

**CANADA – MEASURES RELATING TO EXPORTS OF WHEAT  
AND TREATMENT OF IMPORTED GRAIN**

Preliminary Ruling by the Panel

Further to a request by the United States, acceded to by the Panel (WT/DS276/11), the preliminary ruling by the Panel, dated 25 June 2003, regarding the consistency of the United States' panel request of 6 March 2003 (WT/DS276/6) with Article 6.2 of the DSU is circulated to Members for their information.

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**PRELIMINARY RULING ON THE PANEL'S JURISDICTION UNDER  
ARTICLE 6.2 OF THE DSU**

**1. Consistency of the United States' panel request with Article 6.2 of the DSU**

(a) Introduction

1. Article 6.2 of the DSU provides in relevant part:

The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2. **Canada** asserts that certain claims set out in the United States' panel request<sup>1</sup> fail to satisfy the requirements of Article 6.2 of the DSU. Canada considers that Article 6.2 establishes the basis for the Panel's authority to reject those elements of the United States' panel request that do not meet the requirements of Article 6.2. Specifically, Canada requests that the Panel not assume jurisdiction in respect of (i) the claim under Article XVII of the GATT 1994, (ii) the claim under Article III:4 of the GATT 1994 concerning rail car allocation and (iii) the claims under Article 2 of the *TRIMs Agreement* concerning rail car allocation and grain segregation.

3. The **United States** considers that Canada's arguments in support of its request for a preliminary ruling in respect of the consistency of the United States' panel request with Article 6.2 of the DSU are without merit. The United States submits, therefore, that the Panel should reject Canada's request for a favourable preliminary ruling. The United States also argues that, even if its panel request were defective, this would not automatically deprive the Panel of jurisdiction over the matter. Rather, the Panel must consider the particular circumstances of the case, including whether Canada has been prejudiced by the relevant defect. Also, the United States argues, Canada's

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<sup>1</sup> See document WT/DS276/6.

procedural objections to the United States' panel request are in any event untimely. The United States notes in this regard that procedural objections must be raised at the earliest possible opportunity and not, as in this case, for the first time in a letter sent after the establishment of the panel.<sup>2</sup>

4. The **Panel** notes that Canada's request for a preliminary ruling regarding the consistency of the United States' panel request with Article 6.2 of the DSU concerns three distinct elements of the panel request. The Panel will examine these elements separately and in the order in which they were addressed in Canada's request for a preliminary ruling.

5. However, before addressing the three elements identified by Canada, it is well to recall the recent Appellate Body report on *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, wherein a summary is given of the Appellate Body jurisprudence on Article 6.2 of the DSU. The summary states in relevant part:<sup>3</sup>

There are [...] two distinct requirements [in Article 6.2], namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.<sup>4</sup>

The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.<sup>5</sup> When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."<sup>6</sup>

As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.<sup>7</sup> [...] Moreover, 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 attendant circumstances.<sup>8</sup>

6. With this statement of Appellate Body jurisprudence in mind, we now turn to the first element of the panel request in respect of which Canada seeks a ruling.

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<sup>2</sup> On 7 April 2003, Canada sent a letter to the United States in which it stated its view that the United States' panel request did not meet the requirements of Article 6.2 of the DSU and requested that the United States promptly identify the specific measures at issue and provide a brief summary of the legal basis for its complaint. Canada's preliminary written submission, para. 30.

<sup>3</sup> Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("US – Carbon Steel"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paras. 125-127.

<sup>4</sup> (original footnote) Appellate Body Report, *Guatemala – Cement I*, paras. 69-76.

<sup>5</sup> (original footnote) Appellate Body Report, *Brazil – Dessicated Coconut*, at 186. See also, Appellate Body Report, *EC – Bananas III*, para. 142.

<sup>6</sup> (original footnote) Appellate Body Report, *EC – Bananas III*, para. 142.

<sup>7</sup> (original footnote) *Ibid.*, para. 143.

<sup>8</sup> (original footnote) Appellate Body Report, *Korea – Dairy*, paras. 124-127.

(b) Claims under Article XVII of the GATT 1994

7. The United States' panel request sets out a claim under Article XVII of the GATT 1994 as follows:<sup>9</sup>

(1) The Government of Canada has established the Canadian Wheat Board ("CWB"), and has granted to this enterprise exclusive and special privileges. These exclusive and special privileges include the exclusive right to purchase western Canadian wheat for export and domestic human consumption at a price determined by the Government of Canada and the CWB; the exclusive right to sell western Canadian wheat for export and domestic human consumption; and government guarantees of the CWB's financial operations, including the CWB's borrowing, the CWB's credit sales to foreign buyers, and the CWB's initial payments to farmers.

The laws, regulations and actions of the Government of Canada and the CWB appear to be inconsistent with the obligations of the Government of Canada under Article XVII of the GATT 1994. In particular, the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat appear to be:

- inconsistent with paragraph 1(a) of Article XVII of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB, in its purchases or sales involving wheat exports, shall act in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994; and
- inconsistent with paragraph 1(b) of Article XVII of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB shall make such purchases or sales solely in accordance with commercial considerations and shall afford the enterprises of other WTO Members adequate opportunity, in accordance with customary business practice, to compete for such purchases or sales.

The apparent inconsistency with Canada's obligations under Article XVII of the GATT 1994 includes the failure of the Government of Canada to ensure that the CWB makes such purchases or sales in accordance with the requirements set forth in paragraphs 1(a) and 1(b) of Article XVII.

8. **Canada** considers that the United States' claim under Article XVII as set out in the panel request fails to satisfy the requirements of Article 6.2 of the DSU in at least three ways. *First*, Canada considers that the Article XVII claim does not "identify the specific measures at issue". According to Canada, the foundation for the United States' claim is in various "laws, regulations and actions", but these laws, regulations and actions are nowhere described. Canada submits that any number of laws, regulations and actions may be related to the export of wheat but have no relevance to the instant claim. Canada argues that there are dozens of "laws and regulations" that could be the subject of the United States panel request as worded. With respect to the term "actions", Canada notes that this term implies some specific conduct or instance, but the United States panel request identifies neither conduct nor a specific instance.

9. *Second*, Canada recalls that the United States alleges a violation of Article XVII:1(b) and that that article contains two distinct obligations. Canada asserts that the United States panel request is

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<sup>9</sup> See document WT/DS276/6.

defective in that it does not make clear which laws, regulations or actions result in the violation of which obligation.

10. *Third*, Canada considers that the United States' panel request does not set out a brief summary of the legal case sufficient to present the problem clearly. According to Canada, there is nothing in the United States' Article XVII claim which establishes the legal basis of allegations by the United States that the CWB does not follow customary business practice or does not take into account commercial considerations in its conduct, or that Canada is in violation of its Article XVII obligations because it has failed to ensure such conduct.

11. The **United States** considers that Canada's *first* argument regarding identification of specific measures is without merit. The United States submits that Canada is incorrect to argue that the foundation for the United States' claim is in various "laws, regulations and actions" which are nowhere described. The United States argues that any person reading the phrase "laws, regulations and actions" would take note of the immediately preceding paragraph of the United States panel request, which identifies the specific measures at issue. These measures include the establishment of the CWB granting the CWB exclusive and special privileges, including the exclusive right to purchase western Canadian wheat for export and domestic human consumption at a price determined by the Government of Canada and the CWB, the exclusive right to sell western Canadian wheat for export and domestic human consumption and government guarantees of the CWB's financial operations. The United States further argues that the subsequent paragraph also clarifies that the measures at issue include the failure by the Government of Canada to ensure that the CWB acts in conformity with the provisions of Article XVII. With regard to the term "actions", the United States notes that its panel request uses the term "actions" because the provisions of Article XVII:1 quoted in the request impose obligations with regard to purchases and sales involving wheat exports. The terms "laws and regulations" were not sufficient to cover this aspect of conduct addressed in the panel request.

12. In response to the *second* deficiency alleged by Canada, the United States argues that its panel request cites both obligations contained in Article XVII:1(b) because the Canadian measures are inconsistent with both of these obligations.

13. Regarding the *third* alleged deficiency, the United States recalls that Article 6.2 of the DSU requires "a brief summary of the legal *basis* of the complaint sufficient to present the problem clearly". The United States notes that a panel request may satisfy this requirement simply by listing the provisions of the WTO agreements with respect to which the measures at issue are allegedly inconsistent. The United States argues that there is no requirement in Article 6.2 that panel requests contain a summary of the legal arguments in support of a claim.

(i) *Identification of the Specific Measures at Issue*

14. The **Panel** begins its analysis with Canada's assertion that the United States' panel request fails to "identify the specific measures at issue". In determining whether the United States' identification of the measures at issue in this dispute is sufficient for the purposes of Article 6.2, we consider, as an initial matter, the provisions of Article 6.2 itself. At issue is the phrase "identify the specific measures at issue". The dictionary defines the term "identify" as "establish the identity of".<sup>10</sup> The term "specific" is defined as "clearly or explicitly defined; precise; exact"<sup>11</sup>. Thus, the ordinary meaning of the phrase "identify the specific measures at issue" is "to establish the identity of the precise measures at issue". Accordingly, based on the text of Article 6.2, it is clear to us that in the

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<sup>10</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1304.

<sup>11</sup> *Ibid.*, Vol. 2, p. 2972.

present case the United States' panel request must establish the identity of the precise measures at issue.

15. Having regard to the relevant context of Article 6.2 of the DSU, we note Article 4.4 of the DSU, which deals with the contents of requests for consultations. It states in relevant part that "any request for consultations shall give the reasons for the request, including identification of the measures at issue". Notably, Article 4.4 omits the term "specific" in referring to the "measures at issue". We believe that this difference in language is not inadvertent and must be given meaning. Indeed, in our view, this difference in language supports the view that requests for consultations need not be as specific and as detailed as requests for establishment of a panel under Article 6.2 of the DSU. As a corollary, in our view, this relevant context bears out the importance of the term "specific" as it appears in Article 6.2.

16. We note, in addition, that it is clear from the Appellate Body report on *US – Carbon Steel* that the purposes underlying the requirements of Article 6.2 are (i) to define the scope of a dispute and thus a panel's jurisdiction, and (ii) to notify and inform the responding party and the third parties of the nature of the complaining party's case.<sup>12</sup> We believe that the emphasis deriving from the presence of the term "specific" in the phrase "identify the specific measures at issue" is consistent with these purposes. Indeed, without identification of the precise measures at issue, the jurisdiction of a panel could not be clearly established. Likewise, the due process objective of notifying and informing the responding party and the third parties could not be attained.

17. In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 "depends [...] upon whether they satisfy the purposes of [those] requirements".<sup>13</sup> We also find relevant the statement by the Appellate Body 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 attendant circumstances".

18. With these considerations in mind, we now turn to examine whether the United States' Article XVII claim set out in the panel request "identifies the specific measures at issue". We agree with Canada that the measures covered by the panel request are set out in the second paragraph of the Article XVII claim contained in the panel request. In that paragraph, the United States refers to "the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat". Canada objects to this description of the measures at issue on the grounds that it is overly broad.

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.<sup>14</sup> 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.

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<sup>12</sup> Appellate Body Report, *US – Carbon Steel*, *supra*, para. 126.

<sup>13</sup> Appellate Body Report, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("EC – Computer Equipment"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 69

<sup>14</sup> At the preliminary hearing, the parties expressed the same view. Canada's reply to preliminary Panel question no. 6; United States' reply to preliminary Panel question no. 3.

20. 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. Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue.

21. In light of the foregoing and in the absence of an explicit reference to the laws and regulations at issue, we proceed now to examine whether, in the absence of an explicit reference to the laws and regulations at issue, the information provided by the United States in its panel request is sufficient to inform Canada, as the responding party in this case, of the specific measures at issue.

22. In this regard, we note firstly that the panel request uses the terms "laws" and "regulations" in the plural. This strongly suggests that more than one law and regulation are implicated by the United States' panel request. Precisely how many laws and regulations are covered by the panel request is not stated in explicit terms. This absence of clarity as to the number of laws and regulations at issue is the source of significant uncertainty.

23. Secondly, the precise content of the laws and regulations which are being challenged is unclear. In particular, in identifying the measures at issue, the United States, in the second paragraph of its Article XVII claim, refers to the "laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat". This phrase suggests that the laws and regulations implicated by the panel request are those "related to exports of wheat" by the Government of Canada and the CWB. On the other hand, the first paragraph of the United States' Article XVII claim provides a description of certain aspects of the Canadian legal regime governing the activities of the CWB. In particular, it specifies certain exclusive and special privileges which have allegedly been granted by the Government of Canada to the CWB. We agree with the United States that reference should be made to that paragraph given that, as always when interpreting portions of a text, it is important to take account of the relevant context. However, when the first and second paragraph of the Article XVII claim are read together, confusion and uncertainty arise. *First*, it is unclear whether the measures at issue include only those laws and regulations, or those parts of laws and regulations, which govern the activities of the CWB mentioned in the first paragraph, or whether other laws and regulations, or other parts of laws and regulations, would also be included. *Second*, another source of uncertainty is that the second paragraph is concerned with measures "related to exports of wheat", while the first paragraph appears to refer also to activities which are not necessarily export-related, such as the purchase and sale of wheat by the CWB for domestic consumption, or "government guarantees of the CWB's financial operations, including the CWB's borrowing, the CWB's credit sales to foreign buyers, and the CWB's initial payments to farmers". Accordingly, we do not agree with the United States that the first paragraph removes all uncertainty as to the precise content of the laws and regulations which are being challenged.

24. In our view, the United States' panel request, by creating considerable uncertainty as to the identity, number and content of the laws and regulations which it is challenging, does not provide adequate information on its face to identify the specific measures at issue. In particular, we consider that it does not fulfil the due process objective inherent in Article 6.2. Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge. In the present case, the panel request effectively shifts part of that burden onto Canada as the responding party, inasmuch as it leaves Canada little choice, if it wants to begin preparing its defence<sup>15</sup>, but to

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<sup>15</sup> Appellate Body Report, Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/AB/R, adopted 5 April 2001, para. 88.

undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request.

25. The United States has offered no persuasive explanation for the lack of precision about the identity of the laws and regulations at issue. The United States argues that Canada knows what is at issue in this dispute from the discussions at the consultations preceding the panel request and, indeed, from 15 years of previous discussions between the two countries on this issue.<sup>16</sup> Even assuming that this was correct, Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties. Moreover, the fact that Canada would know or should know which laws and regulations the United States meant to be covered by the panel request would not relieve the United States of its obligation to establish, in its panel request, the identity of the laws and regulations at issue. In our view, it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.

26. With respect to the term "actions" as it appears in the phrase "the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat", Canada argues that these actions are nowhere identified and that it is unclear what the actions at issue are. The United States asserts that it used the term "actions" because Article XVII prescribes certain conduct with respect to purchases and sales by state-trading enterprises.<sup>17</sup> In our view, the two indents of the second paragraph of the Article XVII claim as well as the first and third paragraphs bear out this assertion, inasmuch as the only actions referred to in these paragraphs are actions relating to purchases and sales involving wheat exports. While we consider that the United States could certainly have included additional information regarding the actions to which it wished to refer in its panel request, we agree with the United States that the Article XVII claim sufficiently establishes the nature of the actions at issue.<sup>18</sup>

27. Canada notes that the CWB is involved in thousands of transactions with multiple parties.<sup>19</sup> We agree that the panel request as drafted potentially applies to a multitude of actions which are not specified in the request. However, we consider that, for this type of measure, the United States need not necessarily specify the relevant actions individually.<sup>20</sup> Failure to identify the relevant actions individually inevitably creates some uncertainty for Canada as the responding party. Nevertheless, unlike in the case of the reference to "laws" and "regulations" in the United States' panel request, it is clear that the relevant part of the panel request that refers to actions of the CWB relates to purchases and sales of wheat for export. Therefore, we do not think that the uncertainty created by the lack of enumeration of each action significantly impairs Canada's ability to prepare its defence.

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<sup>16</sup> United States preliminary written submission, para. 28; United States reply to preliminary Panel question no. 6.

<sup>17</sup> United States' preliminary written submission, note 15.

<sup>18</sup> It should be noted that the term "actions" could, in principle, be read to refer to actions by the Government of Canada as well as by the CWB. It is thus somewhat unclear whether the term "actions" was meant to refer only to CWB actions, just like, presumably, the term "laws" was intended to refer only to the Government of Canada, or whether the United States meant to indicate that the actions of the CWB were attributable also to the Government of Canada. Whereas this lack of clarity is regrettable, we note that, in either case, the nature of the actions at issue is the same.

<sup>19</sup> Canada's preliminary oral statement, para. 11.

<sup>20</sup> We note that, in *EC – Computer Equipment*, the Appellate Body found that a general reference to the "application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities" constituted a "proper" identification of the "specific measures at issue" within the meaning of Article 6.2, even though these measures were not normative rules. Appellate Body Report, *EC – Computer Equipment*, *supra*, para. 65.

28. In conclusion, we note that, taken as a whole, the United States' panel request does not sufficiently establish the identity of the "laws" and "regulations" at issue in the Article XVII claim. In particular, the identification of the measures at issue in this claim is inadequate because it creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to "begin preparing its defence"<sup>21</sup> in a meaningful way.<sup>22</sup> Accordingly, we conclude that the United States' panel request is inconsistent with Article 6.2 because the Article XVII claim set out therein does not "identify the specific measures at issue".<sup>23</sup>

(ii) *Legal Basis of the Complaint Sufficient to Present the Problem Clearly*

29. Canada makes the further assertion that the United States' panel request is inconsistent with Article 6.2 because it does not make clear which laws, regulations or actions result in the violation of which of the two obligations set forth in Article XVIII:1(b). The first observation to be made here is that the panel request identifies both obligations contained in Article XVIII:1(b). Thus, the panel request thus does more than merely list Article XVII. By referring to the Government of Canada and the CWB when identifying the two obligations, the panel request also links those obligations to the facts of the case. Thus, we believe that the request on its face provides adequate notice to Canada and the third parties that the United States may have wished to raise claims of violation under the two obligations set out in Article XVII:1(b). We do not agree with Canada's assertion that the panel request does not make it clear which laws, regulations or actions are inconsistent with which obligation. The panel request states that "the laws, regulations *and* actions of the Government of Canada and the CWB related to exports of wheat appear to be [...] inconsistent with paragraph 1(b) of Article XVII of the GATT 1994 [...]" (emphasis added). This wording suggests to us – and we consider that it should suggest to Canada and the third parties as well – that the United States may have wished to claim before us that each of the three categories of measures identified – laws, regulations and actions – is inconsistent with both obligations of Article XVII:1(b). This way of presenting the Article XVII claim does not, in our view, have as a consequence that Canada does not know what case it has to answer and so cannot begin to prepare its defence, or that the third parties are uninformed as to the legal basis of the complaint and thus lack an opportunity effectively to respond to the United States' complaint. We do not consider, therefore, that this aspect of the presentation of the Article XVII claim compels the conclusion that the United States' panel request falls short of the requirements of Article 6.2.

30. Canada's third and final allegation is essentially that the United States' claim under Article XVII:1(b) does not establish why and how the CWB does not follow customary business practice or does not act in accordance with commercial considerations, or why or how Canada fails to ensure that the CWB acts consistently with Article XVII:1(b). The requirement imposed by Article 6.2 is that the panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The panel request in this case explicitly identifies the relevant legal provisions by citing the relevant subparagraph of the article at issue and states the two distinct obligations contained in the relevant subparagraph. As previously noted, the panel request also links those obligations to the Government of Canada and the CWB. We find this summary of the legal basis of the United States' Article XVII:1(b) claim to be adequate, in the circumstances of this case, to present the problem clearly. It is apparent to us – and we consider that it should be apparent to Canada and the third parties as well – that the United States may have wished to claim before us that,

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<sup>21</sup> Appellate Body Report, *Thailand – H-Beams*, *supra*, para. 88.

<sup>22</sup> In view of our finding that the United States' panel request fails to give adequate notice to Canada of the measures at issue, we do not need to examine, in addition, whether the panel request gives adequate notice to the third parties.

<sup>23</sup> We believe that our finding is sufficient to resolve the issue before us and we do not, therefore, find it necessary to "limit" the United States' Article XVII claim to certain measures identified by Canada. Canada's preliminary oral statement, para. 24.



as a result of the laws and regulations at issue or through its conduct in specific instances, the CWB fails to make purchases or sales involving wheat exports solely in accordance with commercial considerations and to afford the enterprises of other Members adequate opportunity to compete for such purchases or sales. Moreover, if the measures at issue had been sufficiently identified, the link established in the panel request between, on the one hand, the mentioned laws and regulations and, on the other hand, the alleged violation of Article XVII:1(b) would no doubt have had more meaning. Thus, while the summary provided of the legal basis for the United States' claim under Article XVII:1(b) is brief, we do not think that this results in Canada not knowing what case it has to answer and hence being unable to begin preparing its defence, or in the third parties being uninformed as to the legal basis of the complaint and thus lacking an opportunity effectively to respond to the United States' complaint. We therefore do not agree with Canada that the summary of the legal basis for the Article XVII:1(b) claim fails to comply with the requirements of Article 6.2.

31. It should also be recalled that, under Article 6.2 as interpreted by the Appellate Body, the United States' panel request must set out the United States' claims, but not the arguments supporting those claims.<sup>24</sup> Accordingly, we do not consider that the United States' panel request is defective because it does not set out arguments supporting the conclusion that the measures at issue are inconsistent with the obligations contained in Article XVII:1(b).

32. Overall, we thus conclude that those portions of the United States' panel request which deal with the Article XVII claim fail to satisfy the requirements of Article 6.2 insofar as they do not "identify the specific measures at issue". As a result, we will refrain from addressing the merits of this claim.

(c) Claim in respect of rail car allocation

33. The United States' panel request sets out a claim in respect of rail car allocation as follows:<sup>25</sup>

(2) With regard to the treatment of grain that is imported into Canada, Canadian measures discriminate against imported grain, including grain that is the product of the United States:

[...]

- Canadian law caps the maximum revenues that railroads may receive on the shipment of Canadian domestic grain, but not revenues that railroads may receive on the shipment of imported grain. *In addition, in allocating railcars used for the transport of grain, Canada provides a preference for domestic grain over imported grain.* These measures concerning rail transportation accord to imported grain less favorable treatment than that accorded to like domestic grain, and thus appear to be inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

34. **Canada** considers that the United States claim in respect of rail car allocation as set out in the panel request fails to meet the requirements of Article 6.2 of the DSU. Specifically, Canada asserts that the panel request does not give any indication of the specific measures with which the United States takes issue. In Canada's view, it is insufficient to raise generally the issue of rail car allocation without providing details as to the measure at issue. Canada submits that it is not possible for Canada

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<sup>24</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("EC – Bananas III"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141.

<sup>25</sup> See document WT/DS276/6 (emphasis added).

to prepare a defence against this claim without being alerted in some detail to the provisions that are alleged to violate WTO obligations.

35. The **United States** does not agree with Canada that the United States' claim regarding rail car allocation fails to identify the specific measures at issue. Moreover, in the United States' view, in view of Canada's conduct with regard to the consultations addressed to this issue, Canada's argument is disingenuous.<sup>26</sup> The United States asserts that, during consultations, it sought elaboration from Canada on a statement from the website of the Canadian Grain Commission ("CGC") indicating that Canada had adopted a measure providing differential treatment for Western Canadian and imported wheat. According to the United States, Canada stated that it had no knowledge of any Canadian rules on this issue. The United States notes that, in the absence of confirmation of the proper appellation or legal status of this rule, its panel request reasonably addressed this issue. The United States further points out that, six weeks after the consultations, and after it had filed its panel request, Canada confirmed that it does establish rules governing the allocation of rail cars used in the transport of grain. The United States notes that Canada referred to the allocation powers of the CGC under section 87 of the Canada Grain Act and under section 68 of the Regulations to the Canada Grain Act and also stated that, on a crop year basis, the CGC issues to the industry at large an order that sets out how the CGC will allocate producer cars for the various grains and destinations for the coming crop year.<sup>27</sup> The United States also notes that Canada's response does not explain whether these rules and orders are publicly available. The United States submits that, in the light of the aforementioned circumstances, there can be no legitimate confusion over the rail car allocation measures at issue. Canada must certainly be aware of the content of CGC grain car allocation orders.

36. The **Panel** understands Canada to allege that the claim set out in the United States' panel request concerning the issue of rail car allocation fails to "identify the specific measures at issue" in the sense of Article 6.2. The claim in question is set out in the panel request in the following terms: "[I]n allocating railcars used for the transport of grain, Canada provides a preference for domestic grain over imported grain". We note that this description of the measures at issue does not specify any particular laws, regulations or other legal instrument. However, as noted by us previously in relation to the Article XVII claim, the fact that a panel request does not specify by name, date of adoption, etc. the relevant law, regulation or other legal instrument to which a claim relates does not necessarily render the panel request inconsistent with Article 6.2, provided that the panel request contains sufficient information that effectively identifies the precise measures at issue. In this regard, as we have also noted above, whether a panel request provides sufficient information will depend on whether the information provided serves the purposes of Article 6.2 and, in particular, its due process objective. It will also depend upon the specific circumstances of each case, which include, *inter alia*, the type of measure that is at issue.

37. In examining whether, in the absence of an explicit reference to the particular laws, regulations or other instruments, the description provided in the United States' panel request of the measures at issue in the claim regarding rail car allocation is sufficient for the purposes of Article 6.2, we begin by considering whether that description adequately notifies and informs Canada of the measures under challenge so that Canada can begin preparing its defence in a meaningful way.

38. The first thing to be noted is that unlike in the case of the United States' claim under Article XVII, where it is in many ways unclear what measures "related to exports of wheat" are being challenged, the United States' claim here at issue identifies clearly what specific Canadian measures concerning rail transportation are at issue. The panel request makes it clear that the specific measures at issue are Canada's measures concerning the allocation of rail cars used for the transport of grain.

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<sup>26</sup> The United States notes in this regard that it finds it difficult to reconcile Canada's conduct of the consultations with its obligations under Article 4.3 of the DSU.

<sup>27</sup> The United States refers to exhibit US-2, para. 15.

39. We observe, furthermore, that the claim in respect of rail car allocation does not explicitly indicate whether the measures at issue are laws, regulations and/or actions.<sup>28</sup> However, we consider that the description in the panel request is broad enough to cover both measures of general application – *i.e.*, laws and regulations related to the allocation of rail cars – and individual (administrative) acts of rail car allocation.

40. Moreover, we note that, in its defence, the United States suggests that it has been unable to obtain confirmation from Canada of the proper name or legal status of the relevant measures and that, in the absence of such confirmation, its panel request reasonably identifies the measures at issue. In considering this argument, we recall 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 attendant circumstances".<sup>29</sup>

41. The facts and circumstances which we have been made aware of and which we consider relevant are as follows. At the conclusion of the consultations of 31 January 2003 in Ottawa, Canada agreed to provide in writing and at a subsequent time answers to a number of questions. In one of these questions, the United States sought "[i]nformation on any rules, regulations or administrative actions concerning the [Canadian Grain Commission's] allocation of railcars".<sup>30</sup> It appears that a written version of this and other questions was sent to Canada on 11 February 2003.<sup>31</sup> On 12 March 2003, *i.e.*, almost five and a half weeks after completion of the consultations and six days after the United States' panel request of 6 March 2003<sup>32</sup>, Canada provided the United States with the requested answers, including to the question on rail car allocation.<sup>33</sup> At the preliminary hearing, the United States stated that, at the time it submitted its panel request to Canada and the WTO, it was not confident that Canada would still provide written answers.<sup>34</sup> Canada, on the other hand, stated that, during the consultations in Ottawa, Canada's head of delegation had given her word that the relevant questions would be answered and that, at the time the United States filed its panel request, Canada was in the midst of answering the United States' questions.<sup>35</sup> The parties have made conflicting statements regarding whether the United States renewed its request for answers before filing its panel request.<sup>36</sup>

42. In addition, it should be noted that in the answer Canada provided to the United States' question on rail car allocation, Canada refers, in a general way, to certain allocation orders issued by the Canadian Grain Commission ("CGC") on a crop year basis.<sup>37</sup> At the preliminary hearing, Canada

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<sup>28</sup> See also EC preliminary written third party submission, para. 18.

<sup>29</sup> Appellate Body Report, *US – Carbon Steel*, *supra*, para. 127.

<sup>30</sup> The United States sent similar questions to Canada in advance of the consultations in Ottawa. Exhibit US-1, question nos. 35 and 48. It is not clear whether the final version of these questions was agreed during the Ottawa consultations.

<sup>31</sup> United States' reply to preliminary Panel question no. 4.

<sup>32</sup> The panel request was circulated to WTO Members on 7 March 2003. See document WT/DS276/6. We further note that the United States' request for consultations is dated 19 December 2002 and that, pursuant to Article 4.7 of the DSU, if the consultations fail to settle a dispute, the complaining party may request a panel within 60 days after the date of receipt of the request for consultations.

<sup>33</sup> Exhibit US-2. Canada provided relatively short answers to all fifteen questions. We also note that the United States did not consider Canada's answer to the question on rail car allocation fully satisfactory. United States' preliminary written submission, note 20.

<sup>34</sup> United States' reply to preliminary Panel question no. 10.

<sup>35</sup> Canada's reply to preliminary Panel question nos. 10 and 4. Canada indicated that the "delay" was due, *inter alia*, to the need for interdepartmental consultations and vetting of replies by lawyers. Canada's reply to preliminary Panel question no. 4.

<sup>36</sup> United States' reply to preliminary Panel question no. 4; Canada's reply to preliminary Panel question no. 10.

<sup>37</sup> Exhibit US-2, para. 15.

provided the further explanation that there are two types of CGC allocation orders, regulatory and shipment-specific ones, and that only the former are publicly available.<sup>38</sup>

43. To reiterate, it is our view that the panel request makes it clear that the specific measures at issue are Canada's measures concerning the allocation of rail cars used for the transport of grain. This said, we accept the United States' contention that the aforementioned facts and circumstances affected the degree of precision with which the United States did set out and could be expected to have set out the measures at issue in its claim in respect of rail car allocation. More specifically, we consider the fact that the panel request does not explicitly indicate whether the measures at issue are laws, regulations and/or actions to be justified in the light of the attendant circumstances<sup>39</sup> and the fact that the description in the panel request is broad enough to cover both measures of general application and individual acts of rail car allocation.

44. Therefore, having regard to the text of the panel request and the particular facts and circumstances of this case, we consider that the United States' claim regarding rail car allocation adequately notifies and informs Canada of the specific measures under challenge. We do not agree with Canada that it is impossible for it to prepare its defence because the panel request in this case is inadequate. The United States' panel request in our view provides sufficient information on the measures at issue to allow Canada to "begin preparing its defence"<sup>40</sup> in a meaningful way. The information on relevant rules governing rail car allocation transmitted by Canada to the United States days after the filing of the panel request confirms our view.

45. With respect to whether the claim regarding rail car allocation adequately notifies and informs the third parties of the specific measure under challenge, we note that one of the third parties to these panel proceedings, Japan, has suggested that, by failing to specify the relevant laws, regulations and actions, the United States did not fully take into account the object and purpose of Article 6.2, *i.e.*, to inform the third parties, in addition to Canada, of the substance of the complaint.<sup>41</sup> Another third party, the European Communities, has stated that it is unclear from the description in the panel request whether the United States seeks to challenge legislation, or administrative or commercial practices.<sup>42</sup> As we have already stated, we think that the United States' panel request clearly identifies the Canadian rail transportation measures at issue. Also, it is clear from the panel request as worded that it covers both measures of general application and individual (administrative) acts of rail car allocation. Finally, we recall our finding that, due to the particular circumstances of this case, it was justifiable for the United States to set out the measures concerning rail car allocation by using the description provided in the United States' panel request. We consider, therefore, that it would be inconsistent for us to conclude that, notwithstanding these particular circumstances, the United States' panel request is inadequate because it does not sufficiently inform the third parties of the measures at issue. Were we to conclude otherwise, we would, in effect, require the United States to do more than it could be expected to do in the circumstances of this case.

46. In conclusion, we find that Canada has failed to establish that the United States' panel request, when examined on its face and in light of the attendant circumstances, is inconsistent with Article 6.2

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<sup>38</sup> Canada's reply to preliminary Panel question no. 5.

<sup>39</sup> See also Appellate Body Report, *Thailand – H-Beams*, *supra*, paras. 91-92.

<sup>40</sup> Appellate Body Report, *Thailand – H-Beams*, *supra*, para. 88.

<sup>41</sup> Japan's preliminary oral third party statement, para. 9.

<sup>42</sup> European Communities' written third party submission, para. 18. We note that, in its third party submission, Chile did not suggest that the United States' panel request insufficiently informs the third parties of the measure at issue in the United States' claim concerning rail car allocation.

because the rail car allocation claim set out therein does not "identify the specific measures at issue". Accordingly, we see no reason not to address the merits of this claim.<sup>43</sup>

(d) Claims under Article 2 of the *TRIMs Agreement*

47. The United States' panel request sets out claims under Article 2 of the *TRIMs Agreement* as follows:<sup>44</sup>

(2) With regard to the treatment of grain that is imported into Canada, Canadian measures discriminate against imported grain, including grain that is the product of the United States:

- Under the Canada Grain Act and Canadian grain regulations, imported grain must be segregated from Canadian domestic grain throughout the Canadian grain handling system; imported grain may not be received into grain elevators; and imported grain may not be mixed with Canadian domestic grain being received into, or being discharged out of, grain elevators. These measures accord to imported grain less favorable treatment than that accorded to like Canadian grain, and thus appear to be inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.
- Canadian law caps the maximum revenues that railroads may receive on the shipment of Canadian domestic grain, but not revenues that railroads may receive on the shipment of imported grain. In addition, in allocating railcars used for the transport of grain, Canada provides a preference for domestic grain over imported grain. These measures concerning rail transportation accord to imported grain less favorable treatment than that accorded to like domestic grain, and thus appear to be inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

48. **Canada** considers that the United States' claims under Article 2 of the *TRIMs Agreement* as set out in the panel request fail to meet the requirements of Article 6.2 of the DSU. Canada asserts that the United States appears to rely solely on the relationship between Article 2 of the *TRIMs Agreement* and Article III:4 of the GATT 1994. Canada notes that the United States does not provide any indication as to the nature of the investment measure that it alleges is WTO-inconsistent. For example, there is no reference to any measures of the type identified in the illustrative list under Article 2 of the *TRIMs Agreement*. Therefore, Canada submits that it can only speculate as to the specific investment measures at issue and the legal basis for the allegation of breach of Article 2 of the *TRIMs Agreement*.

49. The **United States** rejects Canada's arguments. According to the United States, Canada's arguments are not about the "specific measures at issue". Rather, Canada is essentially arguing that the panel request must lay out the legal arguments why the specifically identified measures are within the scope of the *TRIMs Agreement*. However, there is no such requirement in Article 6.2 of the DSU.

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<sup>43</sup> We believe that our finding is sufficient to resolve the issue before us and we do not, therefore, find it necessary to "limit" the United States' claim regarding the rail car allocation to certain measures identified by Canada. Canada's preliminary oral statement, para. 24.

<sup>44</sup> See document WT/DS276/6.

50. The **Panel** begins its analysis with Canada's assertion that the United States' claims under the *TRIMs Agreement* do not give any indication as to the nature of the specific "investment measures" at issue.<sup>45</sup> The requirement imposed by Article 6.2 of the DSU is that a panel request "identify the specific measures at issue". We do not consider that Article 6.2 requires the United States to establish, in its panel request, that the measures identified by it are trade-related investment measures within the meaning of the *TRIMs Agreement*, or that they fit within one of the investment measures enumerated in the illustrative list in the Annex to the *TRIMs Agreement*. That the measures identified by the United States in its panel request are properly to be considered trade-related investment measures within the meaning of the *TRIMs Agreement* is something to be established by the United States in its written submissions and oral statements, through evidence and argument. We therefore disagree with Canada that the United States' panel request is inconsistent with Article 6.2 because it fails to set out the "investment measures" which are alleged to be contrary to the *TRIMs Agreement*.

51. According to Article 6.2, the United States' panel request must "provide a summary of the legal basis sufficient to present the problem clearly". The claims under Article 2 of the *TRIMs Agreement* set out in the panel request cite the relevant article, which has two paragraphs, but in fact contains only one obligation. The claims also state that the measures at issue "accord to imported grain less favorable treatment than that accorded to like domestic grain", which makes it clear that the United States' claims are based on Article 2 of the *TRIMs Agreement* insofar as that article incorporates the obligations contained in Article III:4 of the GATT 1994. This is confirmed by the fact that the measures which are being challenged under Article 2 of the *TRIMs Agreement* are also challenged under Article III:4 of the GATT 1994. The claims also contain allegations regarding how the relevant measures concerning rail transportation, rail car allocation and grain segregation give rise to less favourable treatment for imported grain. In view of the foregoing, we think that the summary of the legal basis for the United States' claims under Article 2 of the *TRIMs Agreement* presents the problem raised with sufficient clarity, such that Canada is able to know the case it has to answer and begin preparing its defence. We also think that the summary provided is sufficient to inform the third parties about the legal basis of the complaint and to give them an opportunity effectively to respond to the United States' complaint. We therefore do not consider that the summary of the legal basis for the claims under Article 2 of the *TRIMs Agreement* fails to comply with the requirements of Article 6.2.

52. Based on the above considerations, we reject Canada's assertion that the United States' panel request is inconsistent with Article 6.2 because the claims under Article 2 of the *TRIMs Agreement* do not identify the specific measures at issue and do not indicate the legal basis for the complaint. Accordingly, we see no reason not to address the merits of these claims.

## **2. Timeliness of Canada's objection to the United States' panel request**

53. Having concluded above that the United States' panel request fails to satisfy the requirements of Article 6.2, we need to consider, as an additional matter, the United States' argument that Canada's request for a preliminary ruling on Article 6.2 should be denied on the basis that Canada failed to raise its procedural objection at the earliest opportunity.

54. The United States notes that at no time prior to the establishment of this Panel did Canada indicate that it considered the panel request deficient, and that it waited until after the panel was established to offer its objection. The United States considers that Canada's procedural objection to the panel request is untimely and should not stand in the way of consideration of the substantive issues in this dispute. The United States points out that the Appellate Body in *United States - Tax*

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<sup>45</sup> Canada's preliminary oral statement, para. 25.

*Treatment for "Foreign Sales Corporations"*<sup>46</sup> upheld the panel's rejection of a United States request for a preliminary ruling under very similar circumstances.

55. In addressing the United States' argument, we first recall the relevant facts as we understand them. Canada filed its requests for a preliminary ruling on 13 May 2003, the day after the Director-General of the WTO announced the Panel's composition to the parties. Prior to that, on 7 April 2003, Canada wrote to the United States, indicating, *inter alia*, that "[t]he U.S. request, dated March 6, 2003, does not meet the requirements of Article 6(2). [...] We ask the U.S. to promptly identify the specific measures at issue and provide a brief summary of the legal basis for its complaint".<sup>47</sup> Canada did not receive a reply from the United States.<sup>48</sup> The DSB established this Panel on 31 March 2003. The parties disagree over whether Canada raised objections prior to the establishment of the Panel.<sup>49</sup> Canada asserts that it raised similar objections in respect of the United States' request for consultations during consultations, which is denied by the United States.<sup>50</sup>

56. The United States considers that Canada should not have raised its objections for the first time in a letter sent after the establishment of the Panel. In considering this issue, we note that Canada informed the United States of its concerns about the consistency of the United States' panel request with Article 6.2 by letter. Before us, Canada described the letter it sent to the United States as "a good-faith effort to clarify the grounds" for the United States panel request. Canada noted in this regard that the Appellate Body in *Thailand - H-Beams* made the following statement:<sup>51</sup>

In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". As we have previously stated, the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".<sup>52</sup>

57. We find this statement relevant to the issue before us. The Appellate Body made this statement as part of its review of a finding by the panel that the request for the establishment of a panel submitted by Poland was sufficient to meet the requirements of Article 6.2 of the DSU. The panel, in turn, made this finding in response to a request for a preliminary ruling by Thailand, the defending party in that case. Thailand submitted its request to the panel as part of its first written

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<sup>46</sup> Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("US – FSC"), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619.

<sup>47</sup> Canada's preliminary written submission, para. 30.

<sup>48</sup> *Ibid.*

<sup>49</sup> Canada's comments at the preliminary hearing on para. 9 of the United States' preliminary oral statement; United States' preliminary written submission, para. 24.

<sup>50</sup> Since there appears to be no formal record of the consultations, we are unable to determine whether or not Canada raised an objection during the consultations in respect of the request for consultations, and whether the alleged objection should have assisted the United States in drafting its panel request in a way which meets the requirements of Article 6.2.

<sup>51</sup> Appellate Body Report, *Thailand - H-Beams*, para. 97.

<sup>52</sup> (original footnote) Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

submission.<sup>53</sup> There is no indication in the Panel report that Thailand made its concerns known to Poland before filing its first written submission.

58. The above-quoted statement by the Appellate Body notes that there is no legal bar to any Member requesting clarification of a panel request even before the filing of the first written submission. The statement does not suggest that, in *Thailand - H-Beams*, Thailand should have raised its concerns at the DSB meetings at which Poland's panel request was on the agenda. In the case at hand, Canada did avail itself of the possibility of seeking clarification of the claims raised in the United States' panel request. As suggested by the Appellate Body, Canada did so "before the filing of the first written submission", namely, soon after this Panel was established. Canada did not receive a reply from the United States.<sup>54</sup> Canada then filed its request for a preliminary ruling immediately upon receiving notice that this Panel had been duly constituted. Unlike Thailand in the *Thailand - H-Beams* case, Canada did not wait until the due date of its first submission before filing its request. In fact, Canada informed the Panel at the earliest possible opportunity. In addition, Canada requested the Panel to rule on its request at the earliest possible opportunity, namely, before the due date of the parties' first written submissions. In the light of this, we do not think that the conduct of Canada in this case justifies the conclusion that Canada has engaged in "litigation techniques" in an effort to prevent this Panel from considering the substantive issues of this dispute.

59. We note that Canada could arguably have sought clarification of the United States' panel request earlier than it did. We recall in this regard that Canada waited a month, from 6 March 2003 to 7 April 2003, before it informed the United States of its concerns.<sup>55</sup> Had Canada informed the United States earlier, it might have convinced the United States to amend its panel request, which, in turn, might have obviated the need for Canada to request a preliminary ruling. We might then have been able to proceed to examine the substance of the United States' Article XVII claim. Obviously, this would have been a preferable outcome. At the same time, Canada might have failed to convince the United States to amend its panel request. If the United States had declined to amend its panel request, and if it had done so notwithstanding the merits of some of Canada's arguments, Canada could not have prevented the panel from being established.

60. While we thus consider it unfortunate that Canada did not act more promptly in raising its concerns with the United States, it would, in our view, be inappropriate, in the specific circumstances of this case, to focus solely on the conduct of Canada. As we have said, Canada's letter of 7 April 2003 was not answered by the United States. If the United States had provided sufficient clarification of its panel request to Canada, Canada might, for instance, have refrained from requesting a preliminary ruling. Indeed, Canada stated so at the preliminary hearing.<sup>56</sup> We do not see why it should be assumed by us that the United States would have amended its panel request if Canada had raised concerns at a relevant DSB meeting, but that Canada would necessarily have proceeded with its request for a preliminary ruling if the United States had provided clarification of its panel request.<sup>57</sup>

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<sup>53</sup> Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.1.

<sup>54</sup> The United States indicated in this regard that any clarification of its panel request could not have cured possible defects of its panel request, and that the United States' panel request was sufficient on its face. United States' reply to preliminary Panel question no. 3.

<sup>55</sup> Canada indicated to us that it used the time from 7 to 31 March 2003 to hold interdepartmental consultations on the panel request which it considered unclear. Canada indicated that these consultations involved several ministries, including those of agriculture, finance, transport, foreign affairs and trade, as well as the Canada Wheat Board and the Canadian Grain Council. Canada's comments on para. 9 of the United States' preliminary oral statement.

<sup>56</sup> Canada's comments on para. 9 of the United States preliminary oral statement.

<sup>57</sup> It is true that the United States could not have "cured" any inconsistencies with Article 6.2 of its panel request subsequent to the establishment of this Panel and hence could not have prevented Canada from



We find it incongruous, therefore, for the United States to suggest that Canada should have raised its concerns before the Panel was established (and thus assisted the United States in making use of its right to have a dispute resolved effectively and promptly) when the United States itself made no attempt at addressing Canada's concerns (and thus at assisting Canada in exercising its rights of defence effectively) once Canada did raise those concerns with the United States. In our view, both disputing parties are under an obligation to engage in dispute settlement procedures in good faith in an effort to resolve their dispute.

61. We do not think that the Appellate Body report on *US - FSC* assists the United States in this case. Contrary to what the United States suggests<sup>58</sup>, the Appellate Body in that case did not address a preliminary objection by the United States based on Article 6.2 of the DSU, *i.e.*, an objection in respect of a panel request. Rather, the objection in question was based on Article 4.4 of the DSU and thus concerned the request for consultations in that case.<sup>59</sup> It was in this context that the Appellate Body stated that:<sup>60</sup>

[...] a year passed between submission of the request for consultations by the European Communities and the first mention of this objection by the United States – despite the fact that the United States had numerous opportunities during that time to raise its objection. It seems to us that, by engaging in consultations on three separate occasions, and not even raising its objections in the two DSB meetings at which the request for establishment of a panel was on the agenda, the United States acted as if it had accepted the establishment of the Panel in this dispute, as well as the consultations preceding such establishment. In these circumstances, the United States cannot now, in our view, assert that the European Communities' claims under Article 3 of the *SCM Agreement* should have been dismissed and that the Panel's findings on these issues should be reversed.

62. As an initial matter, we note that, in the present case, it was not a year that passed between submission of the panel request and the first mention of Canada's objection to the request, but a month. Regarding the issue of whether Canada should have raised its objections in the DSB meetings in this case, it should be noted that later in the *US - FSC* report, the Appellate Body stated that "the [...] principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB *or* the Panel, so that corrections, if needed, can be made to resolve disputes"<sup>61</sup>. We think that if the Appellate Body was of the view that raising objections at relevant DSB meetings is always necessary in cases where such objections could be made at such meetings, the Appellate Body would have used different wording. We note that, in a subsequent case, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, the Appellate Body stated that:<sup>62</sup>

In examining Mexico's conduct, we note that Mexico did not bring up the issues it now relies upon at the DSB meeting on 23 October 2000. Rather, Mexico in effect

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successfully challenging the panel request. However, this does not provide a justification in itself for the United States not working with Canada to clarify its request. Indeed, if that were the case, there would have been little point in the Appellate Body pointing out, in *Thailand - H-Beams*, that responding parties may seek clarification of panel requests even before the filing of their first written submissions to panels.

<sup>58</sup> United States' preliminary oral statement, para. 9.

<sup>59</sup> Article 4.4 of the DSU reads as follows:

<sup>60</sup> Appellate Body Report, *US – FSC*, *supra*, para. 165.

<sup>61</sup> Appellate Body Report, *US – FSC*, *supra*, para. 166 (emphasis added).

<sup>62</sup> Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/AB/RW, adopted 21 November 2001, para. 45.

consented to refer the matter to the Article 21.5 Panel at the first DSB meeting where the matter was raised. We further note that Mexico did not refer to these issues, *at all*, in either of its written submissions to the Panel. Nor did Mexico ask the Panel to make any preliminary ruling on these issues. The alleged deficiencies in the authority of the Panel were mentioned by Mexico *only* at the meeting with the Panel on 20-21 February 2000.

63. The Appellate Body then went on to find that the panel in that case "could reasonably have concluded that Mexico's 'objections' were not raised in a timely manner".<sup>63</sup> However, there is no indication that the Appellate Body based this finding primarily, or even solely, on Mexico's failure to raise its "objections" at the DSB meeting where the matter was raised. We believe that, in the circumstances of the present case, we cannot reasonably conclude that solely because Canada did not raise its objections at the relevant DSB meetings, Canada's request for a preliminary ruling should be denied.

64. For these reasons, we are unable to accept the United States' argument that we decline Canada's request for a preliminary ruling on the grounds that it was not raised in a timely manner. Accordingly, we grant Canada's request for a preliminary ruling and, consistent with our ruling, will refrain from considering the substance of the United States' claim under Article XVII.

65. In reaching this conclusion, we wish to emphasise once again that disputing parties are required, under the provisions of Article 3.10 of the DSU, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". Accordingly, should the United States wish to see a panel address the substance of its Article XVII claim promptly, we believe that the procedures of the DSU are sufficiently flexible, if adhered to in good faith by both disputing parties, to allow the United States to do so. Thus, we consider that, in working with each other towards a resolution of this dispute, it may be possible for the parties to explore, and avail themselves of, the flexibility offered by the DSU. In our view, the options open to the parties include the possibility of the United States filing a new panel request and the parties agreeing to have a panel established at the first DSB meeting at which the panel request is on the agenda.<sup>64</sup> The Panel, for its part, stands ready to assist the parties in their efforts to reach a fair, prompt and effective resolution of this dispute.

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<sup>63</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 - US)*, para. 50.

<sup>64</sup> Without taking a position on this issue, we note that the provisions of Article 9.3 of the DSU may also be of interest to the parties.