "India's avian influenza measures", which, as we determined in Section 3.2.3 above, are maintained through legal instruments that include S.O. 1663(E). Thus, with respect to India's allegation regarding the products covered by United States' claims under Article 2.3 of the SPS Agreement, we are not persuaded by India's argument that the listing of the 10 categories of products in the panel request means that the United States intended to limit its challenge to those products. Nor are we persuaded that the listing of the products rendered the panel request so vague and broad that India is not able to know the case against it and thus is not able to begin preparing its defence.

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[178] India's request for a preliminary ruling, paras. 64 and 69.

[179] Appellate Body Report, *EC – Computer Equipment*, para. 67.

[180] Indeed, as stated by the Appellate Body in *EC – Chicken Cuts*:

> [T]he identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather it is a consequence of the scope of application of the scope of the specific measures at issue. In other words, it is the measure at issue that generally will define the product at issue

Appellate Body Report, *EC – Chicken Cuts*, para. 165. *See also* Panel Report, *EC – IT Products*, paras. 7.194-7.197.

3.3.2.4 Conclusion

3.94. With respect to all of India's allegations regarding the description by the United States of its claims under Article 2.3 in the panel request, the Panel concludes that the panel request has not failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claims under Article 2.3 of the SPS Agreement.

3.3.3 Claim under Article 5.5 of the SPS Agreement

3.95. India argues that the United States' claim under Article 5.5 of the SPS Agreement is not sufficiently precise to present the problem clearly and has created significant uncertainty for India regarding the case it has to answer. According to India, the uncertainty arises on account of two issues: (i) uncertainty arising on account of the use of the word "for example"; and (ii) failure to provide a brief summary sufficient to present the problem clearly.[181] We shall examine each issue in turn.

3.3.3.1 Alleged uncertainty arising due to the use of the term "for example"

3.96. The first issue that we consider is whether, as India argues, the use of the term "for example" in the description of the United States' claim under Article 5.5 of the SPS Agreement "takes away from the requirement of precision" required of claims, and consequently of panel requests in Article 6.2 of the DSU.[182] India's arguments in this regard are along the same lines it argues with respect to its claims under Article 2.3 described above. In addition, as it does with respect to Article 2.3, India contends that if the description in the panel request is treated as a mere example, the United States would be "abdicating its duty towards precision in asserting its claim"[183] and seriously prejudicing India's ability to formulate a specific response. India therefore requests the Panel to limit the scope of the United States' claim under Article 5.5 to the specific description of the example mentioned in the panel request, in order to preserve the due process rights of India.[184]

3.97. The United States refutes India's allegation and contends that the wording of the examples hardly lack precision. According to the United States, even without the examples provided when stating the claim under Article 5.5 (and 2.3), the United States satisfies its duty to state clearly which claims it considers to be at issue. The United States adds that its "decision to preview arguments under these articles"[185] merely provided India with additional information about the United States' view of the dispute.

3.98. We start our examination by scrutinizing the panel request, which states in relevant part that:

> The United States considers that India's measures are inconsistent with India's commitments and obligations under the following provisions of the SPS Agreement and the GATT 1994:
>
> SPS Agreement
>
> ...
>
> Article 5.5 because India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade. For example, - to the extent transmission of avian influenza by way of U.S. agricultural products is considered a "different situation" than the transmission of avian influenza by way of India's domestic agricultural products – India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and

[181] India's request for a preliminary ruling, para. 48.
[182] India's request for a preliminary ruling, para. 56.
[183] India's request for a preliminary ruling, para. 62.
[184] India's request for a preliminary ruling, para. 62.
[185] United States' first written submission, para. 220.

> these distinctions result in discrimination or a disguised restriction on international trade.

3.99. The relevant part of the panel request starts with a sentence explaining why the United States believes that India's measures are inconsistent with Article 5.5 of the SPS Agreement "because India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade". Article 5.5 reads, in relevant part:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

3.100. An examination of the panel request on its face reveals that the United States in its first sentence of the description of its claim under Article 5.5 of the SPS Agreement utilises the language of the provision to describe how India allegedly violates its obligation under this provision.

3.101. India's concern pertains primarily to the second sentence of the description in the panel request of the claim under Article 5.5 of the SPS Agreement. This second sentence commences with the words "[f]or example". In India's view, in order to preserve its due process rights, the scope of the claim under Article 5.5 should be limited to the description of the example in the second sentence.[186] Hence, similar to the issue raised with respect to the claims under Article 2.3, the Panel is tasked with determining whether the inclusion of the term "for example" in the United States' claim under Article 5.5 of the SPS Agreement creates such confusion as to render the summary of the legal basis of the complaint insufficient to present the problem clearly, thereby prejudicing the ability of India to defend itself.

3.102. We have previously observed that the word example is defined as "a thing characteristic of its kind or illustrating a general rule".[187] Applying this ordinary meaning, we are not persuaded that an example of a violation of Article 5.5, which follows a general brief summary of the United States' challenge thereunder, would be exhaustive and serve to limit the scope of the claim as described in the first sentence. Rather, as we have observed above in the context of the claims under Article 2.3, we consider this example to be illustrative, and concur with the United States' view that it "merely provided additional information about the [United States'] view of the dispute".[188]

3.103. We note that the example provided in the United States' claim under Article 5.5 of the SPS Agreement relates to the potential "different situations" that may exist under this provision. This example describes transmission of avian influenza by "U.S. agricultural products" on the one hand and "India's domestic agricultural products" on the other hand, as different situations that are allegedly comparable for the purpose of determining a violation of Article 5.5. To our minds, this example goes beyond identifying a claim and rather addresses a part of the arguments needed to establish the claim of violation under Article 5.5. We recall that the requirement in Article 6.2 of the DSU is for a complainant to set out its claims and that there is a significant difference between the claims identified in a panel request and the arguments supporting those claims, which are to be set out and progressively clarified in the first written submissions, and during the course of the proceedings.[189] Accordingly, we do not consider that the argument relating to "different situations" as described in the second sentence of the claim under Article 5.5 should be used to limit the scope of the brief summary of the general claim under Article 5.5 set out in the first sentence. With regard to India's reference to the infringement of its due process rights; we do not consider these to have been infringed by the inclusion of the example in the second sentence. Indeed, India

[186] India's request for a preliminary ruling, para. 62.
[187] Oxford Dictionaries Pro, accessed 29 April 2013, <http://english.oxforddictionaries.com/definition/example;jsessionid=1DC77D106F745250DCF45643CB23DF80#m_en_gb0278520.007>.
[188] United States' first written submission, para. 219.
[189] Appellate Body Report, *EC – Bananas III*, para. 141.

not only received notice of the challenge against it as required under Article 6.2 of the DSU through the description of the claim in the first sentence, but it also received a preview of the arguments that the United States intends to put forward during the course of the proceedings.

3.104. The Panel therefore dismisses India's allegation that the inclusion of the term "for example" in the United States' claim under Article 5.5 limits the scope of this claim to the specific description of the example mentioned in the panel request. Consequently, the Panel also dismisses India's allegation that its due process rights are prejudiced by this reference to "for example".

3.3.3.2 Alleged failure to provide a brief summary sufficient to present the problem clearly with respect to the claim under Article 5.5 of the SPS Agreement

3.105. With respect to the alleged failure to provide a brief summary sufficient to present the problem clearly, India raises four issues. First, India argues that the example provided with respect to the claim under Article 5.5 in the panel request "simply identifies the 'different situations', which is only one of the important aspects" of a claim under Article 5.5, thus failing to identify the "other important" aspects, being "the distinctions in appropriate levels of sanitary protection", and "the alleged 'discrimination or disguised restriction in international trade'".[190] Second, India contends that the description of the claim under Article 5.5 "itself is highly inadequate and imprecise" as it is not clear whether the United States' reference to "transmission of avian influenza" refers to a transmission of HPAI or LPAI.[191] Third, according to India, the confusion is "also heightened" because of the use of the term "agricultural products", as it is not clear whether the term refers to some or all of the products listed in paragraph 3 of the panel request, or to products other than those listed.[192] Fourth, India argues that, given that claims under Articles 5.5 and 2.3 are generally interlinked, the differing formulations of the descriptions of the two claims suggests an intention on the part of the United States to rely on a different set of facts for each claim, meaning that India cannot rely on the summary provided in the claims under Article 2.3 to understand the dimensions of the United States' claim under Article 5.5 or *vice versa*.[193]

3.106. The United States is of the view that India confuses claims, which must be stated in a panel request, and the facts and arguments supporting those claims, which a complainant need not present until it makes its submissions to the Panel.[194] With respect to the reference to "transmission of avian influenza", the United States refutes India's allegations, noting that the legal instrument S.O. 1663(E) defines the term "notifiable avian influenza" as encompassing both HPNAI and LPNAI, and that the restrictions it imposes apply equally following detections of either.[195] As regards the use of the term "agricultural products", the United States contends that not only does the claim under Article 5.5 leave no ambiguity with respect to product coverage, "such clarity is unnecessary" to meet the requirements of Article 6.2 of the DSU.[196] The United States does not address in its first written submission the fourth issue raised by India regarding the alleged different formulations of the descriptions of the claims under Articles 2.3 and 5.5 of the SPS Agreement.

3.107. The Panel now proceeds to examine India's four allegations in turn.

3.3.3.2.1 Allegation that the claim under Article 5.5 of the SPS Agreement is incomplete as it identifies only one of the aspects of a claim under this provision

3.108. As noted above, India argues that the example provided with respect to the claim under Article 5.5 in the panel request simply identifies the "different situations", which is just one of the aspects of a claim under Article 5.5, thus failing to identify the other aspects, being "the distinctions in appropriate levels of sanitary protection", and "the alleged discrimination or

[190] India's request for a preliminary ruling, para. 66.
[191] India's request for a preliminary ruling, para. 67.
[192] India's request for a preliminary ruling, para. 67.
[193] India's request for a preliminary ruling, paras. 68 and 69.
[194] United States' first written submission, para. 222.
[195] United States' first written submission, para. 224.
[196] United States' first written submission, para. 223.

disguised restriction in international trade".[197] The United States responds that India confuses claims, which must be stated in a panel request, and the facts and arguments supporting those claims, which a complainant need not present until it makes its submissions to the Panel.[198]

3.109. We now turn to examine whether the panel request, in its description of the claim under Article 5.5, "simply identifies" only one "aspect" of a claim under Article 5.5, as alleged by India.[199]

3.110. India refers to three "aspects" of a claim under Article 5.5: (i) different situations; (ii) the distinctions in the appropriate levels of sanitary protection (ALOPs); and (iii) the alleged discrimination or disguised restriction in international trade.[200]. According to India, the latter two aspects are "not identified"[201] in the panel request. We observe that the panel request, in the first sentence of the description of the claim under Article 5.5, refers to these aspects in mirroring the language of Article 5.5. This first sentence reads, in relevant part: "because India is maintaining arbitrary or unjustifiable distinctions in its [ALOPs] in different situations, and these distinctions result in discrimination or a disguised restriction on international trade".

3.111. However, India appears to suggest that the United States has "identified" the first aspect because it provided an example of the "different situations", and that by failing to provide similar examples for the other two aspects, the panel request "leaves India to wonder about the dimensions" of the claim under Article 5.5.[202] We recall in this respect our conclusion in Section 3.3.3.1 above that the example included in the description of the claim under Article 5.5 is merely illustrative and does not delimit the scope of the United States' claim under that provision. We also recall that there is a significant difference between the claims identified in a panel request and the arguments supporting those claims, and that the latter need not be included in the panel request but rather are developed in the written submissions.[203]

3.112. In the light of the above, we are not persuaded that the obligation under Article 6.2 of the DSU requires elaboration of the claim under Article 5.5 of the SPS Agreement in the panel request beyond what is contained in the text of the first sentence of the description.[204] As such, we are unable to agree with India that the panel request falls short in this respect of the requirements of Article 6.2 of the DSU.

3.3.3.2.2 Alleged uncertainty as to whether the reference to "transmission of avian influenza" refers to a transmission of HPAI or LPAI

3.113. According to India, the description of the claim under Article 5.5 "itself is highly inadequate and imprecise" as it is not clear whether the United States' reference to "transmission of avian influenza" refers to a transmission of HPAI or of LPAI.[205] The United States, in refuting India's allegation, notes that the legal instrument S.O. 1663(E) defines the term "notifiable avian influenza" as encompassing both HPNAI and LPNAI, and that the restrictions it imposes apply equally following detections of either.[206]

3.114. As we noted in Section 3.2.3 above, the measures at issue are defined as "India's avian influenza measures" and are described as measures that prohibit the importation of various

[197] India's request for a preliminary ruling, para. 66.
[198] United States' first written submission, para. 222.
[199] *See* paragraphs 3.98. and 3.99. for the relevant text of the panel request and that of Article 5.5 of the SPS Agreement
[200] India's request for a preliminary ruling, para. 66.
[201] India's request for a preliminary ruling, para. 66.
[202] India's request for a preliminary ruling, para. 66.
[203] Appellate Body Report, *EC – Bananas III*, para. 141.
[204] The Panel acknowledges the United States' argument in paragraph 225 of its first written submission that the absence of additional information as to the ALOP adopted by India as regards avian influenza should be attributed to India's alleged failure to respond to the United States' Article 5.8 request. The United States requests the Panel to take this alleged failure into account as attendant circumstances that should inform the understanding of the panel request. However, as the Panel has determined that elaboration in the panel request of, *inter alia*, the ALOP is not required by Article 6.2 of the DSU with respect to the United States' claim under Article 5.5, the Panel refrains from addressing here this argument of the United States.
[205] India's request for a preliminary ruling, para. 67.
[206] United States' first written submission, para. 224.

agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI). One such Indian avian influenza measure is S.O. 1663(E).[207] There are two references in the text of S.O. 1663(E) to NAI, and as the United States points out, both of these references include, in brackets, both HPNAI and LPNAI.[208]

3.115. An examination of the panel request on its face and as a whole, together with an examination of the text of S.O. 1663(E), lead us to conclude that the reference to "transmission of avian influenza" should be understood as encompassing both HPAI and LPAI. Therefore, the Panel concludes that the reference to "transmission of avian influenza" does not render the claim under Article 5.5 so imprecise as to fail to present the problem clearly, as required under Article 6.2 of the DSU.

3.3.3.2.3 Alleged uncertainty occasioned by the use of the term "agricultural products"

3.116. India argues that it is not clear from the panel request whether the term "agricultural products" refers to some or all of the products listed in paragraph 3 of the panel request, or to products other than those listed.[209] India posits that when an allegation of violation is made with respect to a claim involving an "obligation concerning distinction in treatment between various products or situations", the identification of those products or situations "serves to orient the determination of the scope of such an obligation".[210] Thus, India contends that, as a minimum, "an identification of the nature of distinctions and [relevant] products", on the basis of which the claim under Article 5.5 (and 2.3) is being made, "need[s] to be identified in order for the panel request to be considered to be sufficiently precise".[211] India considers the description underlying the claim under Article 5.5 (and 2.3) to be imprecise and does not constitute a "summary of the legal basis of the complaint sufficient to present the problem clearly", violating India's due process rights and "making it challenging for India to know what case it has to answer".[212]

3.117. The United States contends that the panel request leaves no basis for doubt that all products mentioned in S.O. 1663(E) are at issue with respect to the claim under Article 5.5, and that the description of its claim under Article 5.5 is not limited to "any subset of products mentioned in S.O. 1663(E) or the panel request". The United States adds that while the claim under Article 5.5 leaves no ambiguity with respect to product coverage, such clarity is unnecessary.[213]

3.118. The Panel notes that the products listed in paragraph 3 of the panel request are those identified in S.O. 1663(E) that are subject to a prohibition on importation into India. We also observe that the description of the claim under Article 5.5 makes no mention of specific products or of S.O. 1663(E). Rather, the request refers to transmission of avian influenza by way of "U.S. agricultural products" and to the transmission of avian influenza by way of "India's domestic agricultural products". We agree with India that the description of the claim under Article 5.5 is not precise with respect to which "U.S. agricultural products" are covered by that claim. Indeed, as we concluded in Section 3.2.3 above, a review of the panel request as a whole does not permit a respondent to discern exactly the entire product coverage of the measures at issue.

3.119. Nevertheless, we recall that Article 6.2 of the DSU does not require the identification of products at issue; rather it refers to the identification of the specific measure at issue.[214] Thus, we are not persuaded that India's ability to defend itself is prejudiced by this absence of precision of product coverage because India has been provided with sufficient notice of the measures at issue, namely, India's avian influenza measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. This is sufficient to enable India to begin preparing its defence, as required by Article 6.2 of the DSU.

[207] India's request for a preliminary ruling, Legal Instrument S.O. 1663(E), Annex A.
[208] India's request for a preliminary ruling, Annex-A.
[209] India's request for a preliminary ruling, para. 67.
[210] India's request for a preliminary ruling, para. 69.
[211] India's request for a preliminary ruling, para. 69.
[212] India's request for a preliminary ruling, para. 70.
[213] United States' first written submission, para. 223.
[214] Appellate Body Report, *EC – Computer Equipment*, para. 67.

3.3.3.2.4 Alleged uncertainty due to the differing descriptions of the claims under Articles 2.3 and 5.5 of the SPS Agreement

3.120. In India's view, "a claim under Article 5.5 is interlinked with a claim under Article 2.3", such that a violation of the former leads to a violation of the latter.[215] Given this view, India is concerned that differing formulations of the descriptions of the facts underlying the two claims in the panel request suggest an intention on the part of the United States to allege a violation of Article 5.5 through a different set of facts and circumstances than those leading to a violation of Article 2.3.[216] India considers that the differing formulations mean that India cannot rely on the summary provided in the claims under Article 2.3 to understand the dimensions of the United States' claim under Article 5.5 or *vice versa*.[217] As we noted in paragraph 3.106. above, the United States does not specifically address this allegation.

3.121. We have set out in paragraphs 3.77. and 3.99. above the relevant texts of Articles 2.3 and 5.5 of the SPS Agreement, respectively. Comparing these two provisions with the relevant text in the panel request, we first observe that the language in the panel request concerning the claims under Articles 2.3 and 5.5 corresponds to the language of the two provisions, respectively. We also observe that panel request goes beyond merely listing the provisions challenged.[218] It also utilises the language of Articles 2.3 and 5.5 of the SPS Agreement to describe the claims under these provisions.

3.122. We are not persuaded by India's arguments regarding "differing descriptions" for two reasons. First, we reiterate that Article 6.2 of the DSU requires a complainant to set out its claims, but not its arguments.[219] Requiring the United States to set out detailed "facts and circumstances" in its panel request would be tantamount to requiring the United States to delve into its arguments, which the United States is not obliged to do. Hence, the United States was not required to set out detailed "facts and circumstances" to justify the allegations of violations under Articles 2.3 or 5.5 in order to present the problem clearly as required by Article 6.2. Moreover, even if it were, India has not supported its contention that the "facts and circumstances" set out in the description of the claims under Articles 2.3 and 5.5 must be identical in order to enable India to understand the claims brought against it. Nor do we believe that it can do so. We recall in this respect that the Appellate Body has found that these two provisions differ in scope.[220] Although it is not necessary in this ruling to examine in detail the elements required to substantiate a violation of the provisions in question, we must be mindful in the context of India's allegation regarding Articles 2.3 and 5.5 that the Appellate Body has found that Article 2.3 is broader in scope than Article 5.5. Indeed, while a violation of Article 5.5 would necessarily mean a violation of the first sentence of Article 2.3, there are certain violations under Article 2.3 that are not covered by Article 5.5.[221]

3.123. Based on the foregoing, the Panel concludes that India's allegation that differing descriptions of the claims under Articles 2.3 and 5.5 render the panel request inconsistent with the requirements of Article 6.2 of the DSU is without merit.[222]

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[215] India's request for a preliminary ruling, para. 68 (citing Appellate Body Report, *Australia – Salmon*, para. 252).

[216] India's request for a preliminary ruling, para. 68 (citing Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.24, footnote 394). The Panel notes that the footnote in the panel report on *Thailand – Cigarettes (Philippines)* cited by India relates to a discussion by the panel of the Appellate Body's statement in *EC – Selected Customs Matters* that "determining the scope of the claims that are set out in a panel request requires that the panel request be construed as a whole". (Appellate Body Report, *EC – Selected Customs Matters*, para. 168, referring to the Appellate Body Reports on *US – FSC (Article 21.5 – EC II)*, paras. 66-68; *US – Carbon Steel*, para. 127.

[217] India's request for a preliminary ruling, paras. 68 and 69.

[218] Appellate Body Report, *EC – Bananas III*, para. 141.

[219] Appellate Body Report, *EC – Bananas III*, para. 141.

[220] Appellate Body Report, *Australia – Salmon*, para. 252. See also Panel Report, *US – Poultry (China)*, para. 7.318.

[221] Appellate Body Report, *Australia – Salmon*, para. 252. See also Panel Report, *US – Poultry (China)*, para. 7.318. The European Union has also cited this Appellate Body report in its third party written submission, para. 46.

[222] Appellate Body Report, *Korea – Dairy*, paras. 123, 127 and 129. See also Panel Report, *US – Lamb*, paras. 5.18-5.31.

3.3.3.3 Conclusion

3.124. With respect to all of India's allegations regarding the description by the United States of its claim under Article 5.5 in the panel request, the Panel concludes that the panel request has not failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the United States' claim under Article 5.5 of the SPS Agreement.

3.3.4 Claim under Article 5.6 of the SPS Agreement

3.125. India argues that the United States' claim under Article 5.6 of the SPS Agreement as described in the panel request, is "nothing beyond a mere restatement of Article 5.6" that does not indicate how or why India's avian influenza measures "are more trade restrictive than required to achieve its [ALOP] ".[223] India contends that the panel request only summarily identifies the legal basis of the complaint by merely reproducing the text of Article 5.6, thus not presenting the problem clearly.[224] For India, the panel request is deficient in that it "does not shed light on the nature of the obligation at issue" and on how or why the United States believes India is violating the said obligation.[225] This "mere statement of Article 5.6" does not, in India's view, plainly connect India's avian influenza measures with the obligation at issue so that India can be made aware of the basis for the alleged violation of Article 5.6.[226] India also considers the panel request to be unclear as to whether "India's avian influenza measure as a whole" is the object of the challenge. India claims to be uncertain whether the object of the United States' challenge is India's treatment of imports on account of both HPAI and LPAI, and whether the treatment of products is limited to all or some of the products listed in paragraph 3 of the panel request, or extends to other unidentified products. Thus India posits that there is no link between the object of the challenge and the obligation at issue.[227]

3.126. The United States responds that India's allegations ignore the context surrounding the sentence on Article 5.6 in the panel request, as well as the nature of a claim under Article 5.6. According to the United States, India seeks inclusion of arguments in the panel request, which is not required under Article 6.2 of the DSU.[228] The United States asserts that once the measures at issue have been described, a claim under Article 5.6 needs no elaboration, and the statement that less restrictive measures suffice to achieve the protection desired by the responding Member puts the responding Member on notice of what it will need to defend.[229] The United States adds that any explanation of how other measures satisfy the responding Member's ALOP would constitute arguments that a complaining Member need not set out until its submissions.[230] With regard to the arguments on product coverage and the "avian influenza measures", the United States reiterates its arguments in respect of India's similar challenges to claims under Articles 2.3 and 5.5.[231]

3.127. We understand India's main objections with respect to the United States' claim under Article 5.6 to be as follows: (i) failure of the United States to indicate how or why India's avian influenza measures are more trade restrictive than required to achieve its ALOP; (ii) uncertainty as to the scope of the measures at issue; and (iii) uncertainty as to the scope of the products at issue.

3.3.4.1 Alleged failure of the United States to indicate how or why India's avian influenza measures are more trade restrictive than required to achieve its ALOP

3.128. According to India, the United States' claim contains "nothing beyond a mere restatement of Article 5.6" that does not indicate how or why India's avian influenza measures "are more trade

[223] India's request for a preliminary ruling, para 71.
[224] India's request for a preliminary ruling, paras. 72 and 73 (citing Appellate Body Report, *Korea – Dairy*, para. 120).
[225] India's request for a preliminary ruling, para. 73 (citing Appellate Body Report, *US – Carbon Steel*, para. 130).
[226] India's request for a preliminary ruling, para. 73 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 162).
[227] India's request for a preliminary ruling, para. 74.
[228] United States' first written submission, para. 227.
[229] United States' first written submission, para. 227 and 228 (citing Appellate Body Report, *EC – Bananas III*, para. 141).
[230] United States' first written submission, paras. 227.
[231] United States' first written submission, para. 228, footnote 333.

restrictive than required to achieve its [ALOP]".[232] India contends that the restatement of the article is equivalent to merely listing the article without providing anything more, which the Appellate Body has held is not enough.[233] In response, the United States submits that India's allegations ignore the context surrounding the sentence on Article 5.6 in the panel request, as well as the nature of a claim under Article 5.6. For the United States, India essentially seeks inclusion of arguments in the panel request.[234]

3.129. The Panel is therefore tasked with determining whether there was an obligation on the part of the United States to indicate how or why India's avian influenza measures "are more trade restrictive than required to achieve its [ALOP]"[235], in order to fulfil the requirement of Article 6.2 of the DSU to not only summarily identify the legal basis of the complaint, but also to ensure that the identification presents the problem clearly.[236]

3.130. The panel request states in relevant part:

> The United States considers that India's measures are inconsistent with India's commitments and obligations under the following provisions of the SPS Agreement and the GATT 1994:
>
> SPS Agreement
>
> ...
>
> Article 5.6 because India's avian influenza measures are more trade-restrictive than required to achieve its appropriate level of sanitary protection.

3.131. We recall that identifying the treaty provisions at issue is a minimum prerequisite and 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.[237] We observe that the panel request has gone beyond merely listing the provision challenged. It has also utilised the language of Article 5.6 to connect India's avian influenza measures to the alleged violation of the obligations under that provision. Article 5.6 of the SPS Agreement reads as follows:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]
>
> _____
>
> (footnote original)[3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

3.132. As we have already mentioned, the requirement in Article 6.2 of the DSU is for a complainant to identify in the panel request the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. A complainant need not set out in the panel request its arguments in support of those claims. We have also cited a number of times the Appellate Body's explanation that there is a significant difference between the claims identified in a panel request and the arguments supporting those claims, which are to be set out and progressively clarified in the first written submissions, and

[232] India's request for a preliminary ruling, para 71.
[233] India's request for a preliminary ruling, para, 72.
[234] United States' first written submission, para. 227.
[235] India's request for a preliminary ruling, para 71.
[236] Appellate Body Report, *Korea – Dairy*, para. 120.
[237] Appellate Body Report, *Korea – Dairy*, para. 124; and Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.30.

during the course of the proceedings.[238] We have likewise discussed similar situations faced by panels dealing with SPS issues such as in *EC – Approval and Marketing of Biotech Products* and *Australia – Apples,* where questions arose as to whether the panel requests met the requirements of Article 6.2 in providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[239] We recall in particular that in *Australia—Apples*, the panel request referred to several measures imposed by Australia on the importation of apples and, at the end of those measures, it listed several provisions of the SPS Agreement that were alleged to have been violated by all of the measures, including Article 5.6. In its preliminary ruling, the panel in that case stated that:

> [C]onsidering the language used in the panel request and the specific content of the provisions of the SPS Agreement cited therein, the Panel concludes that the … panel request contains enough information to adequately inform the responding party … on the nature of the complaint and to allow the responding party to begin preparing its defence.[240]

3.133. With respect to the claim under Article 5.6, the panel request mentions the avian influenza measures, refers to the provisions alleged to have been violated, and tracks the language of Article 5.6 to describe the claim under that provision. Like the panel in *Australia—Apples*, we are not persuaded that, in fulfilling the requirements under Article 6.2 of the DSU to provide the legal basis of the complaint sufficient to present the problem clearly, the panel request needed to go beyond what it did. In other words, the plain language of Article 5.6, read together with its footnote quoted above, present the problem sufficiently clearly: the United States claims that the avian influenza measures are more trade restrictive than required to achieve the ALOP and there is another measure reasonably available, taking into account technical and economic feasibility, that achieves the ALOP that is significantly less restrictive to trade.[241]

3.134. Accordingly, the Panel dismisses India's allegation that the description of the claim under Article 5.6 of the SPS Agreement does not allow India to know the claim it has to meet with regard to this provision.

3.3.4.2 Alleged uncertainty as to the scope of the measures at issue with respect to the claim under Article 5.6 of the SPS Agreement

3.135. The Panel observes that India's allegation relating to the scope of the measures at issue under this claim echoes that of its allegations with respect to claims under Articles 2.3 and 5.5 of the SPS Agreement. India considers the panel request to be unclear as to whether India's avian influenza measure as a whole is the object of the challenge, noting that it is uncertain whether the object of the United States' challenge is India's treatment of imports on account of both HPAI and LPAI.[242]

3.136. We recall that the claim under Article 5.6 in the panel request reads as follows: "… Article 5.6 because India's avian influenza measures are more trade-restrictive than required to achieve its [ALOP]". Thus, on its face, the wording of this claim specifically refers to "India's avian influenza measures". In examining the panel request as a whole, we recall that "India's avian influenza measures" are described as measures that prohibit the importation of various agricultural products into India from those countries reporting NAI (both HPAI and LPAI). As previously discussed, panel requests need not set out arguments "as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".[243] Accordingly, we consider that, as the description of the measures at issue, namely India's avian influenza

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[238] Appellate Body Report, *EC – Bananas III*, para. 141.

[239] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 102; and, *Australia – Apples*, Annex A-2, paras. 11 and 12.

[240] Panel Report, *Australia – Apples*, Annex A-2, para. 11.

[241] The Panel acknowledges the United States' argument in paragraph 228 of its first written submission that the absence of additional information as to the ALOP adopted by India as regards avian influenza should be attributed to India's alleged failure to respond to the United States' Article 5.8 request. As the Panel has determined that elaboration in the panel request of, *inter alia*, the ALOP is not required by Article 6.2 of the DSU with respect to the United States' claim under Article 5.6, the Panel does not need to address here this argument of the United States

[242] India's request for a preliminary ruling, para. 74.

[243] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 102; and, *Australia – Apples*, Annex A-2, paras. 11 and 12.

measures, includes both HPAI and LPAI, the description of the claim as challenging "India's avian influenza measures" adequately identifies the intention of the United States to challenge India's treatment of imports under Article 5.6 with respect to both HPAI and LPAI.

3.137. In light of the above, the Panel concludes that India's allegation that, with respect to the scope of the measures, there is no link between the object of the challenge and the obligation at issue has no merit.

3.3.4.3 Alleged uncertainty as to the scope of the products at issue with respect to the claim under Article 5.6 of the SPS Agreement

3.138. As with India's allegations on the scope of the measures at issue, the Panel observes that India's allegation relating to the scope of the products at issue under this claim echoes the language of its allegations with respect to claims under Articles 2.3 and 5.5 of the SPS Agreement. India considers the panel request to be unclear as to whether the treatment of products is limited to all or some of the products listed in paragraph 3 of the panel request, or extends to other unidentified products. Thus, India posits that there is no link between the object of the challenge and the obligation at issue.[244]

3.139. The text of the panel request with respect to the claim under Article 5.6 makes no explicit reference to the products listed in paragraph 3 of the panel request; neither does the text make an explicit reference to S.O. 1663(E), from which the list of products in paragraph 3 of the panel request is derived. Indeed, as mentioned in section 3.3.4.2 above, the claim under Article 5.6 refers to "India's avian influenza measures", which we have already determined encompass more than S.O. 1663(E).

3.140. Moreover, as we concluded in Section 3.2.3 above, and with particular respect to the claim under Article 5.6 of the SPS Agreement, we are not persuaded by India's argument that the listing of the 10 categories of products in the panel request means that the United States intended to limit its challenge to those products. We are also not persuaded that India's ability to defend itself is prejudiced by this absence of a precision of product coverage because India has been provided with sufficient notice of the measures at issue, namely, India's avian influenza measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. This suffices to enable India to begin preparing its defence, as required by Article 6.2 of the DSU.

3.3.4.4 Conclusion

3.141. With respect to all of India's allegations regarding the description of the claim under Article 5.6 in the panel request, the Panel concludes that the panel request has not failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claim under Article 5.6 of the SPS Agreement.

4 PRELIMINARY RULING OF THE PANEL

4.1. The Panel preliminarily concludes as follows:

a. the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI);

b. the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request together with the reference to "these products" immediately following that listing do not suggest that the United States intended to limit its challenge to those products;

[244] India's request for a preliminary ruling, para. 74.

c. the word "orders" included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself;

d. under the circumstances, there can be no uncertainty on India's part at this stage of the proceedings as to whether the United States is challenging measures that were not in force as of the date of the panel request. The United States is challenging only the measures that were in force as of the date of the panel request, namely 11 May 2012; and

e. the panel request has not failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.

4.2. The Panel declines to provide a preliminary ruling at this time with respect to certain matters raised by India. Specifically, the Panel considers that:

a. in the circumstances of the present case, it is premature and indeed unnecessary to make a determination in the abstract, at this preliminary stage, as to precisely which measures fall within the Panel's terms of reference by virtue of the inclusion of the terms "related measures, or implementing measures" in the panel request. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise; and

b. it is premature for us to make a determination, in the abstract, as to whether any "orders" not specifically listed in the panel request fall within the Panel's terms of reference. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise.

4.3. Finally, we note that this preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties during the interim review.

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