European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs

(WT/DS174 and WT/DS290)

Response of the United States to the Request for a Preliminary Ruling Regarding the Panel's Jurisdiction Under Article 6.2 of the DSU Submitted by the European Communities

March 15, 2004

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

III. THE REQUIREMENTS OF DSU ARTICLE 6.2 2

IV. THE EC'S ASSERTION THAT THE U.S. PANEL REQUEST DOES NOT IDENTIFY THE "SPECIFIC MEASURES AT ISSUE" IS INCORRECT. 4

A. In Citing Regulation 2081/92, the U.S. Panel Request Has Identified the "Specific Measures at Issue". 4

B. In Identifying Regulation 2081/92 "And its Related Implementing and Enforcement Measures", the U.S. Panel Request Identified the "Specific Measures at Issue." 6

V. CONTRARY TO THE EC'S ALLEGATIONS, THE U.S. PANEL REQUEST PROVIDES A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY. 8

A. The U.S. Panel Request Provides a Brief Summary of the Legal Basis of the Complaint Sufficient to Present the Problem Clearly. 8

1. Citations to specific WTO agreement provisions 8

2. Narrative description 9

3. Attendant circumstances 9

B. The EC's Real Criticism of the U.S. Panel Request Is That it Does Not Set Forth the U.S. Arguments, Which Is Not Required by Article 6.2. 10

VI. THE U.S. PANEL REQUEST DOES NOT PREJUDICE THE ABILITY OF THE EC TO DEFEND ITSELF 13

VII. CONCLUSION 14

I. INTRODUCTION

1. The European Communities ("EC") offers no legitimate basis for its request for a preliminary ruling ("EC Request") that the U.S. panel request in this dispute fails to meet the requirements of Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU"). To the contrary, as required by Article 6.2, the U.S. panel request properly "identif[ies] the specific measures at issue and provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

2. The EC would, in contrast, have this Panel require the identification, not of the "specific measures", but of the specific *aspects* or parts of the measures that the United States intends to raise in this proceeding. The EC would also have this Panel read into Article 6.2 another requirement that is not there and that the Appellate Body has specifically rejected: a requirement that the United States summarize the specific legal arguments to be presented in the first U.S. submission. The Appellate Body in *EC Bananas*[1] has already rejected the suggestion that a complaining party must summarize its legal arguments in the panel request, and this Panel should do so as well.

II. STATEMENT OF FACTS

3. The United States requested formal dispute settlement consultations with the EC concerning "the protection of trademarks and geographical indications for agricultural products and foodstuffs", and, in particular, Regulation 2081/92, as amended,[2] almost five years ago, on June 1, 1999.[3] The United States and the EC held a first set of consultations on July 9, 1999. In its request, the United States stated that Regulation 2081/92 "does not provide national treatment with respect to geographical indications, and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication." At no time during this first set of consultations did the EC suggest it did not understand the legal basis for the U.S. complaint.

4. Indeed, over the course of the following four years, numerous consultations were held between representatives of the United States and of the EC concerning, in detail, what the United States perceived to be inconsistencies between Regulation 2081/92 and the WTO obligations of the European Communities.[4]

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[1] Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997 ("*EC Bananas*").

[2] Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

[3] WT/DS174/1.

[4] Letter from Joseph Papovich to Joao Pacheco, dated June 6, 2001, incorporating 20 questions concerning Regulation 2081/92 (Exhibit US-1); Letter from Joseph Papovich to Joao Pacheco, dated August 21, 2001, attaching additional 15 questions (Exhibit US-2); Letter from Steve Kho to Jean-Jacques Boufflet, dated May 19, 2003, enclosing 36 questions for purposes of the May 27, 2003, consultations, and addressing, among other issues relative to Regulation 2081: national treatment, most favored nation treatment, exclusivity of trademarks, implementing regulations and enforcement, availability of legal means for interested parties to prevent misleading uses of

5. On April 4, 2003, the United States requested additional consultations with the EC which, *inter alia*, specified that Regulation 2081/92, as amended, and its related implementing and enforcement measures appeared to be inconsistent with the national treatment and most favored nation ("MFN") obligations of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"), with respect to nationals, and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), with respect to goods.[5] On May 19, the United States submitted detailed questions to the EC in advance of consultations that were held on May 27, 2003, which, as noted above, addressed issues that are the subject of the panel request.[6] Again, at no time during this last set of consultations did the EC even suggest it did not understand the legal basis for the U.S. complaint.

6. The May 27th consultations also failed to resolve the matter. Consequently, on August 18, 2003, the United States requested the establishment of a panel, specifically identifying Regulation 2081/92, as amended, and its related implementing and enforcement measures, and providing a brief summary of the legal basis of the complaint. That summary consisted of both a narrative and a specific citation to particular paragraphs of the TRIPS Agreement and the GATT 1994.

III. THE REQUIREMENTS OF DSU ARTICLE 6.2

7. Article 6.2 of the DSU requires, in relevant part, that a request for the establishment of a panel:

> identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

8. The EC Request contains a number of quotations from Appellate Body and panel reports, in particular from *Korea Dairy*[7] and *EC Bananas,* that explain this provision and emphasize its role and importance in dispute settlement. It has entirely missed, however, one aspect of these reports which is critical to the issue now before this Panel: the key distinction between the *claims* – which must be included in the panel request – and the *arguments* in support of those claims – which need not be included. As the Appellate Body explained in *EC Bananas*:

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geographical indications, transparency, and definitions of geographical indications (Exhibit US-3). These documents from the consultations are relevant because they show that the EC is not in the dark, as it claims to be, concerning problems with respect to Regulation 2081/92. The claims in this dispute, however, are as set forth in the U.S. panel request.

[5] WT/DS290/1 /Add.1.

[6] *See* Exhibit US-3.

[7] Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted January 12, 2000 ("*Korea Dairy*").

> In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, 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.[8]

9. Furthermore, and contrary to the EC's argument at paragraph 37 of its preliminary ruling request, the Appellate Body in *EC Bananas* made clear that a panel request may adequately state a claim if the request simply cites the pertinent provision of the WTO agreement:

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.[9]

10. The Appellate Body confirmed this reading in *Korea Dairy*. In that dispute, the problem with the panel request was that it cited too broadly to Article XIX of the GATT 1994 and various articles of the *Agreement on Safeguards*, all of which contained numerous sub-articles, so that it was difficult to determine which specific obligations in those provisions were at issue.[10] The U.S. panel request in this dispute, by contrast, cites to specific provisions of the WTO agreements at issue, and cannot be said to suffer a similar defect.

11. The EC also fails to note that *even if* a panel request is insufficiently detailed "to present the problem clearly," the Panel is not automatically deprived of jurisdiction over the matter. Rather, the Panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself. As the Appellate Body explained in *Korea Dairy*:

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[8] *EC Bananas*, para. 141.

[9] *Id.*

[10] The Appellate Body explained:

> In the present case, we note that the European Communities' request for a panel, after identifying the Korean safeguard measure at issue, listed Articles 2, 4, 5 and 12 of the Agreement on Safeguards and Article XIX of the GATT 1994. Article XIX of the GATT 1994 has three sections and a total of five paragraphs, each of which has at least one distinct obligation. Articles 2, 4, 5 and 12 of the Agreement on Safeguards also have multiple paragraphs, most of which have at least one distinct obligation. The Agreement on Safeguards in fact addresses a complex multi-phased process from the initiation of an investigation, through evaluation of a number of factors, determination of serious injury and causation thereof, to the adoption of a definitive safeguard measure. Every phase must meet with certain legal requirements and comply with the legal standards set out in that Agreement.

Korea Dairy, para. 129.

> In assessing whether the European Communities' request met the requirements of Article 6.2 of the DSU, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities' request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU.[11]

12. Therefore, in evaluating claims regarding whether a panel request "presents the problem clearly," the Panel must consider the particular circumstances of the dispute, including whether the responding party has been prejudiced.

13. The EC asserts that, inconsistently with Article 6.2, the U.S. panel request neither (1) identifies the specific measures at issue, nor (2) provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, and that the EC has thereby been seriously prejudiced. As detailed in the sections that follow, the EC is wrong on all counts.

IV. THE EC'S ASSERTION THAT THE U.S. PANEL REQUEST DOES NOT IDENTIFY THE "SPECIFIC MEASURES AT ISSUE" IS INCORRECT

A. In Citing Regulation 2081/92, the U.S. Panel Request Has Identified the "Specific Measures at Issue."

14. The EC argues that specifically citing a particular EC regulation is not "sufficiently specific to permit an identification of the 'specific measure [*sic*: measures] at issue'."[12] The EC argues that the complainants should have identified which specific aspects of Regulation 2081/92 they intend to raise, and claims that "it would have easily been possible for the complainants to provide more specific references to individual provisions of Regulation 2081/92."[13] This argument is groundless, for several reasons.

15. First, Article 6.2 requires that the complaining party identify the "specific measures at issue" in its panel request, and the United States has done precisely that in identifying EC Regulation 2081/92, in its entirety. There is nothing in Article 6.2 which limits the right of

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[11] *Id.,* para. 131.

[12] EC Request, paras. 14 - 15. The EC quotes Article 6.2 as requiring identification of a single "measure" at issue, whereas Article 6.2 refers to the "measures" at issue.

[13] EC Request, para. 22. The EC Request does not question the inclusion of amendments to Regulation 2081/92 as part of the measures at issue in the U.S. panel request. The United States therefore assumes that whether the inclusion of amendments is sufficiently specific under Article 6.2 is not at issue.

complaining parties to choose the measures they wish to challenge, and previous disputes have covered a broad range of measures.[14] This, in itself, is grounds for rejecting the EC request.

16. Second, the EC suggests that identifying EC Regulation 2081/92, which addresses the protection of geographic indications and designations of origin for agricultural products and foodstuffs, is analogous to identifying the entire civil code of another Member.[15] EC Regulation 2081/92, however, is not like a civil code. Unlike a civil code, which addresses a broad range of subject matter, including, for example, marriage, adoption, labor, property, contracts and other obligations, and antitrust, EC Regulation 2081/92 addresses one specific subject , *i.e.*, the rules for the protection of designations of origin and geographical indications for certain agricultural products and foodstuffs. Indeed, while it is true, as the EC notes, that EC Regulation 2081/92 includes several articles, they all relate to this one subject, and in fact all of these articles are relevant to the U.S. claims in this dispute.

17. Third, the EC offers an "illustrative list" of supposedly distinct "topics" in Regulation 2081/92. Apart from the fact that Article 6.2 includes no requirement that specific "topics" within a measure be identified,[16] Regulation 2081/92 is an integrated whole: Article 12a, for instance, which concerns applications for third country geographical indications, contains specific cross-references to Articles 4, 5, 12, and 15, which in turn cross-reference Articles 2, 4, and 6. And, of course, other articles, *e.g.,* addressing definitions, objective, and scope, are implicitly incorporated. Taking into account the integrated nature of EC Regulation 2081/92, the United States chose, in exercising the broad discretion afforded it under Article 6.2, to identify the whole Regulation as the "specific measures at issue."

18. Fourth, the EC quotes from a number of disputes in which the sufficiency of panel requests under Article 6.2 was considered, but does not point to any in which the Appellate Body or a panel found that identifying a particular law or regulation as a measure, without identifying particular articles of the law or regulation, is insufficient. For instance, in *EC Bananas*, both the panel and the Appellate Body found a request sufficient when it referred to "a regime for the

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[14] *See, e.g., United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*"United States Gambling"*), Request for Establishment of a Panel by Antigua and Barbuda, WT/DS285/2, in which the cited measures included a range of code sections and constitutional provisions for all 50 U.S. states and several U.S. territories.

[15] EC Request, para. 18.

[16] The EC apparently does not believe itself obligated to identify specific topics within a measure in other disputes; *e.g., United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108 ("*US FSC*"), where the measures identified were sections 921-927 of the U.S. Internal Revenue Code and related measures. The cited statutory provisions alone consisted of seven sections with numerous sub-parts, taking up more than 20 pages of the EC's first exhibit. Further, in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, Preliminary Ruling circulated July 21, 2003 ("*Canada Wheat"*), in which the EC is a third party, the EC stated, at paragraphs 15-16 of its June 4, 2003, comments, that the U.S. identification of "the Canada Grain Act and Canadian grain regulations," without referencing specific articles, was sufficient to satisfy the requirements of Article 6.2.

importation, sale and distribution of bananas established by Regulation 404/93 and subsequent EC legislation, regulations and administrative measures . . . which implement, supplement and amend that regime."[17] Indeed, the issue in prior disputes regarding the identification of measures at issue has generally been whether Article 6.2 requires a citation to a particular law or regulation, or whether simply describing the measure without citation is specific enough. On that particular question, the panel in *Canada Wheat*, the only dispute cited by the EC on this issue, noted that it is desirable but unnecessary for panel requests to "specify measures of general application – *i.e.*, laws and regulations – by name, date of adoption, etc."[18] In this dispute, by contrast, the U.S. panel request specifically cites Regulation 2081/92 and the EC is arguing that even this "desirable," although unnecessary, form of identification is insufficient. In short, the EC is seeking to dramatically increase the level of specificity required under Article 6.2 in this proceeding without any textual or other basis, simply to suit its immediate interest in this dispute.

19. For the reasons above, the U.S. reference to Regulation 2081/92 constitutes an identification of the specific measures at issue, as required by Article 6.2.

B. In Identifying Regulation 2081/92 "And its Related Implementing and Enforcement Measures", the U.S. Panel Request Identified the "Specific Measures at Issue."

20. The EC argues that Australia's identification of "related implementing and enforcement measures" falls short of the Article 6.2 requirement to identify the "specific measures at issue." The EC asserts, at footnote 10, that the U.S. panel request does not include a reference to "related implementing and enforcement measures." This is incorrect. In paragraph 2 of its panel request, the United States defines the measures at issue – Regulation 2081/92, as amended – to include its related implementing and enforcement measures. Be that as it may, the EC has not challenged this aspect of the U.S. panel request, even after it was pointed out at the March 3 organizational meeting that the United States used precisely the same formulation as Australia. Under these

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[17] *EC Bananas*, para. 140.

[18] Preliminary Ruling of the Panel, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, circulated on July 21, 2003 ("*Canada Wheat")*, para. 19:

> We note that the United States' panel request refers to "laws" and "regulations", yet does not specify the relevant laws and regulations by name, date of adoption, etc. We consider that it is desirable for Members to be as specific as possible in identifying measures of general application, including by indicating their name and date of adoption. However, by its terms, Article 6.2 does not require that panel requests explicitly specify measures of general application – *i.e.*, laws and regulations – by name, date of adoption, etc. Therefore, we consider that the fact that the United States has not specified the relevant laws or regulations by name, date of adoption, etc. does not necessarily render the panel request inconsistent with Article 6.2.

circumstances, it is unclear on what basis the EC continues to maintain its complaint about the Australian panel request.

21. In any case, the EC's argument with respect to Australia's panel request is wrong and ill-founded. The EC claims that "related" is a vague term and that many laws and regulations might be considered "related." It also claims that many laws and regulations may be necessary to implement and enforce the regulation. Therefore, the EC professes ignorance of what measures are at issue. This argument is disingenuous. The Australian panel request does not refer to unknown "related implementing and enforcement" measures. It refers to a specific regulation providing for the protection of geographical indications in the EC and its related implementing and enforcement measures. The identification of these measures is specified through the reference to its relationship to Regulation 2081/92, *i.e.*, those measures that enforce and implement Regulation 2081/92. As noted above, the Appellate Body found less specific language to be adequate in *EC Bananas*: "a regime for the importation, sale and distribution of bananas established by Regulation 404/93 and subsequent EC legislation, regulations and administrative measures . . . which implement, supplement and amend that regime."[19] The EC itself adopted a similar approach in *US FSC* when it identified the measures as "sections 921 - 927 of the Internal Revenue Code and related measures establishing special tax treatment for 'Foreign Sales Corporations'."[20]

22. Finally, the EC is in a poor position to be pleading that the "related implementing and enforcement measures" are not specified. In trying to understand these measures fully during the course of consultations almost one year ago, the very first category of information the United States and Australia requested from the EC was with respect to "Implementing Regulations." In particular, the United States asked for a list of "all EC rules, regulations or other measures implementing or related to EC Regulation 2081/92" and copies of all such "relevant measures." In addition, the United States asked several specific questions about relevant member State implementing regulations, including those related to member State inspection structures, and asked for copies of all such relevant measures. The EC was utterly unresponsive to this request during the consultations, and never provided citations to a single implementing measure in response to this request, despite numerous opportunities to do so. Article 4.10 of the DSU states that Members will engage in dispute settlement procedures in good faith in an attempt to resolve the dispute. More specifically, Article 4.3 of the DSU obliges the Members to enter into consultations in good faith. Given the failure of the EC itself to identify Regulation 2081/92's implementing and enforcement measures by citation, this Panel should require no more specificity of the United States than the EC was willing to offer the United States.

23. The EC, in arguing that the identification of "related implementation and enforcement measures" is unspecific, refers to the preliminary ruling in *Canada Wheat*, where, in paragraphs

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[19] *EC Bananas*, para. 140.

[20] WT/DS108/2, July 9, 1998.

20 and 24, the panel found that, "in the absence of an explicit identification, sufficient information must be provided in the request for establishment of the panel itself that effectively identifies the precise measures at issue."[21] The *Canada Wheat* panel found there was not sufficient information where the panel request contained contradictory references which obscured the content and meaning of the "laws and regulations" referred to in the request.[22] However, that panel also found that a similarly broad reference to "actions" was clear, in context, because the request stated that these actions related to "purchases or sales involving wheat exports."[23]

24. In this dispute, there are no contradictory references, and there is no uncertainty as to the content or the nature of the "implementing and enforcement measures" at issue: they are the implementing and enforcement measures that are "related" to Regulation 2081/92, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

25. In summary, both the Australian and the U.S. panel requests specifically identify the "implementing and enforcement measures" at issue in this dispute, consistent with Article 6.2.

V. CONTRARY TO THE EC'S ALLEGATIONS, THE U.S. PANEL REQUEST PROVIDES A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

A. The U.S. Panel Request Provides a Brief Summary of the Legal Basis of the Complaint Sufficient to Present the Problem Clearly.

26. The United States does provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2. It both lists the specific provisions of the TRIPS Agreement and the GATT 1994 alleged to be violated, and provides, in addition, a brief textual explanation of the basis of the complaint.

1. Citations to specific WTO agreement provisions

27. The Appellate Body has made clear on several occasions, directly contrary to the EC's assertion in paragraph 37 of its request, that a panel request may adequately summarize the legal basis of the complaint under Article 6.2 by simply citing the pertinent provisions of the WTO Agreement.[24] The EC cites *Korea Dairy*, in which the Appellate Body stated that there may be circumstances in which a "listing of treaty articles would not satisfy the standard of Article

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[21] EC Request, paras 25 and 26.

[22] *Canada Wheat,* para. 24.

[23] *Canada Wheat,* para. 26.

[24] *E.g., EC Bananas*, para. 141; *Korea Dairy*, para 124.

6.2."[25] But in that proceeding the articles cited had multiple paragraphs, many of which had their own distinct obligations: for instance, the panel request cited Article XIX of the GATT 1994, containing three sections and five paragraphs, each with at least one distinct obligation, and Article 12 of the Safeguards Agreement, which spans two pages and contains 11 paragraphs.[26]

28. By contrast, the U.S. panel request in this dispute lists 17 specific provisions of the TRIPS Agreement and two specific provisions of the GATT 1994. Where an article consisted of more than one paragraph, the U.S. panel request specifically identified the particular paragraph number.[27] Generally, each of these paragraphs consists of a single obligation. Unlike in the case of *Korea Dairy*, there are no circumstances in this dispute that would render citation to the relevant specific provision of the WTO agreement insufficient under Article 6.2.

2. Narrative description

29. Moreover, the U.S. panel request does not rest solely on specific citation to particular WTO obligations. It also includes a brief narrative description of the legal basis for the complaint, adding clarity to the summary. For instance, it summarizes that, in the view of the United States, Regulation 2081/92 does not provide national or most favored nation treatment to goods or nationals of other WTO Members, and that Regulation 2081/92 diminishes legal protection for trademarks (with a specific illustrative reference to the right to prevent confusing uses of an identical or similar sign and adequate protection against invalidation). It also states, as a brief summary of the legal basis of the complaint, in conjunction with specifically cited WTO agreement provisions, that Regulation 2081/92 does not provide the legal means for interested parties to prevent the misleading use of a geographical indication, defines geographical indications in a manner inconsistent with the TRIPS Agreement, is not sufficiently transparent, and does not provide for adequate enforcement procedures. Contrary to the EC's argument at paragraph 42 of its request, there is no requirement under Article 6.2 that each part of the narrative be specifically linked to particular WTO provisions, nor does the EC point to any disputes in which this was required.

30. As stated above, the citation to specific WTO obligations in the U.S. panel request is sufficient to summarize the legal basis for the complaint under Article 6.2. The narrative is an additional description of the legal basis. Therefore, there is no legitimate foundation in this dispute for the EC to assert that the U.S. panel request violated the second prong of Article 6.2.

3. Attendant circumstances

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[25] *Korea Dairy*, para. 124, cited in EC Request, para. 36. The EC's conclusion, at paragraph 37, that identification of the treaty provisions "is a necessary, but not sufficient condition under Article 6.2 DSU" (emphasis in original) is a patently incorrect reading of *Korea Dairy*.

[26] *Korea Dairy*, para. 124.

[27] Except for GATT 1994 Article I, which consists of one paragraph followed by several exceptions.

31. In addition to (1) the specific citation to WTO obligations, which alone is a sufficient summary of the legal basis of the complaint, and (2) the narrative description, which additionally describes the legal basis, the attendant circumstances surrounding this panel request make clear that the panel request's summary of the legal basis of the complaint is sufficient and presents the problem clearly. The Appellate Body, in *Korea Dairy*, clarified that the sufficiency of the panel request can be judged in light of these circumstances.[28]

32. There is a long history of consultations in this dispute. The United States requested formal consultations on June 1, 1999, and the first set of consultations was held almost five years ago, on July 9, 1999, and continued through the last set of formal consultations on May 27, 2003. As noted earlier, and as set forth in further detail below, as a result of these consultations it is abundantly clear that the EC understands the legal basis of the U.S. complaint.

B. The EC's Real Criticism of the U.S. Panel Request Is That it Does Not Set Forth the U.S. Arguments, Which Is Not Required by Article 6.2.

33. Previous panels and the Appellate Body have been very careful to distinguish between the claims that must be made in a panel request under Article 6.2 -- *i.e.*, the brief summary of the legal *basis* for the complaint sufficient to present the problem clearly -- and the *arguments* supporting those claims. The claims must be set forth in the panel request. The arguments do not. As the Appellate Body stated in *EC Bananas:*

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, 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.[29]

34. In this dispute, the EC is not faulting the United States for failing to set out the legal *basis* for the complaint. It is faulting the United States, incorrectly, for not including its *arguments* in support of that basis.[30]

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[28] *Korea Dairy*, para. 124.

[29] *EC Bananas*, para. 141.

[30] In criticizing the specificity of the "measures" under Article 6.2, the EC argues incorrectly that the lack of citation to individual provisions of Regulation 2081/92 "does not permit the EC to understand which specific aspects among those covered by Regulation 2081/92 the complainants intend to raise . . ." EC Request, para. 22 (emphasis added). Article 6.2 requires an identification of the specific measures at issue; it does not require identification of the specific "aspect" of the measures. In fact, the EC's argument appears to be confusing the Article 6.2 requirement that the measures be identified with the requirement that the legal basis be summarized (*i.e.*, the

35. With respect to national treatment, for example, the EC complains that the U.S. panel request does not specify which provision or aspect of Regulation 2081/92 violates the EC's national treatment obligations, and "in which way such a violation is deemed to occur."[31] This is precisely what the Appellate Body in *EC Bananas* found was not required. The United States will lay out in detail the specific ways in which Regulation 2081/92 fails to provide national treatment to non-EC nationals and non-EC goods, but will do so in its submissions, as part of its arguments supporting the claim that Regulation 2081/92 denies national treatment to non-EC nationals and goods.[32]

36. In other words, the legal basis for the complaint, made clear in the U.S. panel request, is that the EC's regulation for the protection of certain geographical indications is inconsistent with specific national treatment obligations in the TRIPS Agreement, the Paris Convention, and the GATT 1994. The detailed arguments as to how specific aspects of Regulation 2081/02 are inconsistent with these obligations will be the subject of the arguments to be presented in future U.S. submissions.

37. Similarly, with respect to MFN treatment, the EC complains that the panel request does not specify which provision of Regulation 2081/92 violates MFN obligations, how such a violation occurs, which WTO Members are being denied favorable treatment, what this more favorable treatment is, and how it is conferred. Such detailed explanations and argumentation clearly go beyond the requirements for a brief summary of the legal basis for the complaint pursuant to Article 6.2, and instead fall squarely into the category of arguments in support of the claim that the regulation does not provide most favored nation treatment with respect to goods and nationals of WTO Members.[33]

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claims). Even with respect to the claims, however, the Appellate Body specifically rejected this argument in the paragraph of *EC Bananas* quoted above. This issue is discussed in further detail in this section, but suffice it to say that the EC cannot fairly claim to be in the dark about what aspects of Regulation 2081/92 are at issue. *See, e.g.,* footnote 32 below.

[31] EC Request, para. 44.

[32] The claims are clear from the U.S. panel request. But, in addition, the EC cannot fairly claim to be unaware of the problem presented, in light of the long history of consultations. For instance, several of the questions put to the EC in consultations question why non-EC nationals cannot register their own geographical indications for originating products, and why they are faced with various problematic provisions in Regulation 2081/92 that do not apply to EC nationals. *See, e.g.*, May 19, 2004, Consultation Questions, questions 7 - 25 (Exhibit US-3); indeed, the EC Request itself attaches, as EC Exhibits 2 and 3, the minutes of the DSB meetings in which the United States described some of the specific problems with Regulation 2018/92, including with respect to national and most favored nation treatment, among other issues. EC Exhibit 2, para. 72; EC Exhibit 3, paras. 28 and 29.

[33] With respect to this issue, too, the EC cannot fairly claim to be in the dark. Several questions were raised in consultations about why nationals and products of some WTO Members -- *i.e.*, those that have a system of geographical indication protection that is equivalent to the EC system -- have rights and receive protections that other WTO Members do not. *See, e.g.*, May 19, 2004, Consultation Questions, questions 7 - 25 (Exhibit US-3); EC Exhibit 2, para. 72; EC Exhibit 3, paras. 28 - 29.

38. With respect to "legal protection for trademarks," the EC acknowledges that Regulation 2081/92 addresses the issue of conflicts between trademarks and geographical indications in three paragraphs of Article 14, and in Article 7(4), all of which can and do have significant negative implications for trademark rights provided for under the TRIPS Agreement.[34] The EC further claims that Regulation 2081/92 provides "specific solutions" to the various conflicts between trademarks and geographical indications.[35] By engaging in the substance of the U.S. claims in such detail in its preliminary ruling request, it is obvious that the U.S. summary of the legal basis of the complaint was sufficient to present the problem clearly.[36] The EC's desire to "understand which specific problems the United States wishes to raise" is a request for argumentation that is appropriate for the first submission, but not for a panel request, a point that the EC has itself noted in other disputes.[37]

39. With respect to Regulation 2081/92's failure to "provide legal means for interested parties to prevent the misleading use of a geographical indication," the EC claims that Regulation 2081/92 contains detailed provisions regarding the protection of registered geographical indications that do provide such means. Again, the EC is interested in engaging in argumentation regarding the U.S. claims, prior to the U.S. first submission. And again, that the United States did not provide such argumentation in its panel request is not a violation of Article 6.2.

40. With respect to the differences between Regulation 2081/92's definition of "geographical indication" and that in the TRIPS Agreement, the EC is disingenuous to argue that the United States does not explain the differences between the two definitions. The TRIPS Agreement definition is in Article 22.1 of the TRIPS Agreement; the Regulation definition is in Article 2.2(b) of Regulation 2081. The differences between them are obvious, and speak for themselves. As for the nature of the breach, this is properly a subject for arguments in the submissions of the parties. Again, however, it is disingenuous for the EC to argue that it does not understand the U.S. claim. As the United States explained to the EC during consultations, the TRIPS Agreement contains obligations to protect geographical indications, as defined in the TRIPS

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[34] EC Request, paras 46 - 48.

[35] Yet it is these "solutions", among other things, that are at issue, particularly in light of the exclusive right of the registered trademark holder, under Article 16.1 of the TRIPS Agreement, to prevent the use of an identical or similar sign that is likely to confuse.

[36] Note also the detailed discussions that occurred on this subject at the consultations. *See, e.g.,* May 19, 2004, Consultation Questions, "Article 14 -- Exclusivity of Trademarks", questions 29 - 36, and "Article 13" , questions 27 - 28 (Exhibit US-3).

[37] In *United States Gambling*, the EC itself criticized the U.S. request for an Article 6.2 preliminary ruling in its October 24, 2003, comments, arguing at paragraph 16 that the issue raised by the United States "was strictly connected with the substance of the case, which is legally and factually rather complex" and, therefore, "not suited for adjudication through a summary preliminary ruling proceeding brought under article 6.2 of the DSU." Further, the EC criticized Korea's preliminary ruling request in *Korea -- Measures Affecting Trade in Commercial Vessels*, WT/DS273, characterizing Korea's objections to the panel request as "an ill-fated attempt to have the Panel make findings on substantive legal issues that should be at issue during the regular Panel phase, not at the preliminary stage."

Agreement, yet Regulation 2081/92, which is how "Community protection of . . . geographical indications of agricultural products and food stuffs shall be obtained", offers protection to an apparently different category of geographical indications. Differences in coverage therefore raise obvious questions of consistency with TRIPS Agreement obligations.[38]

41. The EC arguments with respect to transparency and enforcement procedures suffer from the same defects: the EC is attempting to engage in argumentation on the substance of the claims -- for instance, asserting that Regulation 2081/92 is transparent, and faulting the United States for not detailing how it is not transparent -- instead of trying to make out a case that the legal basis is not sufficiently summarized.

42. The above are examples of how the EC, in alleging that the U.S. panel request does not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", is in fact arguing that the United States has not adequately set out its *arguments* in support of those claims. It is clear from the face of the panel request, particularly in light of the attendant circumstances of the consultations, that the U.S. panel request does provide a sufficient brief summary of the legal basis of the complaint that presents the problem clearly.

VI. THE U.S. PANEL REQUEST DOES NOT PREJUDICE THE ABILITY OF THE EC TO DEFEND ITSELF

43. The EC argues that the Appellate Body has "attached importance" to the question of whether a responding Party has suffered prejudice as a result of any deficiencies with respect to Article 6.2. More to the point, however, in *Korea Dairy*, the Appellate Body denied Korea's Article 6.2 claim *in toto* because, although it had asserted prejudice, Korea offered no supporting particulars.[39]

44. The EC's argument that it is prejudiced by the U.S. panel request is nothing more than a restatement of its argument, refuted above, that the request is insufficiently detailed with respect to actual arguments to support the legal basis of the complaint. In light of the Appellate Body's reasoning in *Korea Dairy*, such a mere restatement is plainly insufficient to establish prejudice. If lack of detail in the panel request automatically meant "prejudice", there would be no need for a "prejudice" analysis. Even if the EC had succeeded in demonstrating that the U.S. panel request does not meet the requirements of DSU Article 6.2, which it has not, the EC has offered nothing to suggest that it has been prejudiced.

45. The EC argues, at paragraph 71, that the United States made a similar "prejudice"

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[38] *See, e.g.*, May 19, 2004, Consultation Questions, "Definition of GIs", questions 4 - 6 (Exhibit US-3).

[39] *Korea Dairy*, para 131.

argument in *U.S. Lamb*,[40] and states that the same standard should be applied in the present case.[41] Of course, if this Panel does adopt the same standard as in the *U.S. Lamb* dispute, it will reject the EC's request, consistent with the *U.S. Lamb* panel's rejection of the U.S. argument and its finding that the panel request in *U.S. Lamb* was consistent with Article 6.2.[42]

46. The EC speculates, at paragraph 73 of its request, that either both co-complainants are conspiring to leave the EC in the dark, or both are unsure of the case they are intending to bring. The truth is more mundane: Article 6.2 requires only a brief summary of the legal *basis* for the complaint sufficient to present the problem clearly. It does not, as explained above, require a preview of the *arguments* that will be submitted later during the course of the panel proceedings.

VII. CONCLUSION

47. For the reasons stated above, the EC's arguments in support of its request for a preliminary ruling that the U.S. panel request does not meet the requirements of Article 6.2 are without merit. Accordingly, the Panel should reject that request.

[40] Report of the Panel, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS178/R, adopted May 16, 2001 ("*U.S. Lamb*").

[41] EC Request, para. 72.

[42] *U.S. Lamb*, para. 5.53.