



**AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS,  
GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING REQUIREMENTS  
APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING**

COMMUNICATION FROM THE PANEL

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

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On 7 May 2014, Australia submitted to the Panel a request for a preliminary ruling concerning the consistency of the Dominican Republic's request for the establishment of a Panel (WT/DS441/15) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

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

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

## PRELIMINARY RULING BY THE PANEL

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### 1 PROCEDURAL BACKGROUND

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

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

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

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

### 2 AUSTRALIA'S REQUEST FOR A PRELIMINARY RULING

2.1. Australia requests that the Panel make a preliminary ruling excluding from its terms of reference "the non-exhaustive list of related measures and measures that 'complement or add to' the measures explicitly identified in the Dominican Republic's panel request", on the basis that the panel request does not identify the specific measures at issue contrary to the requirements of Article 6.2 of the DSU.<sup>1</sup>

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

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<sup>1</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 1.

### 3 MAIN ARGUMENTS OF THE PARTIES

#### 3.1 Australia

3.1. Australia requests that the Panel make preliminary procedural rulings excluding from its terms of reference the "non-exhaustive list of related measures and measures that 'complement or add to' the measures explicitly identified in the Dominican Republic's panel request".<sup>2</sup> Australia requests this ruling on the basis that the request does not identify the specific measures at issue, contrary to the requirements of Article 6.2 of the DSU. In Australia's view, the Dominican Republic's panel request should read:

[A]ny related measures adopted by Australia, ~~including measures that implement, complement or add to~~ these laws and regulations, as well as any measures that amend or replace these laws and regulations.<sup>3</sup>

3.2. Australia submits that, as a responding party, it is entitled to know the case it is required to answer, and that the deficiencies in the Dominican Republic's panel request have prejudiced, and continue to prejudice, the preparation of its defence, thereby violating Australia's "fundamental right to due process in these proceedings".<sup>4</sup>

3.3. Australia submits that it is crucial that a complainant identify in its panel request the specific measures at issue as required by Article 6.2 of the DSU because this sets the panel's terms of reference and also serves an important due process objective.<sup>5</sup> Referring to the Oxford English Dictionary, Australia submits that "specific" is defined as "[s]pecially or peculiarly pertaining to a particular thing or person, or a class of these... clearly or explicitly defined; precise, exact; definite".<sup>6</sup> Australia argues that a complaining party must therefore establish the identity of the precise measures at issue.<sup>7</sup> It further submits that, in determining consistency with Article 6.2 of the DSU, a panel must "analyse whether the measures that the complaining party is contesting were identified such that the respondent party received 'adequate notice'" of the measures at issue.<sup>8</sup>

3.4. Australia observes that the Dominican Republic has identified the measures at issue in its panel request by listing the specific instruments that it considers constitute the "plain packaging measures" as follows:

The measures at issue, which the Dominican Republic collectively refers to as the "plain packaging measures", are the following:

*Tobacco Plain Packaging Act 2011*, Act No. 148 of 2011, "An Act to discourage the use of tobacco products, and for related purposes";

*Tobacco Plain Packaging Regulations 2011* (Select Legislative Instrument 2011, No. 263), as amended by the *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)* (Select Legislative Instrument 2012, No. 29);

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<sup>2</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 1 (citing the Dominican Republic's request for the establishment of a panel).

<sup>3</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, footnote 2.

<sup>4</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 2.

<sup>5</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 4 (citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).

<sup>6</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 5 (citing *Shorter Oxford English Dictionary*, (6<sup>th</sup> ed., 2007), p. 2944).

<sup>7</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 5 (citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).

<sup>8</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 5 (citing Panel Report, *China – Publications and Audiovisual Products*, para. 7.20).

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*Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*, Act No. 149 of 2011, "An Act to amend the Trade Marks Act 1995, and for related purposes"...<sup>9</sup>

3.5. While not challenging this approach, Australia refers to the following additional language in the Dominican Republic's panel request:

Any related measures adopted by Australia, including measures that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations.<sup>10</sup>

3.6. Australia submits that the Dominican Republic's panel request does not identify the specific measures at issue for two reasons. First, Australia argues that the use of the term "including" defines the "related measures" in a non-exhaustive way. Second, Australia contests "the attempt to include unspecified measures that 'complement or add to' those explicitly named in the panel request ('complementary or additional measures')".<sup>11</sup>

3.7. In relation to the use of the word "including", Australia argues that the Dominican Republic "attempts to include a non-exhaustive and therefore indeterminate list" of "related measures" within the Panel's terms of reference. As a result, the Dominican Republic has not provided Australia with adequate notice of the measures being challenged, "or even a complete and specific list" of the "related measures" that it purports to challenge.<sup>12</sup> Australia draws an analogy with the panel request in *China – Raw Materials*, in which the complainants preceded the list of challenged measures with the phrase "among others". In response to this, the panel concluded that the complainants could not use this phrase to include an "open-ended" list of measures, as this would "not contribute to the 'security and predictability' of the WTO dispute settlement system".<sup>13</sup> Australia notes that, in that dispute, only those measures that were explicitly identified by the complainants fell within the panel's terms of reference.<sup>14</sup> Australia submits that the issue before the panel in *China – Raw Materials* is analogous to the one presented in the Dominican Republic's panel request. In particular, the Dominican Republic attempts to challenge an "open-ended" list of "related measures" and, apart from the categories of "related measures" actually listed, the Dominican Republic provides no indication of what "other forms" such unspecified measures could take. Australia therefore argues that it has not been provided with notice of the measures under challenge, which creates "considerable uncertainty" as to the identity, number and content of the measures at issue.<sup>15</sup>

3.8. Australia also submits that the Dominican Republic's panel request fails to identify the specific measures at issue because it provides no guidance on what it means when it refers to measures that "complement or add to" the listed instruments. Australia argues that this adds further to the uncertainty regarding the identity, number and content of the laws and regulations under challenge, and "forces Australia to speculate regarding the measures at issue if it is to begin to prepare its defence".<sup>16</sup> Australia submits that the Dominican Republic's panel request impermissibly shifts the burden of attempting to identify the complementary or additional measures at issue to Australia.<sup>17</sup>

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<sup>9</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 6 (citing the Dominican Republic's request for the establishment of a panel).

<sup>10</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 7 (citing the Dominican Republic's request for the establishment of a panel).

<sup>11</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 8.

<sup>12</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 9.

<sup>13</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 10 (citing Panel Reports, *China – Raw Materials*, Annex F-1, para. 12, p. F-6).

<sup>14</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 10 (citing Panel Reports, *China – Raw Materials*, Annex F-1, para. 13, p. F-6).

<sup>15</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 10 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).

<sup>16</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 12.

<sup>17</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 12 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).

3.9. Australia notes that whether a panel request identifies the specific measures at issue may depend on the particular context in which those measures operate and may require examining the extent to which they are capable of being precisely identified.<sup>18</sup> Australia submits that in the specific context of tobacco regulation, the Dominican Republic's attempt to include complementary or additional measures does not identify the "precise, exact or definite measures at issue" and fails to provide Australia with adequate notice of these measures.<sup>19</sup>

3.10. Australia notes that, "in speculating about the possible complementary or additional measures that the Dominican Republic purports to challenge, Australia has had cause to consider that, in line with established international best practice, its tobacco plain packaging measure is part of a comprehensive range of tobacco control measures". Australia submits that this comprehensive approach to tobacco control is mandated by the World Health Organization Framework Convention on Tobacco Control (FCTC). Australia notes that the FCTC emphasizes that "comprehensive multisectoral measures and responses" to reduce consumption of all tobacco products are essential to prevent the incidence of diseases, premature disability and mortality due to tobacco consumption and exposure to tobacco smoke.<sup>20</sup> Australia also observes that the FCTC "mandates" that each party to it "develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes" in accordance with the FCTC.<sup>21</sup>

3.11. Australia submits that "the uncertainty regarding the scope of the related measures arises because of the particular context in which Australia's tobacco plain packaging measure exists and operates, namely as part of a comprehensive range of complementary tobacco control measures".<sup>22</sup> It considers that in this context, the references in the panel request of the Dominican Republic to a non-exhaustive list of "related" measures, "including" those that "complement" or "add to" the named measures, are not sufficient to identify the specific measures at issue in this dispute. Rather, Australia submits that the inclusion of "these broad and vague terms" in a dispute that concerns one of Australia's tobacco control measures (that is, tobacco plain packaging in its context as part of a complementary range of tobacco control measures) does not identify sufficiently the scope of the measures at issue such that Australia is informed of the case it has to answer.<sup>23</sup>

3.12. Australia notes that if "general tobacco control measures" are "indeed the types of complementary or additional measures the Dominican Republic refers to in its panel request (which is not clear and is a matter of speculation)", Australia's tobacco control measures "span back decades" and have been implemented at the federal, state and territory, and local municipality level. Australia asserts that it has implemented its tobacco plain packaging measure as part of a comprehensive range of measures in order to achieve its public health objectives, "in line with its FCTC obligations". Australia identifies a number of measures included in its "comprehensive range of tobacco control measures".<sup>24</sup> Australia adds that this is a non-exhaustive

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<sup>18</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 13 (citing Appellate Body Reports, *China – Raw Materials*, para. 220).

<sup>19</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 14.

<sup>20</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 15 (citing The *WHO Framework Convention on Tobacco Control* (FCTC), done at Geneva, 3 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Article 4.4).

<sup>21</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 16 (citing The *WHO Framework Convention on Tobacco Control* (FCTC), done at Geneva, 3 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Article 5.1).

<sup>22</sup> Australia's comments on responses to Australia's requests for preliminary rulings, para. 29.

<sup>23</sup> Australia's comments on responses to Australia's requests for preliminary rulings, para. 29.

<sup>24</sup> Australia cites "increasing excise and excise-equivalent customs duty on tobacco and tobacco-related products; minimum age restrictions on the purchase and sale of tobacco products; comprehensive bans on tobacco advertising and promotion, including bans on internet advertising of tobacco products; retail display bans; bans on smoking in offices, bars, restaurants and other indoor public spaces, and increasingly outdoor places, particularly those where children may be exposed to environmental tobacco smoke; extensive and continuing public education campaigns on the dangers of smoking; compulsory health warnings on the packaging of tobacco products; the listing of nicotine replacement therapies and other smoking cessation supports on Australia's Pharmaceutical Benefits Scheme; "Quitlines" and other smoking cessation support services; investment in anti-smoking social marketing campaigns; support for Aboriginal and Torres Strait Islander communities to reduce smoking rates; and stronger penalties for people convicted of tobacco

list, and that each of these measures includes multiple laws and regulations that may have been adopted at the federal, state or local level, such that Australia's tobacco control measures number in the hundreds. Australia argues that it "cannot be the case that the Dominican Republic intends to challenge every current or future tobacco control measure implemented in Australia" and that, in these circumstances, the Dominican Republic is obliged to identify the specific measures at issue so that Australia is informed of the case it has to answer.<sup>25</sup>

3.13. Australia adds that if the Dominican Republic's reference to complementary or additional measures "is intended to refer to certain tobacco control measures currently in force in Australia (apart from tobacco plain packaging), there is no reason why these measures could not be explicitly named, other than to prejudice Australia's defence". Australia argues that this is in contrast to amending measures which may not come into existence until after a panel request is submitted and therefore may legitimately be listed by category rather than by the unknown future name of the amending law or regulation.<sup>26</sup>

3.14. In sum, Australia considers that the Dominican Republic has not identified the specific measures at issue in a way that is "precise", "exact" or "definite", contrary to Article 6.2 of the DSU, and has not provided reasonable notice to Australia as to the case it has to answer.<sup>27</sup> Australia requests that the Panel find that its terms of reference are limited to the measures specifically identified in the panel request, and that the remainder of its terms of reference be limited in the following manner:

Any related measures adopted by Australia, ~~including measures~~ that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations.<sup>28</sup>

3.15. Australia notes that "a deficient panel request will fail to meet the requirements of Article 6.2 of the DSU regardless of whether the respondent is able to defend itself", but also that the deficiencies in the Dominican Republic's panel request have in fact prejudiced Australia's ability to defend itself in this dispute.<sup>29</sup> Australia observes that "[i]n a WTO dispute, the complainant decides when to bring its dispute, and may therefore take as much time as it needs to prepare its offensive case. By contrast, a responding party has only a limited timeframe in which to respond to the complainant's first written submission." Australia submits that it is therefore critical that a panel request provide a responding party with sufficient clarity as to the case it has to answer in advance of receiving the complainant's first written submission, and notes that "[t]his due process requirement 'is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings'".<sup>30</sup> In light of this, Australia argues that a panel request should be examined very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.<sup>31</sup>

3.16. Citing the Appellate Body, Australia argues that prejudice is to be determined on the basis of whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself.<sup>32</sup> It submits that, for the reasons outlined in its submission, the Dominican Republic's panel request has not made Australia aware of the claims presented

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smuggling offences." Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 17.

<sup>25</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 17-18.

<sup>26</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 19.

<sup>27</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 20.

<sup>28</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 22.

<sup>29</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 23.

<sup>30</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 24 (citing Appellate Body Report, *Thailand – H-Beams*, para. 88).

<sup>31</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 24 (citing Appellate Body Reports, *EC – Bananas (III)*, para. 142 and *Korea – Dairy*, para. 130).

<sup>32</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 25 (citing Appellate Body Report, *Thailand – H-Beams*, para. 95).

sufficient to allow Australia to defend itself, to the extent that it fails to identify sufficiently the specific measures at issue.<sup>33</sup>

3.17. Australia also notes that defects in a panel request cannot be cured by subsequent submissions of the parties during the panel proceedings<sup>34</sup>, and that compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel.<sup>35</sup> Australia therefore submits that the Dominican Republic cannot overcome the deficiencies in its panel request by clarifying the legal basis of this claim in its first written submission.<sup>36</sup>

### 3.2 The Dominican Republic

3.18. The Dominican Republic submits that its panel request is fully consistent with the requirements of Article 6.2 of the DSU. In particular, considered as a whole and in light of the attendant circumstances, the Dominican Republic argues that its panel request identifies the measures at issue with ample precision. Prior Appellate Body and panel decisions confirm that use of the terms to which Australia objects is proper, and that Australia's analogy to *China – Raw Materials* is inapposite. The inclusion of the challenged terms is important to protect the Dominican Republic's interests in this dispute and has not prejudiced Australia's ability to begin to prepare its defence.<sup>37</sup>

3.19. The Dominican Republic argues that Australia's "speculative objections" are baseless because Australia "improperly fixates on three isolated terms, without considering their context". The Dominican Republic submits that, when considered as a whole, as required by prior Appellate Body and panel decisions, the Dominican Republic panel request "clearly identifies the challenged measures with sufficient precision, consistent with Article 6.2 of the DSU".<sup>38</sup> The Dominican Republic argues (i) that the measures at issue – the "plain packaging measures" for tobacco products – can be discerned from the face of the panel request; (ii) that, in light of prior Appellate Body and panel decisions, the three contested terms used in the panel request are sufficiently precise to meet the requirement of specificity; and (iii) that the attendant circumstances confirm that the Dominican Republic is challenging only Australia's plain packaging measures.<sup>39</sup>

3.20. The Dominican Republic submits that, on the face of the panel request, considered as a whole, the measures are framed "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".<sup>40</sup> The Dominican Republic identifies four main reasons to support this submission.

3.21. First, the Dominican Republic notes that by referring to the measures at issue, and throughout its panel request, it consistently refers to the challenged measures as "plain packaging measures". Thus, the Dominican Republic submits, by its very terms, this description specifies that the measures at issue relate to elements of "packaging" that are "plain".<sup>41</sup> This alone demonstrates that Australia has no plausible basis for its speculation that the measures at issue could encompass tobacco control measures besides "plain packaging measures", such as smoking cessation support services, or penalties for tobacco smuggling. The Dominican Republic observes that Australia itself has used the term "plain packaging" to refer to the "plain packaging measures"

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<sup>33</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 26.

<sup>34</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 28 (citing Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>35</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 28 (citing Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>36</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 28.

<sup>37</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 4.

<sup>38</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 13.

<sup>39</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 14.

<sup>40</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 20.

<sup>41</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 21.

at issue and has never (to the knowledge of the Dominican Republic) described its other tobacco control measures, such as a minimum legal purchase age requirement, as "plain packaging measures".<sup>42</sup>

3.22. Second, the Dominican Republic observes that, in Section A of its panel request, it provides a narrative description of the substantive nature, content and effects of the measures at issue.<sup>43</sup> The Dominican Republic elaborates that the panel request states that the measures at issue "apply to the retail sale of cigarettes, cigars, and other tobacco products" and "establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves".<sup>44</sup> This is followed by the longer narrative description of the substantive content and operation of the challenged measures which makes clear that the measures being challenged relate to "the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves". The Dominican Republic observes that previous panels have recognized that a narrative description of the measures at issue is relevant to establishing whether they are properly identified.<sup>45</sup> The Dominican Republic adds that the narrative description also makes Australia's speculative objections untenable, as it is simply not possible to understand the panel request as encompassing tobacco control measures that have nothing to do with the standardized appearance and form of the retail packaging. The Dominican Republic argues that the only way to arrive at this reading is to read the terms "including", "complement", and "add to" in isolation from the rest of the panel request and, thereafter, to engage in "speculation".<sup>46</sup>

3.23. Third, the Dominican Republic argues that the structure of its panel request, coupled with the immediate context of the three contested terms, also imparts meaning to these terms. The Dominican Republic observes that the three contested terms – "including", "complement", and "add to" – appear in the fourth bullet point of Section A of the panel request, which identifies certain "related measures", which "have a substantive nexus or relationship to other measures", namely, between the "related measures" and the "laws and regulations" specified in the first three bullets, all of which are exclusively plain packaging measures. The Dominican Republic submits that, for these reasons, the "related measures" in the fourth bullet must enjoy a sufficiently close nexus to the named plain packaging measures.<sup>47</sup> In addition, the Dominican Republic submits that the scope of that relationship is clarified by the terms that follow the reference to "related measures": specifically, the measures are those that implement, complement or add to these laws and regulations, as well as any measures that amend or replace them. The Dominican Republic further specifies that the word "including" contributes to defining the meaning of "related measures", and that under the common interpretive principle of *ejusdem generis*, a general term will be understood to refer to things of the same type as the more specific terms which are included within it.<sup>48</sup> In addition, the Dominican Republic argues that the word "related" must "be read in light of the general appellation given to the measures at issue ([that is] the 'plain packaging measures'), as well as the narrative description of the nature, content and effect of these measures". This is because any "related measures, including measures that ... complement or add to" the named plain packaging laws and regulations are necessarily among the measures identified in the panel request as the "plain packaging measures". It is also because the Dominican Republic in its panel request describes the "plain packaging measures" as measures that "apply to the retail sale of cigarettes, cigars, and other tobacco products" and "establish comprehensive

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<sup>42</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 22.

<sup>43</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 23 (emphasis omitted).

<sup>44</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 23 (citing the Dominican Republic's request for the establishment of a panel, p. 2).

<sup>45</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 23 (citing Panel Reports, *EC – IT Products*, para. 7.1181; and *China – Publications and Audiovisual Products*, para. 7.47; Preliminary Ruling, *India – Agricultural Products*, para. 3.19).

<sup>46</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 24.

<sup>47</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 25.

<sup>48</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 26 and footnote 35 (citing Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, footnote 1290).



regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves".<sup>49</sup>

3.24. Fourth, the Dominican Republic submits that the limited scope of "related measures" is confirmed by Section B of its panel request, which explains that the "plain packaging measures appear to be inconsistent with" the enumerated provisions of the TRIPS Agreement, the TBT Agreement, and the GATT 1994, together with reasons for each apparent inconsistency.<sup>50</sup> This description "show[s] that the measures at issue are limited to those that denude tobacco products and packaging of differentiating elements, including through interference with the use of trademarks on packaging", and that non-plain-packaging tobacco-control measures, such as smoking cessation programs and minimum legal purchase age requirements do not fall within the substantive ambit of the stated claims under the TRIPS or TBT Agreements.<sup>51</sup>

3.25. The Dominican Republic summarizes that the structure and content of the panel request, considered as a whole, indicate that the "related measures, including measures that ... complement or add to" referred to therein cannot extend to non-plain-packaging tobacco-control measures.<sup>52</sup>

3.26. The Dominican Republic argues that prior case law indicates that the terms used in its panel request "are not objectionable". Regarding the term "including", the Dominican Republic submits that Australia's reliance on *China – Raw Materials* is "inapt" because, in that dispute, the panel considered the use of the words "among others" served to suggest that the measures identified in the bullet points were not the only measures alleged to be inconsistent with China's WTO obligations. The formulation made the list of measures "open-ended", thus holding out the possibility of some unidentified bullet point yet to be specified.<sup>53</sup> The Dominican Republic submits that it does not, in the equivalent part of its panel request, purport to identify an open-ended group of measures, but instead that "[t]he measures at issue, which the Dominican Republic collectively refers to as the 'plain packaging measures', are the following...".<sup>54</sup> Thus, the Dominican Republic emphasizes that the four bullet points of measures listed in its panel request constitute a closed list.<sup>55</sup>

3.27. The Dominican Republic also submits that Australia's general objection to its panel request is inconsistent with how the Appellate Body and prior panels have addressed "related measures" in the context of Article 6.2. Endorsing the panel in *India – Agricultural Products*, the Dominican Republic argues that the sufficiency of a reference in a panel request to "related" and other secondary measures depends, in part, on the specificity of the primary measures in the panel request. If the primary measures are defined in broad or vague terms, the nexus between those measures and the related secondary measures necessarily suffers from the same difficulties.<sup>56</sup> The Dominican Republic argues that in its panel request the "primary" plain packaging measures are very clearly specified as three named laws and regulations: Tobacco Plain Packaging Act 2011; Tobacco Plain Packaging Regulations 2011; and the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011. The Dominican Republic argues that this is similar to the clear specification of the primary measures in *India – Agricultural Products*. Consequently, the "secondary" measures

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<sup>49</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 27.

<sup>50</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 28.

<sup>51</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 29.

<sup>52</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 30.

<sup>53</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 33 (citing Panel Reports, *China – Raw Materials*, Annex F-1, para. 11).

<sup>54</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 34 (citing the Dominican Republic's request for the establishment of a panel, p. 1 (emphasis added)).

<sup>55</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 35.

<sup>56</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 37-40 (citing Preliminary Ruling, *India – Agricultural Products*, para. 3.43 and paras. 3.48-3.49).

– that is, "any related measures" – are "narrowly tailored" as they are measures "related" in the stated manners to the named primary measures.<sup>57</sup>

3.28. Regarding the terms "complement" and "add to", the Dominican Republic argues that Australia provides no specific argument in support of its objection to these terms, beyond its speculation that these words could encompass non-plain-packaging tobacco-control measures. The Dominican Republic notes that in *Chile – Price Band System*, the Appellate Body analysed, without objection, whether a measure fell within the scope of a panel request that referenced a primary measure (the price band system under a named law) "as well as the regulations and complementary provisions and/or amendments".<sup>58</sup> The Dominican Republic also notes that the Appellate Body in *EC – Bananas III* considered measures "which implement[ed], supplement[ed] and amend[ed]" the Framework Agreement on Bananas "adequately identified" the relevant measures for the purposes of Article 6.2.<sup>59</sup> The Dominican Republic argues that because such words have a similar meaning to both "complement" and "add to", the use of these terms is not objectionable.<sup>60</sup>

3.29. The Dominican Republic also argues that attendant circumstances confirm that the Dominican Republic is challenging only Australia's plain packaging measures. Noting that the Appellate Body has stated that the adequacy of a panel request must be discerned "in light of attendant circumstances"<sup>61</sup>, the Dominican Republic argues that the attendant circumstances confirm what is evident on the face of the panel request. Specifically, the Dominican Republic refers to its statements at the DSB, the Council for TRIPS, and the TBT Committee, in which the Dominican Republic has "consistently represented its concerns as being focused solely on Australia's plain packaging requirements applicable to retail packaging of tobacco products or to the tobacco products themselves". The Dominican Republic argues that it has never provided a plausible basis for Australia to believe that it was concerned with other non-plain-packaging measures.<sup>62</sup>

3.30. The Dominican Republic also notes that Australia has never previously raised concerns regarding the scope of its challenge, for example in the DSB, nor has it sought clarification from the Dominican Republic. The Dominican Republic notes that, when responding in the DSB to the request by the Dominican Republic for a panel, the representative of Australia appeared to understand perfectly well the nature and gist of the measures at issue, as opposed to its minimum legal purchase age requirements, smoking cessation programs, or other tobacco control measures. Nor did the representative of Australia suggest that Australia was unable to begin preparation of its defence. The Dominican Republic states that it is, therefore, "surprised that Australia has filed this Preliminary Ruling Request".<sup>63</sup>

3.31. The Dominican Republic also submits that the terms challenged by Australia are necessary to preserve its due process rights in these proceedings, because it is important to prevent Australia from adopting future measures closely connected to the named plain packaging measures, or from changing the legal form of its existing plain packaging measures, in a way that would exclude them from scrutiny by the Panel.<sup>64</sup> The Dominican Republic notes that "[t]his was

<sup>57</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 40.

<sup>58</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 42 (citing Appellate Body Report, *Chile – Price Band System*, para. 135 (emphasis added)).

<sup>59</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 43 (citing Panel Report, *EC – Bananas III*, para. 7.27 and Appellate Body Report, *EC – Bananas III*, para. 140).

<sup>60</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 43 (referring to the definition of "supplement" in *Merriam-Webster's Collegiate Dictionary* (11th ed., 2011), p. 1256).

<sup>61</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 44 (citing Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>62</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 45.

<sup>63</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 46.

<sup>64</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 47 (citing Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10 (sub-paras. 16-28)).

the exact case in *EC – Chicken Cuts*, where the panel considered that new regulations did not fall within its terms of reference precisely because the complainants' panel requests did not 'appear to anticipate inclusion of any measures in addition to those specifically identified'.<sup>65</sup> Had the complainants' panel requests been similar to the fourth bullet of Section A of the Dominican Republic's panel request, it "would have been apt to encompass properly specified *secondary* measures".<sup>66</sup> In this regard, the Dominican Republic notes that new measures have "regularly been found to fall within a panel's terms of reference, provided that the language of the panel request was 'broad enough' to encompass such measures, while also being specific enough to satisfy Article 6.2 of the DSU".<sup>67</sup>

3.32. The Dominican Republic points out that "Australia itself appears to consider this a legitimate reason to reference implementing measures, amendments, and replacement measures in a panel request". Australia accepts that Article 6.2 does not require that each challenged measure be named explicitly, as it does not object to the inclusion of "related measures that implement ... amend, or replace" the specified laws and regulations.<sup>68</sup> The Dominican Republic also points out that Australia also uses similar language in its own panel requests in other WTO disputes<sup>69</sup>, and that Australia recognizes in its Preliminary Ruling Request the legitimacy of listing measures by category in a panel request.<sup>70</sup>

3.33. The Dominican Republic notes that "Australia's entire argument with respect to prejudice is premised on (i) its incorrect assertion that the [Dominican Republic's] panel request fails to identify the specific measures at issue and (ii) unwarranted speculation 'that the Dominican Republic intends to challenge every current or future tobacco control measure implemented in Australia'".<sup>71</sup> The Dominican Republic reiterates that the panel request meets the specificity requirement of Article 6.2, and hence that there is no prejudice to Australia's interests.<sup>72</sup> The due process function of a panel request "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".<sup>73</sup>

3.34. Nevertheless, the Dominican Republic argues that Australia has not suffered prejudice. In support of this contention, the Dominican Republic argues first that Australia's objections are premature. The Dominican Republic observes that Australia has not pointed to any measure not identified in the panel request but that the Dominican Republic alleges is part of the Panel's terms of reference by virtue of the three contested terms. The Dominican Republic submits that Australia cannot do so, because the Dominican Republic has not made any substantive submissions to date

<sup>65</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 48 (citing Panel Report, *EC – Chicken Cuts*, paras. 7.28-7.29).

<sup>66</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 48.

<sup>67</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 49 (citing Appellate Body Reports, *Chile – Price Band System*, para. 144; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 101-102, 130; and Panel Reports, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10; *EC – IT Products*, para. 7.141; *EC – Fasteners (China)*, paras. 7.34, 7.39; *Argentina – Footwear (EC)*, para. 8.46).

<sup>68</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 50 (citing Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 30 and footnote 2).

<sup>69</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 50 (citing Australia's request for the establishment of a panel in *EC – Export Subsidies on Sugar* and *EC – Trademarks and Geographical Indications*).

<sup>70</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 50 (citing Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 19).

<sup>71</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 52 (citing Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 18).

<sup>72</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 53.

<sup>73</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 53 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640).

nor provided any indication that it intends to contest measures other than ones relating to plain packaging.<sup>74</sup>

3.35. The Dominican Republic also notes that, given the terms of the panel request and the attendant circumstances, Australia has no plausible reason to "speculate" that the Dominican Republic might challenge any of the non-plain-packaging measures Australia mentions. For these reasons, the Dominican Republic argues that it is "premature and indeed unnecessary" for the Panel to determine, in the abstract, precisely which measures may or may not be encompassed by the three contested terms<sup>75</sup>, and asks the Panel to reject Australia's speculative Preliminary Ruling Request as "unripe".<sup>76</sup>

3.36. According to the Dominican Republic, the second reason why Australia has not been prejudiced is that Australia has a full opportunity to prepare its defence. The Dominican Republic submits that its panel request identifies the specific plain packaging measures at issue and complies fully with the requirements of Article 6.2, such that Australia is not being prevented from beginning the preparation of its defence, nor has it suffered any prejudice in so preparing.<sup>77</sup>

3.37. The Dominican Republic submits that Australia's rebuttal submission fails to address, let alone rebut, the vast majority of the arguments made by the Dominican Republic, the other co-complainants and the third parties supporting the Dominican Republic.<sup>78</sup> The Dominican Republic points out that Australia fails to respond to its arguments regarding Australia's reliance on the dictionary definition of "specific"; that the measures at issue can be discerned on the face of the Dominican Republic's panel request as a whole; that the Dominican Republic's panel request does not contain an "open-ended" list of measures; that the attendant circumstances, including the Dominican Republic's statements at the DSB, Council for TRIPS, and TBT Committee, confirm that the Dominican Republic is challenging only Australia's plain packaging measures; that Australia understands the nature and gist of the plain packaging measures at issue; that the Appellate Body has upheld the use of terms similar to "complement" and "add to" to identify secondary measures in a panel request; that it is premature and unnecessary for the Panel to address the contested terms in the abstract; and that Australia has a full opportunity to begin to prepare its defence.<sup>79</sup> The Dominican Republic notes that "[m]ost aspects of Australia's Comments are simply repetitive of points that the Dominican Republic has previously addressed", and argues that Australia's preliminary ruling request must fail on the basis that Australia persists in ignoring the Appellate Body's directive to scrutinize carefully the panel request, read as a whole, and on the basis of the language used.<sup>80</sup>

3.38. In relation to the specific measures at issue, the Dominican Republic notes that Australia, in its comments, fails to respond to the Dominican Republic's demonstration of the adequacy of the contested terms in its panel request, read in light of the panel request as a whole. The Dominican Republic adds that Australia does not make any arguments with respect to any portion of the Dominican Republic's panel request besides the contested terms, which it considers only in

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<sup>74</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 55-58 (referring to Preliminary Ruling, *India – Agricultural Products*, paras. 3.49-3.50).

<sup>75</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 59-60 (citing Appellate Body Report, *US – Continued Zeroing*, paras. 168-69.)

<sup>76</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 61.

<sup>77</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 62.

<sup>78</sup> The Dominican Republic identifies these third parties as Cuba, Indonesia, Honduras, Guatemala, the European Union, Mexico, and Argentina. The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 3.

<sup>79</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 3.

<sup>80</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 4 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 562).

isolation. Australia thus completely neglects to engage with the text of the panel request as a whole or on the basis of the language used as directed by the Appellate Body.<sup>81</sup>

3.39. The Dominican Republic argues that Australia recognizes that this dispute is about plain packaging of tobacco products, and that it appears to understand what the concept of "plain packaging" encompasses. The Dominican Republic points out that Australia does not explain how its own views of the overarching regulatory context of the plain packaging measures, coupled with "baseless speculation" about the Dominican Republic's intentions to challenge other tobacco control measures, alter the plain meaning of the terms used in the Dominican Republic's panel request. The Dominican Republic states that this is clearly insufficient for purposes of identifying a violation of Article 6.2 of the DSU.<sup>82</sup>

3.40. The Dominican Republic also argues that Australia misinterprets the case law on "related measures". The Dominican Republic reiterates that the panel in *India – Agricultural Products* examined previous challenges to the identification of "related measures", and noted that the distinguishing feature of the panel requests in *EC – Selected Customs Matters* and *China – Raw Materials* was the identification of "very broad [primary] measures" or "lengthy lists of [primary] measures", such that the secondary "related measures" and "implementing measures" lacked sufficient specificity.<sup>83</sup> The Dominican Republic notes that Australia argues that the decisions in *EC – Selected Customs Matters* and *China – Raw Materials* were based on the "inherent ambiguity" of the terms "implementing measures and other related measures" in the former case and "related measures" in the latter, and had nothing at all to do with the nature of the primary measures referenced in the panel requests at issue. The Dominican Republic argues that this understanding is erroneous, and that the Appellate Body in *EC – Selected Customs Matters* and the panel in *China – Raw Materials* properly considered the specificity of the secondary measures in light of the primary measures to which they related.<sup>84</sup> The Dominican Republic adds that the terms "implementing measures" and "related measures" are inherently ambiguous is belied by Australia's view that references to implementing measures in a panel request are proper; Australia's use of terms such as "related ... instruments" and "related implementing ... measures" in its own panel requests; and the "repeated approval" of references to "related" and "implementing" measures in previous cases.<sup>85</sup>

3.41. The Dominican Republic adds that Australia has at no point attempted to provide a basis in Article 6.2 of the DSU for its distinction between, on the one hand, related measures that "implement", "amend", or "replace", which it concedes are proper to include, and, on the other hand, the allegedly improper "related measures that complement or add to".<sup>86</sup> The Dominican Republic also notes that whether future measures fall within a panel's terms of reference depends on whether a panel request is "broad enough" to encompass such measures.<sup>87</sup> Thus, the Dominican Republic submits that complainants in any dispute face a risk that the respondent will adopt related secondary measures "in addition to" the primary measures and that it is proper for a complainant to mitigate this risk in its panel request, provided that it does so consistently with the requirements of Article 6.2 of the DSU. The Dominican Republic argues that in this dispute, it mitigates the risk for a category of measures related to the named plain packaging measures, including complementary and additional measures. The Dominican Republic adds that the

<sup>81</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 7 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 562).

<sup>82</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 8-9.

<sup>83</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 11 (citing Preliminary Ruling, *India – Agricultural Products*, para. 3.48).

<sup>84</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 12-13.

<sup>85</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 14 (referring to Panel Reports, *US – Shrimp (Thailand)*, para. 7.48; *US – Customs Bond Directive*, para. 7.22; *EC – IT Products*, para. 7.140; and *EC – Bananas III*, para. 7.27; and Appellate Body Reports, *EC – Bananas III*, para. 140; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 112).

<sup>86</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 16.

<sup>87</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 17.

contested terms are almost exactly the terms that the panel in *EC – Chicken Cuts* said were missing from the complainants' panel requests.<sup>88</sup>

3.42. The Dominican Republic argues that it is, at this stage, neither necessary nor appropriate for the Panel to examine the precise boundary between measures that "implement", "amend", and "replace", on the one hand, and measures that "complement" or "add to", on the other hand, on the basis of hypotheticals and Australia's baseless speculation that the Dominican Republic may be challenging non-plain-packaging measures. For the Dominican Republic, this is highlighted by the fact that Australia is demanding clarification on the basis of hypotheticals and speculation.<sup>89</sup> The Dominican Republic offers as an example a scenario in which Australia adopts further plain packaging requirements through a new law or regulation that did not implement, amend or replace the existing plain packaging measures. Such a law or regulation would be a measure that "complements" or "adds to" Australia's existing plain packaging measures. The Dominican Republic argues that there is no reason why the Dominican Republic should not be able to identify such plain packaging measures in its panel request<sup>90</sup>, and that the fourth bullet point of plain packaging measures in its panel request intends to cover the entire universe of plain packaging measures of which the Dominican Republic is not aware or which Australia may enact in the future.<sup>91</sup>

#### 4 MAIN ARGUMENTS OF THE THIRD PARTIES

4.1. **Argentina** considers that, reading the panel request as a whole and taking into account the context of the paragraph in question, it is clear from the text of the challenged paragraph that the complementary or additional measures concerned are directly related to Australia's plain packaging legislation. Argentina submits that among those related measures are the measures that are included, be they measures that complement or add to these laws and regulations. Argentina submits that the text of the request from the Dominican Republic refers to the measures that constitute the plain packaging legislation, and not to any other type of measure with no connecting link other than a reference to tobacco or health.<sup>92</sup> Argentina considers that the terms at issue "are included in claims, and that those claims in turn are presented collectively and under the same heading: tobacco plain packaging measures, for which reason Argentina believes that the measures are presented in a clear and distinct manner and that the scope of the complaint is, therefore, precise".<sup>93</sup> Argentina therefore argues that it is unnecessary to make the changes requested by Australia.<sup>94</sup>

4.2. The **European Union** submits that Australia's concerns regarding the specific measure at issue "have all been expressly and specifically allayed by the Dominican Republic". The European Union suggests, "without endorsing" the Dominican Republic's speculation or reasoning about possible future measures, that the Panel consider deferring a ruling on this matter to a later stage of the proceedings, following a similar approach to that of the Panel in *India – Agricultural Products*.<sup>95</sup>

4.3. **Guatemala** observes that the "co-complainants" consistently refer to the challenged measures as "plain packaging measures" and that the words "including", "complement" and "add to" appear to be limited to the reference to plain packaging measures.<sup>96</sup> Guatemala adds that nothing in the text of the panel requests appears to support the view that there "is uncertainty regarding the identity, number and content of the laws and regulations under challenge." Guatemala states that "[t]he fundamental problem with Australia's objections seems to be requesting the Panel to make a determination in the abstract", and that the circumstances in *India*

<sup>88</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 18-19 (referring to Panel Report, *EC – Chicken Cuts*, paras. 7.28-7.29).

<sup>89</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 20.

<sup>90</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 21.

<sup>91</sup> The Dominican Republic's further comments on Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 22.

<sup>92</sup> Argentina's third-party comments on Australia's requests for preliminary rulings, paras. 9-15.

<sup>93</sup> Argentina's third-party comments on Australia's requests for preliminary rulings, para. 22.

<sup>94</sup> Argentina's third-party comments on Australia's requests for preliminary rulings, para. 24.

<sup>95</sup> The European Union's third-party comments on Australia's requests for preliminary rulings, para. 33.

<sup>96</sup> Guatemala's third-party comments on Australia's requests for preliminary rulings, para. 2.8.

– *Agricultural Products* could be "extrapolated" to the circumstances in the present cases. Finally, Guatemala states that Australia cannot obtain an order from the Panel which effectively modifies the panel request by striking out parts of its language, as the panel request is not subject to amendments, once a panel is established.<sup>97</sup>

4.4. **Honduras** argues that there is no basis in the text of the Dominican Republic's panel request for Australia to claim that it is unclear which, if any, of Australia's current or future tobacco control measures Australia is required to defend in addition to the plain packaging measure. Honduras adds that the additional measures listed in Australia's request would clearly not be "plain packaging measures" and would not be considered measures that are "related" to three specific legal instruments, all of which regulate the packaging of tobacco products.<sup>98</sup>

4.5. Honduras argues that Australia's objection to the use of the term "including" lacks merit because the narrative description of the measure, together with the identification of three specific legal instruments and the residual sub-category of "related" measures, identify the measures at issue as plain packaging measures with sufficient precision. For Honduras, the listing of particular examples within that residual sub-category of "related" measures (through the use of the term "including") logically cannot create an impermissible open-ended list of measures.<sup>99</sup> In addition, Honduras argues that Australia's objection to the use of the terms "complement" and "add to" also lacks merit as the terms "complement" or "add to" "textually must refer to those measures that are related to the plain packaging measures".<sup>100</sup>

4.6. Honduras adds that residual clauses of the kind used by the Dominican Republic are "an important tool by which complainants preserve their right to maintain within a panel's terms of reference future measures that do not alter the essence of the existing measures".<sup>101</sup>

4.7. Honduras also believes that Australia's request is premature and that it is therefore not necessary for the Panel to address Australia's concerns at this point in time. Specifically, there is no evidence that the complainant may be planning to challenge a measure that does not fall "within the four corners" of its panel request, and as such Honduras submits that the current circumstances are the same as those in *India – Agricultural Products*. It would therefore be more prudent for the Panel to revisit this issue if the complainants do attempt to include measures within the Panel's terms of reference that are not "related", "complement" or "add to" the plain packaging measures.<sup>102</sup>

4.8. **Indonesia** argues that the panel request of the Dominican Republic, when read in context, clearly allows the Panel to address only plain packaging measures that are not specifically listed in the panel requests.<sup>103</sup> Specifically, the words "including," "complement," and "add to" are clearly limited so as to refer only to plain packaging measures, and are further qualified by the term "related measures" and the description of their function as measures that "establish comprehensive requirement[s] regarding the appearance and form of the retail packaging of tobacco products".<sup>104</sup> Indonesia adds that the attendant circumstances in this case confirm the intended scope of this dispute. Indonesia refers to its statement, and those of the "co-complainants", at the DSB, the Council for TRIPS, and the TBT Committee, in which they focused on Australia's plain packaging requirements and no other facet of Australia's tobacco control regime.<sup>105</sup>

4.9. Indonesia submits that the challenged language does not prejudice Australia's interests, and that Australia's objection would be more appropriately raised in response to the identification by the parties of a specific measure it believes would fall within the scope of the challenged language.<sup>106</sup> Indonesia likens this case to the circumstances in *India – Agricultural Products*, such

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<sup>97</sup> Guatemala's third-party comments on Australia's requests for preliminary rulings, paras. 2.1-2.13.

<sup>98</sup> Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 5-13.

<sup>99</sup> Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 14-17.

<sup>100</sup> Honduras' third-party comments on Australia's requests for preliminary rulings, para. 19.

<sup>101</sup> Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 20-21.

<sup>102</sup> Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 22-24.

<sup>103</sup> Indonesia's third-party comments on Australia's requests for preliminary rulings, para. 7.

<sup>104</sup> Indonesia's third-party comments on Australia's requests for preliminary rulings, para. 10.

<sup>105</sup> Indonesia's third-party comments on Australia's requests for preliminary rulings, paras. 11-14.

<sup>106</sup> Indonesia's third-party comments on Australia's requests for preliminary rulings, para. 15.

that until written briefing in this case has commenced, it is "premature and indeed unnecessary" for the Panel to opine on Australia's request.<sup>107</sup>

4.10. Indonesia also argues that this language is necessary to protect the parties' rights should Australia adopt measures closely connected to the plain packaging measures listed in the panel requests or change the legal nature of the existing plain packaging measures (e.g., by withdrawing and reissuing measures in a slightly different form) during the course of the Panel proceeding.<sup>108</sup>

4.11. In **Mexico's** view, Australia's objection concerning the words "including", "complement" and "add to" may be resolved at a later stage in the proceedings. Mexico believes that the same approach could be taken in the present case as was taken by the Panel in *India – Agricultural Products*, which determined that it was premature and unnecessary to make a determination in the abstract at a preliminary stage as to which measures fall within the Panel's terms of reference. Mexico adds that the Panel could rule as the case progresses and on the basis of the terms of reference which specific measures are included in the terms of reference.<sup>109</sup>

## 5 ANALYSIS BY THE PANEL

5.1. The question before us is whether the Dominican Republic's panel request is consistent with the requirement under Article 6.2 of the DSU to identify the "specific measures at issue". In particular, Australia challenges the use of the words "including", and "complement or add to" in the Dominican Republic's panel request:

Any related measures adopted by Australia, *including* measures that implement, *complement or add to* these laws and regulations, as well as any measures that amend or replace these laws and regulations.

5.2. Australia submits that "the use of the term 'including', which defines the 'related measures' in a non-exhaustive way", and "the attempt to include unspecified measures that 'complement or add to' those explicitly named in the panel request" indicate that the Dominican Republic's panel request does not specify the measures at issue.<sup>110</sup>

5.3. The Dominican Republic, for its part, submits that "its Panel Request is fully consistent with the requirements of Article 6.2 of the DSU". In particular, the Dominican Republic argues that "considered as a whole and in light of the attendant circumstances, the Panel Request identifies the measures at issue with ample precision" because, *inter alia*, "prior Appellate Body and panel decisions confirm that use of the terms to which Australia objects is proper", and because "the inclusion of the challenged terms is important to protect the Dominican Republic's interests in this dispute and has not prejudiced Australia's ability to begin to prepare its [defence]".<sup>111</sup>

5.4. The Panel will therefore begin its analysis by considering the requirements of Article 6.2 in respect of the identification of the measures at issue.

### 5.1 The requirement to "identify the specific measures at issue"

5.5. Article 6.2 of the DSU provides as follows:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5.6. As described by the Appellate Body, Article 6.2 contains two distinct requirements, namely (1) the identification of the specific measures at issue and (2) the provision of a brief summary of

<sup>107</sup> Indonesia's third-party comments on Australia's requests for preliminary rulings, paras. 15-19.

<sup>108</sup> Indonesia's third-party comments on Australia's requests for preliminary rulings, paras. 20-23.

<sup>109</sup> Mexico's third-party comments on Australia's requests for preliminary rulings, paras. 27-28.

<sup>110</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 8.

<sup>111</sup> The Dominican Republic's response to Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 4.



the legal basis of the complaint (or the claims).<sup>112</sup> Together, these elements 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>113</sup>

5.7. Article 6.2 serves the function of establishing and delimiting the panel's jurisdiction.<sup>114</sup> It serves a "pivotal function" in WTO dispute settlement<sup>115</sup> in that, to the extent that a panel request fails to identify "the specific measures at issue" and/or "to provide a brief summary of the legal basis of the complaint", such measures and/or claims do not fall within a panel's terms of reference and that panel would not have jurisdiction to make findings in respect of them.<sup>116</sup>

5.8. In addition, by establishing and defining the jurisdiction of the panel, the panel request fulfils the due process objective of providing the respondent and third parties notice regarding the nature of the complainant's case<sup>117</sup> to enable them to respond accordingly.<sup>118</sup>

5.9. The Appellate Body recently summarized the manner in which a panel must determine whether a panel request fulfils the requirements of Article 6.2. Specifically, the Appellate Body stated that:

[A] panel must determine compliance with Article 6.2 "'on the face' of the panel request"<sup>119</sup> as it existed at the time of filing. Thus, parties' submissions and statements during the panel proceedings cannot "cure" any defects in the panel request.<sup>120</sup> Nevertheless, these subsequent submissions and statements may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>121</sup> In any event, the determination of the conformity with Article 6.2 should be done on a case-by-case basis, considering the particular context in which the measures exist and operate.<sup>122</sup> This determination must be done on an objective basis, such that any circumstances taken into account may not contemplate those that are relevant only to a party to the panel proceedings.<sup>123</sup>

5.10. The requirement to identify the specific measures at issue serves to define the "object of the challenge", or, more precisely, "the measure that is alleged to be causing the violation of an obligation contained in a covered agreement".<sup>124</sup> The Appellate Body has observed that "the clear identification of the specific measures at the outset is central to define the scope of the dispute to

<sup>112</sup> Appellate Body Reports, *China – Raw Materials*, para. 219; and *EC and certain member States – Large Civil Aircraft*, para. 639.

<sup>113</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72 and 73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416).

<sup>114</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6 (citing Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186; *US – Continued Zeroing*, para. 161; and *EC and certain member States – Large Civil Aircraft*, para. 640).

<sup>115</sup> Appellate Body Reports, *China – Raw Materials*, para. 219.

<sup>116</sup> See, for example, Appellate Body Report, *US – Continued Zeroing*, para. 161 ("[A]s a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel".)

<sup>117</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (citing Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640).

<sup>118</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (citing Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186; *Chile – Price Band System*, para. 164; and *US – Continued Zeroing*, para. 161).

<sup>119</sup> (footnote original) Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>120</sup> (footnote original) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127).

<sup>121</sup> (footnote original) See e.g. Appellate Body Report, *US – Carbon Steel*, para. 127.

<sup>122</sup> (footnote original) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

<sup>123</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>124</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.12 (citing Appellate Body Report, *EC – Selected Customs Matters*, para. 130).

be addressed by a panel".<sup>125</sup> It also serves to ensure that the respondent is in a position to defend itself:

The word "specific" in Article 6.2 establishes a specificity requirement regarding the identification of the measures that serves the due process objective of notifying the parties and the third parties of the measure(s) that constitute the object of the complaint.<sup>126</sup>

5.11. Whether or not a panel request satisfies this requirement must be assessed "on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".<sup>127</sup> The Panel must therefore "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".<sup>128</sup> In addition, "whether a panel request identifies the 'specific measures at issue' may depend on the particular context in which those measures operate and may require examining the extent to which they are capable of being precisely identified".<sup>129</sup>

5.12. In light of the nature of Australia's request, we will consider how this requirement applies in relation to panel requests that define the measures at issue in part without naming them (that is, in a manner other than by specifically enumerating the measures at issue, such as, for example, by referring to "related" measures, "implementing" measures, or "amending" measures). We note that such references are not uncommon in panel requests, and have been challenged in previous disputes.

5.13. For example, the panel request in *EC – Bananas III* referred to EC Regulation 404/93 and "subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which *implement, supplement and amend* that regime".<sup>130</sup> The panel considered that the "banana regime" challenged by the complainants was "adequately identified", even if the "subsequent EC legislation, regulations and administrative measures that further refine and implement the basic regulation" were not identified. The Appellate Body agreed that the request contained "sufficient identification of the specific measures at issue to satisfy the requirements of Article 6.2 of the DSU".<sup>131</sup> We understand this to indicate that general references to unnamed measures, such as, in that case, measures that "implement, supplement and amend" a primary measure explicitly identified in the panel request, may be capable of satisfying the specificity requirement in Article 6.2 of the DSU.

5.14. We also note that in some cases, by contrast, similar general references have been found insufficient to meet the specificity requirement in Article 6.2. Thus, in *EC – Selected Customs Matters*, the Appellate Body found that the phrase "implementing measures and other related measures" was "vague and does not allow the identification of the specific instruments that the reference aims to cover", such that it did not "identify the specific measures at issue", as required by Article 6.2 of the DSU.<sup>132</sup> In *China – Raw Materials*, the panel similarly held that the term "related measures" was too broad and did not allow China to know clearly what specific measures were being challenged.<sup>133</sup> As observed by the panel in *India – Agricultural Products*, the broad scope of the enumerated measures in these two disputes appears to have contributed to the

<sup>125</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 155.

<sup>126</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 152.

<sup>127</sup> Appellate Body Report, *US – Carbon Steel*, para. 127. See also Appellate Body Report, *Korea – Dairy*, paras. 124-127; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, sub-para. 14.

<sup>128</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 562 (citing Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

<sup>129</sup> Appellate Body Reports, *China – Raw Materials*, para. 220 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641).

<sup>130</sup> WT/DS27/6 (emphasis added).

<sup>131</sup> Panel Report, *EC – Bananas III*, para. 7.27; Appellate Body Report, *EC – Bananas III*, para. 140.

<sup>132</sup> In that dispute, the United States had challenged the EC's Community Customs Code, the regulation implementing the Customs Code, the regulation on the tariff and statistical nomenclature and on the Common Customs Tariff, and the Integrated Tariff of the European Communities, as well as "implementing measures and other related measures". Appellate Body Report, *EC – Selected Customs Matters*, paras. 2 and 152, footnote 369.

<sup>133</sup> Panel Reports, *China – Raw Materials*, Annex F-1, para. 17.

conclusion that the terms at issue were insufficiently precise, in the context of those disputes, to meet the specificity requirement of Article 6.2 of the DSU.<sup>134</sup>

5.15. Overall, these rulings suggest to us that a reference to unnamed measures such as those discussed above is not *per se* inconsistent with the specificity requirement in Article 6.2. In particular, as noted by Australia, such an approach may allow the complainant to preserve its due process rights<sup>135</sup> and thereby assist in ensuring that a positive solution to the dispute can be secured.<sup>136</sup> Such language may in particular serve to protect the interests of the complainant in respect of relevant measures not yet in existence at the time of filing the panel request.<sup>137</sup> However, whether such a reference meets the specificity requirements of Article 6.2 will depend importantly on the circumstances of the case. Just as with any assessment under this element of Article 6.2, a finding of whether such language is consistent with the specificity requirement under this provision must be based, as described above, on a consideration of the panel request as a whole and of any attendant circumstances, on a case-by-case basis.<sup>138</sup>

5.16. In this respect, we note the following observations of the panel in *Japan – Film*:

To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified measure. In our view, the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.<sup>139</sup>

5.17. That panel also stressed that the two elements – close relationship and notice – are inter-related, so that "only if a 'measure' not explicitly identified is subsidiary or closely related to an identified 'measure' will notice be adequate".<sup>140</sup>

5.18. Like that panel, we are mindful of the role of the panel request in fulfilling due process objectives, for both parties. Due process is a fundamental principle of WTO dispute settlement,<sup>141</sup>

<sup>134</sup> Preliminary Ruling, *India—Agricultural Products*, paras. 3.45-3.47.

<sup>135</sup> Australia's comments on responses to Australia's requests for preliminary rulings, para. 28.

<sup>136</sup> In this regard we note the determination of the panel in *EC – Chicken Cuts* that two subsequent measures cited by the complainants in the course of the proceedings did not fall within its terms of reference, based on its determination that Brazil's and Thailand's respective panel requests were "much more narrowly drafted" than the "broadly worded" panel requests at issue in previous cases where panels had found measures not identified specifically in the panel requests to be nevertheless within their terms of reference. (see Panel Reports, *EC – Chicken Cuts (Brazil)*, paras. 7.20-7.32 and *EC – Chicken Cuts (Thailand)*, paras. 7.20-7.32). On appeal, the Appellate Body was not persuaded that the subsequent measures in question could be considered as amendments to the two original measures as argued or that the two sets of measures were, in essence, the same. It also noted that the objective of securing a positive and effective resolution of a dispute "cannot be pursued at the expense of complying with the specific requirements and obligations of Article 6.2" (Appellate Body Report, *EC – Chicken Cuts*, paras. 157-158 and 161).

<sup>137</sup> See for example Appellate Body Report, *Chile – Price Band System*, paras. 137 and 138.

<sup>138</sup> Appellate Body Report, *US – Carbon Steel*, para. 127. See also Appellate Body Report, *Korea – Dairy*, paras. 124-127; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, sub-para. 14.

<sup>139</sup> Panel Report, *Japan – Film*, para. 10.8. We note that this test has been referred to by subsequent panels in assessing whether certain measures not expressly identified in the panel request nonetheless fell within the scope of their terms of reference. For instance, the panel in *US – Carbon Steel* referred to the *Japan – Film* panel and concluded that a measure not identified in the panel request was not a measure that was subsidiary, or so closely related to, any of the measures specifically identified that the responding party could reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party (see Panel Report, *US – Carbon Steel*, para. 8.11). The panel in *Australia – Salmon (Article 21.5 – Canada)* also considered whether measures not expressly named in the panel request were "so closely related" to the measures named in the panel request that the respondent "can reasonably be found to have received adequate notice" of the scope of the complainant's claims (see Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 27).

<sup>140</sup> Panel Report, *Japan – Film*, para. 10.8.

<sup>141</sup> The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Appellate Body Reports, *Canada – Continued Suspension / US – Continued Suspension*, para. 433; and *Thailand – H-Beams*, para. 88, respectively. See also Appellate Body Report, *Chile – Price Band System*, para. 176).

which informs various provisions of the DSU.<sup>142</sup> As we understand it, the requirements of due process imply, in this context, both that the complainant is able to define the scope of its complaint so as to secure a positive solution to the dispute<sup>143</sup> and that the panel request identifies the measure(s) at issue with such specificity that all parties and third parties receive adequate notice regarding the nature of the complainant's case.<sup>144</sup>

5.19. We further note that these requirements of due process continue to manifest themselves in the course of panel proceedings. We note, in this respect, the observations of the Appellate Body in *Chile – Price Band System*:

[G]enerally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target". If the terms of reference in a dispute are broad enough to include amendments to a measure ... *and if it is necessary to consider an amendment in order to secure a positive solution to the dispute* ... then it is appropriate to consider the measure as amended in coming to a decision in a dispute.<sup>145</sup> (emphasis added)

5.20. In determining whether a specific amendment identified in the course of the panel proceedings could be considered to be properly before the panel in that case, the Appellate Body considered not only the terms of the panel request, which included a general reference *inter alia* to "complementary provisions and/or amendments", but also the fact that the amendment in question did not change the "essence" of the original measure at issue.<sup>146</sup> We note that the panel in *China – Raw materials* considered that the same approach applied in respect of "replacement measures".<sup>147</sup>

5.21. Thus, even where the language of a panel request is, on its face, broad enough to encompass certain additional instruments not identified by name in the request, this would not provide a basis for the complainant to expand the scope of the dispute or modify its essence through the invocation of such instruments in the course of the panel proceedings. This is consistent, in our view, with the fact that it is the panel request that determines the scope of the dispute before the Panel, and with the due process objectives served by the panel request in this respect.

5.22. Bearing in mind these elements, we now turn to the Dominican Republic's panel request to determine whether it sufficiently identifies the "specific measures at issue" consistently with Article 6.2 of the DSU.

<sup>142</sup> See Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107. See also Appellate Body Reports, *India – Patents (US)*, para. 94; and *Chile – Price Band System*, para. 176.

<sup>143</sup> As the Appellate Body has said, "due process may ... require a panel to take appropriate account of the need to safeguard ... an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close" (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150).

<sup>144</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (citing Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640).

<sup>145</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>146</sup> See Appellate Body Report, *Chile – Price Band System*, paras. 139-144. In that case, the panel request identified a primary law and existing amendments, "as well as the regulations and complementary provisions and/or amendments". In the course of the proceedings, an amendment was discussed, that added a paragraph to the primary law, and set out the maximum *ad valorem* tariff that could be applied (which was in any case evident from Chile's tariff bindings). The Appellate Body considered that the measure was not, in essence, different as a result of the amendment (see Appellate Body Report, *Chile – Price Band System*, paras. 137 to 139).

<sup>147</sup> The panel in *China – Raw Materials* considered that this approach should also apply to "replacement measures that are of the same essence as original measures specifically identified in the [p]anel [r]equest", because the Appellate Body's "rationale for including amendments of the same essence applies equally to replacement measures so that replacement measures of the same essence should also be assessed by a panel in order to secure a positive solution to a dispute". Panel Reports, *China – Raw Materials*, para. 7.16. Similarly, the panel in *China – Publications and Audiovisual Products* analysed whether China could be considered to have received adequate notice of a particular measure, based on the language of the panel request as a whole, notwithstanding the fact that it included a general reference to "amendments, related measures, or implementing measures" (Panel Report, *China – Publications and Audiovisual Products*, para. 7.60 footnote 105).

## 5.2 Whether the Dominican Republic's panel request identifies the specific measures at issue

5.23. As described above, Australia challenges some of the terms used by the Dominican Republic in its panel request to identify the measures at issue in its complaint.

5.24. In order to determine whether these terms meet the requirements of Article 6.2, we must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used"<sup>148</sup>. We therefore start our analysis with a consideration of the terms of the Dominican Republic's panel request.

5.25. Section A of the Dominican Republic's panel request is entitled "Measures at issue". That section provides as follows:

The measures at issue, which the Dominican Republic collectively refers to as the "plain packaging measures", are the following:

- Tobacco Plain Packaging Act 2011, Act No. 148 of 2011, "An Act to discourage the use of tobacco products, and for related purposes";
- Tobacco Plain Packaging Regulations 2011 (Select Legislative Instrument 2011, No. 263), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Select Legislative Instrument 2012, No. 29);
- Trade Marks Amendment (Tobacco Plain Packaging) Act 2011, Act No. 149 of 2011, "An Act to amend the Trade Marks Act 1995, and for related purposes"; and
- Any related measures adopted by Australia, including measures that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations.<sup>149</sup>

5.26. The panel request then states "[t]hese plain packaging measures apply to the retail sale of cigarettes, cigars, and other tobacco products. The plain packaging measures establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves".<sup>150</sup> The panel request then proceeds to elaborate on the manner in which the cited measures regulate the enumerated products.<sup>151</sup>

5.27. Australia's challenge focuses on the fourth "dot point" of the Dominican Republic's enumeration of the measures at issue. Specifically, Australia challenges the use of the terms "including", and "complement or add to" in that context, on the basis that they are "indeterminate"<sup>152</sup> and may potentially cover a broad range of measures relating to tobacco control, such as public education campaigns or the listing of nicotine replacement therapies. Australia explains that "the uncertainty regarding the scope of the related measures arises because of the particular context in which Australia's tobacco plain packaging measure exists and operates, namely as part of a comprehensive range of complementary tobacco control measures".<sup>153</sup>

5.28. We first observe that each of the terms challenged by Australia is used to describe instances of "related" measures. The term "related measures" itself is to be read against the context of the enumeration that precedes it in the first three "dot points" under which the measures at issue are listed. In order to properly understand the terms at issue as part of the panel request "as a whole", we must therefore consider them as they are used in this particular context.

<sup>148</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 562.

<sup>149</sup> The Dominican Republic's request for the establishment of a panel, pp. 1-2.

<sup>150</sup> The Dominican Republic's request for the establishment of a panel, p. 2.

<sup>151</sup> The Dominican Republic's request for the establishment of a panel, p. 2.

<sup>152</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 27.

<sup>153</sup> Australia's comments on responses to Australia's requests for preliminary rulings, para. 29.

5.29. As described above, the Dominican Republic's panel request identifies the measures at issue collectively as the "plain packaging measures". It then elaborates on this category of measures in three separate ways. First, it enumerates three specific acts and regulations (namely, the *Tobacco Plain Packaging Act 2011*, the *Tobacco Plain Packaging Regulations 2011*, and the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*). These may be described as the "primary" measures identified in this dispute. Second, immediately following this enumeration, it provides that the plain packaging measures are also "[a]ny related measures (...) including measures that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations". Finally, the panel request provides a narrative that further defines the "plain packaging measures" as measures that "establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves".

5.30. A plain reading of this language on its face suggests that the term "related" measures, as used here, necessarily refers to the three primary measures enumerated above, i.e. the three listed measures specifically addressing "tobacco plain packaging". Only measures related to these three specifically listed instruments could therefore fall within the scope of the term "related" measures. The final narrative element of the definition of "plain packaging measures" further clarifies that the measures at issue are defined *only* as measures that regulate "the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves". We consider that this narrative element further clarifies and delimits the scope of measures within the Panel's terms of reference, insofar as measures falling within the scope of the three primary measures, or of "related measures, including measures ... that ... complement or add to" the primary measures, would also need to regulate the appearance and form of the "retail packaging of tobacco products, as well as of the tobacco products themselves" in order to fall within our terms of reference.

5.31. In view of these limitations on the scope of measures covered, we do not consider that the language of the panel request in relation to "related measures", and in particular with respect to related measures that "add to" or "complement" the primary listed measures, is as open as Australia has suggested. Australia has argued that the Dominican Republic, through the language of its panel request, "attempts to include a non-exhaustive and therefore indeterminate list" of "related measures" within the Panel's terms of reference.<sup>154</sup> Specifically, Australia has identified a range of "tobacco control" measures that it argues could fall within the scope of the language of the Dominican Republic's panel request, including (for example) public education campaigns, the listing of nicotine replacement therapies and other smoking cessation supports on Australia's Pharmaceutical Benefits Scheme, or Quitlines and other smoking cessation support services.<sup>155</sup> In the light of our understanding of the terms of the panel request, and the parameters created by the language therein, it is not apparent to us how such measures could fall within the scope of the panel request and thus within our terms of reference. Specifically, we are not persuaded that such indeterminacy exists when the terms "including" and "complement or add to" are read in the context of the remainder of the panel request. We are therefore of the view that the terms "including" and "complement or add to" do not unduly broaden the scope of the dispute in the manner that Australia argues.

5.32. Recalling our discussion in Section 5.1 above, we further observe that the language used by the Dominican Republic is similar to that used by the complainants in *EC – Bananas III*. We recall that the panel request in that case referred to a specific EC Regulation and "subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which *implement, supplement and amend* that regime".<sup>156</sup> Notwithstanding such similarities, we are mindful of the requirement that we must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".<sup>157</sup> With this in mind, we note the broader context in which these words appeared in the complainants' panel request in *EC – Bananas III*. In particular, we observe that the panel request in that dispute explicitly identified an impugned measure and then identified, by way of a narrative description,

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<sup>154</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 9.

<sup>155</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 17.

<sup>156</sup> WT/DS27/6. (emphasis added)

<sup>157</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 562.

related unnamed measures that the complainants also sought to challenge (that is, "subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime").<sup>158</sup>

5.33. As discussed, the Dominican Republic has defined the measures at issue as the "plain packaging measures", which it defines with explicit reference to three measures (the *Tobacco Plain Packaging Act 2011*, the *Tobacco Plain Packaging Regulations 2011*, and the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*). Moreover, the Dominican Republic has further identified the measures at issue by reference to their application ("[t]hese plain packaging measures apply to the retail sale of cigarettes, cigars, and other tobacco products") and their effect ("[t]he plain packaging measures establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves").<sup>159</sup> We consider that this approach is also similar to that taken by the complainants in *EC – Bananas III*. In particular, we consider that the scope of the primary measures is well delineated, such that the qualifying role played by the terms "complement" and "add to" is similar to that of the term "supplement" in the context of *EC – Bananas III*. Bearing this similarity in mind, as well as the similarity between the words "implement, supplement and amend" and "complement or add to" themselves, we do not consider that there is any material difference between the language used by the Dominican Republic in its panel request, and that endorsed by the panel and Appellate Body in *EC – Bananas III*.<sup>160</sup> This confirms us in our view that this language is sufficiently specific to satisfy Article 6.2 of the DSU.

5.34. We note Australia's argument that the circumstances in this dispute are analogous to those in *China – Raw Materials*, in which the complainants referred in their panel requests to a series of measures, preceded by the phrase "among others".<sup>161</sup> In its preliminary ruling, the panel in that case found that the complainants could not include additional measures other than those enumerated in the panel requests, because "[s]uch an 'open ended' list would not contribute to the 'security and predictability' of the WTO dispute settlement system as required by Article 3.2 of the DSU".<sup>162</sup> Australia submits that the language used by the Dominican Republic is similarly open-ended and "does not provide Australia with notice of the measures under challenge and creates considerable uncertainty as to the identity, number and content of the measures at issue".<sup>163</sup>

5.35. As discussed above, the language in the Dominican Republic's panel request establishes parameters that circumscribe the measures at issue through reference to (i) the narrative description of "plain packaging measures", (ii) the three primary measures, and (iii) the reference to measures "related to" such measures, which includes measures that "complement" and "add to" those measures, which do not change the essence of the dispute, and of which Australia has notice. In contrast, the panel request in *China – Raw Materials* did not contain such parameters. We are not persuaded that the Dominican Republic's panel request, and the parameters therein, give rise to a similarly "open-ended" list. In particular, as discussed above, we do not consider that these terms, read in context, imply that the broad range of "general tobacco control measures" not directly related to tobacco plain packaging that are the basis for Australia's concern would be covered.

5.36. In light of the above, we consider that the terms "including", "complement" and "add to", as used in the Dominican Republic's panel request, are not, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue.

5.37. In making this determination, we make no assessment, at this stage of our proceedings, as to whether any particular measure that may be invoked by the Dominican Republic in the course of these proceedings as "related" to the plain packaging measures as described above, including

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<sup>158</sup> WT/DS27/6.

<sup>159</sup> The Dominican Republic's request for the establishment of a panel, p. 2.

<sup>160</sup> Panel Report, *EC – Bananas III*, para. 7.27; Appellate Body Report, *EC – Bananas III*, para. 140. We also note the comparable language in *Chile – Price Band System* to "complementary provisions and/or amendments" (See Appellate Body Report, *Chile – Price Band System*, para. 135).

<sup>161</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, paras. 10-11.

<sup>162</sup> Panel Reports, *China – Raw Materials*, Annex F-1, para. 12.

<sup>163</sup> Australia's request for a preliminary ruling in relation to the Dominican Republic's panel request, para. 10.

measures that may "add to or complement" the listed measures, is or is not within our terms of reference.

5.38. We are mindful in this regard that "a clear identification of the specific measures at the outset is central to define the scope of the dispute to be addressed by a panel".<sup>164</sup> We also recall the important due process role played by the panel request in this respect, as discussed in paragraphs 5.18. to 5.21. above. We note the observation of the panel in *EC – IT Products* that it did not consider "that the mere incantation of the phrase 'any amendments, or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the panel request".<sup>165</sup> Similarly, in the present proceedings, these terms would not provide a legitimate basis for seeking to expand or modify the scope of the dispute in the course of the proceedings. In addition, we would expect any invocation in the course of the proceedings of a measure not identified by name in the panel request to take place in a timely manner.

5.39. Finally, we take note of the Dominican Republic's confirmation that it has consistently represented its concerns as being focused solely on Australia's plain packaging requirements applicable to retail packaging of tobacco products or to the tobacco products themselves.<sup>166</sup>

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

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<sup>164</sup> See para. 5.10. above.

<sup>165</sup> Panel Report, *EC – IT Products*, para. 7.140.

<sup>166</sup> The Dominican Republic's response to Australia's request for a preliminary ruling, para. 45.