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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 Indonesia's request for the establishment of a Panel (WT/DS467/15) 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

1 PROCEDURAL BACKGROUND

1.1. On 7 May 2014, Australia submitted to the Panel a request for a preliminary ruling concerning the consistency of Indonesia'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 Indonesia in relation to this preliminary ruling request.

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

1.4. On 1 July 2014, the Panel received comments from Australia on Indonesia's response to Australia's request for a preliminary ruling. Indonesia did not submit further 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 Indonesia'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.[1]

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

3 MAIN ARGUMENTS OF THE PARTIES

3.1 Australia

3.1. Australia requests the Panel to exclude from the Panel's terms of reference the non-exhaustive list of related measures and measures that "complement or add to" the measures

[1] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 1.

explicitly identified in Indonesia's panel request 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 particular, Australia submits that Indonesia's panel request should instead read:

> 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.[2]

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 Indonesia's panel request have prejudiced, and continue to prejudice, the preparation of Australia's defence, thereby violating its "fundamental right to due process in these proceedings".[3]

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 serves an important due process objective.[4] 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".[5] Australia argues that a complaining party must therefore establish the identity of the precise measures at issue.[6] Australia 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.[7]

3.4. Australia argues that Indonesia's panel request does not identify the specific measures at issue in two key ways. Specifically, Australia challenges: (i) the use of the term "including", which defines the "related measures" in a non-exhaustive way; and (ii) the attempt to include unspecified measures that "complement or add to" those explicitly named in the panel request ("complementary or additional measures").[8]

3.5. In relation to the use of the word "including", Australia argues that Indonesia "attempts to include a non-exhaustive and therefore indeterminate list" of "related measures" within the Panel's terms of reference. As a result, Indonesia 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.[9] 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". 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".[10] Australia notes that, in that dispute, only those measures that were explicitly identified by the complainants fell within the panel's terms of reference.[11] Australia submits that the issue before that panel is analogous to the one presented in Indonesia's panel request. In particular, apart from the categories of "related measures" actually listed, Indonesia 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

[2] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 1.
[3] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 2.
[4] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 4 (citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).
[5] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 5 (citing *Shorter Oxford English Dictionary*, (6th ed., 2007), p. 2944).
[6] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 5 (citing Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).
[7] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 5 (citing Panel Report, *China – Publications and Audiovisual Products*, para. 7.20).
[8] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 8.
[9] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 9.
[10] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 10 (citing Panel Reports, *China – Raw Materials*, Annex F-1, 'First Phase of Preliminary Ruling', para. 12, p. F-6).
[11] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 10 (citing Panel Reports, *China – Raw Materials*, Annex F-1, 'First Phase of Preliminary Ruling', para. 13, p. F-6).

challenge, which creates "considerable uncertainty" as to the identity, number and content of the measures at issue.[12]

3.6. In relation to "complementary or additional measures", Australia submits that Indonesia'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".[13] Australia submits that Indonesia's panel request impermissibly shifts the burden of attempting to identify the complementary or additional measures at issue to Australia.[14]

3.7. 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.[15] Australia submits that in the specific context of tobacco regulation, Indonesia'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.[16]

3.8. 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".[17] It considers that in this context, the references in the panel request of Indonesia 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.[18]

3.9. Australia notes that, "in speculating about the possible complementary or additional measures that Indonesia 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 this treaty currently has 178 parties and was developed "in response to the globalisation of the tobacco epidemic". 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.[19] 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.[20]

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[12] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 10 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).

[13] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 12.

[14] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 12 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10).

[15] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 13 (citing Appellate Body Reports, *China – Raw Materials*, para. 220).

[16] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 14.

[17] Australia's comments on responses to Australia's requests for preliminary rulings, para. 29.

[18] Australia's comments on responses to Australia's requests for preliminary rulings, para. 30.

[19] Australia's request for a preliminary ruling in relation to Indonesia'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).

[20] Australia's request for a preliminary ruling in relation to Indonesia'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).

3.10. Australia notes that if "general tobacco control measures" are "indeed the types of complementary or additional measures Indonesia 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's identifies a large number of measures included in its "comprehensive range of tobacco control measures".[21] It adds that this is a non-exhaustive 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 Indonesia intends to challenge every current or future tobacco control measure implemented in Australia" and that, in these circumstances, Indonesia is obliged to identify the specific measures at issue so that Australia is informed of the case it has to answer.[22]

3.11. Australia adds that if Indonesia'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.[23]

3.12. In sum, Australia considers that Indonesia 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.[24] Observing that "where a panel request fails to identify adequately particular measures or fails to specify a particular claim, then such measures or claims will not form part of the matter covered by the panel's terms of reference"[25], 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 set out in paragraph 3.1 above.

3.13. 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 Indonesia's panel request have in fact prejudiced Australia's ability to defend itself in this dispute.[26] 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'".[27] In light of this, Australia argues that a panel request should be examined very

[21] Australia specifically identifies "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 smuggling offences".

[22] Australia's request for a preliminary ruling in relation to Indonesia's panel request, paras. 17-18.

[23] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 19.

[24] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 20.

[25] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 22 (quoting Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120).

[26] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 23.

[27] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 24 (citing Appellate Body Report, *Thailand – H-Beams*, para. 88).

carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.[28] 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.[29]

3.14. Australia also notes that defects in a panel request cannot be cured by subsequent submissions of the parties during the panel proceedings[30], 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.[31] Australia therefore submits that Indonesia cannot overcome the deficiencies in its panel request by clarifying the legal basis of this claim in its first written submission.

3.2 Indonesia

3.15. Indonesia requests the Panel to reject Australia's request because (i) Indonesia has met the requirements of Article 6.2 of the DSU as there is no ambiguity in its panel request regarding the measures at issue; (ii) Australia's objection is premature and without merit; and (iii) "while Indonesia could suffer prejudice as a result of Australia's proposed terms of reference, the reverse is not true".[32]

3.16. Turning first to the requirements of Article 6.2, Indonesia characterizes as mistaken Australia's assertion that the obligation to identify the specific measures at issue means that a panel request must establish the "precise, exact" or "definite" identity of the measures at issue. Referring to the Appellate Body, Indonesia stressed that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particular[ity] [ ]so as to indicate the nature of the measure and the gist of what is at issue".[33] Indonesia also notes that a panel request, though it allows the respondent to begin preparing its defence, does not amount to a requirement allowing the defendant to fully develop its defence on the sole basis of the complainant's request.[34]

3.17. Indonesia first submits that Australia's challenge lacks merit because there is no true ambiguity in its panel request. Indonesia observes that Australia's specific objection to Indonesia's panel request is that the words "including", "complement," and "add to" create a non-exhaustive list of measures that could conceivably include Australia's entire tobacco control regime. Indonesia argues that, when read in context, this provision allows the Panel to address only those plain packaging measures that are not specifically listed in the panel request.[35] Indonesia observes that these terms are qualified by the term "related measures," in direct reference to the three specific plain packaging measures listed in the immediately preceding bullet point in Indonesia's panel request. The terms are also qualified by the description of their function in the next paragraph of Indonesia's request, which describes the measures at issue as those that "establish comprehensive requirement[s] regarding the appearance and form of the retail packaging of tobacco products …". Indonesia submits that the plain language of the panel request indicates that "there can be no mistaking Indonesia's intent to challenge only measures that are directly related to Australia's tobacco plain packaging regime".[36]

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[28] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 24 (citing Appellate Body Reports, *EC – Bananas (III)*, para. 142 and *Korea – Dairy*, para. 130).

[29] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 25 (citing Appellate Body Report, *Thailand – H-Beams*, para. 95).

[30] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 28 (citing Appellate Body Report, *US – Carbon Steel*, para. 127).

[31] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 28 (citing Appellate Body Report, *US – Carbon Steel*, para. 127).

[32] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 1.

[33] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para 4 (citing Appellate Body Report, *US – Continued Zeroing*, paras. 168-169).

[34] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 5 (citing Preliminary Ruling, *India – Agricultural Products*, para. 3.3).

[35] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 6.

[36] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 8.

3.18. Indonesia refers to Australia's reliance on *China – Raw Materials*, in which case "there was actual ambiguity as to the complainant's intent". Indonesia submits that the circumstances of that case are "manifestly not the case in the present dispute". Indonesia argues that the terms of reference strike the proper balance between specificity and flexibility, and are neither vague nor "open-ended" in scope. Indonesia argues that "Australia feigns confusion in its Preliminary Ruling Request by 'speculating' that the panel request could be read as a challenge to a long list of tobacco control measures unrelated to Australia's plain packaging regime", but that this position is unpersuasive given that Indonesia refers to "measures relating to plain packaging" throughout its panel request.[37] Indonesia argues that it has, therefore, satisfied its obligation under Article 6.2 of the DSU to provide Australia with a specific indication of the measures at issue and a sufficiently clear presentation of the dispute.[38]

3.19. Indonesia argues that the Panel may find further confirmation of the intended scope of this dispute in the attendant circumstances. Indonesia notes that its statements at the DSB, the Council for TRIPS, and the TBT Committee, Indonesia and its "co-complainants" have consistently focused on Australia's plain packaging requirements and no other facet of Australia's tobacco control regime. Neither Indonesia nor Australia "have ever raised in these fora any of the 'multiple laws and regulations that may have been adopted at the federal, state or local level' that 'number in the hundreds,' of which Australia is now seemingly concerned".[39] Indonesia argues that it is not its intention to challenge every current or future tobacco control measure implemented in Australia, and that the measures at issue are limited to those measures relating to plain packaging requirements.[40]

3.20. Indonesia also argues that Australia's objections are premature and unnecessary. Given that Indonesia's panel request satisfies the requirements of Article 6.2, the challenged language in Indonesia's panel request does not prejudice Australia's interests. Indonesia is of the view that Australia's objection would be more appropriately raised in response to the identification by Indonesia of a specific measure it believes would fall within the scope of the challenged language. Indonesia argues that this approach is in line with the preliminary ruling of the panel in *India – Agricultural Products*, in which the panel noted that disputes regarding whether a related measure falls within a panel's terms of reference have typically arisen after the complainant sought to challenge a particular legal instrument not specifically referenced in the panel request.[41] That panel noted that no "related" measure had been raised in the dispute before it and, therefore, it was "premature and indeed unnecessary to make a determination in the abstract, at this preliminary stage, as to precisely which measures fell within the Panel's terms of reference by virtue of the inclusion of the terms "related measures, or implementing measures" in the panel request.[42] Indonesia submits that similar circumstances exist in the instant dispute. Indonesia observes that it is yet to make submissions to the Panel, and that Australia is speculating at this juncture about what possible measures Indonesia may raise. Indonesia submits that if Australia wishes to challenge a particular measure raised by Indonesia pursuant to the challenged language falling outside the terms of reference of the Panel, it will have every opportunity to do so. Indonesia submits that, [u]ntil written briefing in this case has commenced, as was the case in *India – Agricultural Products*, it is premature and indeed unnecessary for the Panel to opine on Australia's request.[43]

3.21. Indonesia argues that the challenged language is necessary to protect Indonesia's interests. Specifically, Indonesia stated that it is necessary to protect Indonesia's rights should Australia

[37] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, paras. 9-10.

[38] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 11.

[39] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 12 (citing Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 18.)

[40] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 12.

[41] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 14 (referring to Preliminary Ruling, *India – Agricultural Products*, para. 3.49).

[42] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 15 (citing Preliminary Ruling, *India – Agricultural Products*, para. 3.50).

[43] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 16.

adopt measures that are closely connected to the plain packaging measures listed in Indonesia's panel request, 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. Indonesia adds that this precise circumstance arose in *EC – Chicken Cuts*, whereby Brazil was unable to challenge new regulations because its panel request did not allow for sufficient flexibility to include additional measures other than those specifically listed in its request.[44]

3.22. Indonesia argues, on the basis of prior jurisprudence[45], that because measures that come into existence during the course of the Panel's proceeding may be challenged *only if* the panel request is sufficiently broad to allow for it, Indonesia's procedural rights could be impaired if the challenged language is struck from its panel request.[46]

3.23. For these reasons, Indonesia submits that the Panel should reject Australia's request for a preliminary ruling to revise the terms of reference included in Indonesia's panel request.

4 MAIN ARGUMENTS OF THE THIRD PARTIES

4.1. **Argentina** considers that, reading the panel requests 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 Indonesia's request 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.[47] 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 complaints is, therefore, precise".[48] Argentina therefore argues that it is unnecessary to make the changes requested by Australia.[49]

4.2. The **Dominican Republic** considers that the Panel should reject Australia's request, for the same reasons as it has invoked in respect of Australia's similar request concerning its own panel request.[50]

4.3. The **European Union** submits that Australia's concerns regarding the specific measure at issue have been expressly and specifically allayed by Indonesia. The European Union notes that this issue appears to be moot and is likely to remain so. It therefore suggests 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*.[51]

4.4. **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.[52] 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*

[44] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 18 (citing Panel Report, *EC – Chicken Cuts*, paras. 7.28-7.29).
[45] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, paras. 19-20 (discussing Panel Reports, *US — Continued Zeroing,* and *EC — IT Products*).
[46] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 21.
[47] Argentina's third-party comments on Australia's requests for preliminary rulings, paras. 9-15.
[48] Argentina's third-party comments on Australia's requests for preliminary rulings, para. 22.
[49] Argentina's third-party comments on Australia's requests for preliminary rulings, para. 24.
[50] The Dominican Republic's third-party comments on Australia's requests for preliminary rulings, para. 4.
[51] The European Union's third-party comments on Australia's requests for preliminary rulings, para. 33.
[52] 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.[53]

4.5. **Honduras** argues that there is no basis in the text of Indonesia'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.[54]

4.6. 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 or "related" measures (through the use of the term "including") logically cannot create an impermissible open-ended list of measures.[55] 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".[56]

4.7. Honduras adds that residual clauses of the kind used by Indonesia 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".[57]

4.8. Honduras also believes that Australia's request is premature and that it is therefore not necessary for the Panels to address Australia's concerns at this point in time. Specifically, there is no evidence that the complainants may be planning to challenge a measure that does not fall "within the four corners" of their panel requests, 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 complainant attempts to include measures within the Panel's terms of reference that are not "related", "complement" or "add to" the plain packaging measures.[58]

4.9. In **Mexico's** view, Australia's objection concerning the words "including measures", "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.[59]

5 ANALYSIS BY THE PANEL

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

[53] Guatemala's third-party comments on Australia's requests for preliminary rulings, paras. 2.1-2.13.
[54] Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 5-13.
[55] Honduras' third-party comments on Australia's requests for preliminary rulings, para. 14-17.
[56] Honduras' third-party comments on Australia's requests for preliminary rulings, para. 19.
[57] Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 20-21.
[58] Honduras' third-party comments on Australia's requests for preliminary rulings, paras. 22-24.
[59] Mexico's third-party comments on Australia's requests for preliminary rulings, paras. 27-28.

5.2. As described above, 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 Indonesia's panel request does not specify the measures at issue.[60] Indonesia, for its part, submits that "the Panel should reject Australia's Preliminary Ruling Request because (i) Indonesia has met the requirements of Article 6.2 of the [DSU] in that there is no ambiguity in its Panel Request as to the measures at issue; (ii) Australia's objection is premature and without merit; and (iii) while Indonesia could suffer prejudice as a result of Australia's proposed terms of reference, the reverse is not true".[61]

5.3. We first consider the requirements of Article 6.2 in respect of the identification of the measures at issue, before turning to our assessment of Indonesia's panel request in light of these requirements.

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

5.4. 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.

5.5. 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 the legal basis of the complaint (or the claims).[62] 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.[63]

5.6. Article 6.2 serves the function of establishing and delimiting the panel's jurisdiction.[64] It serves a "pivotal function" in WTO dispute settlement[65] 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.[66]

5.7. 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[67] to enable them to respond accordingly.[68]

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[60] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 8.

[61] Indonesia's response to Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 1.

[62] Appellate Body Reports, *China – Raw Materials*, para. 219; and *EC and certain member States – Large Civil Aircraft*, para. 639.

[63] 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. 72-73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416).

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

[65] Appellate Body Reports, *China – Raw Materials*, para. 219.

[66] 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".)

[67] 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).

[68] 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; *Chile – Price Band System*, para. 164; and *US – Continued Zeroing*, para. 161).

5.8. 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"[69] 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.[70] 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.[71] 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.[72] 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.[73]

5.9. 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".[74] 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 be addressed by a panel".[75] 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.[76]

5.10. 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".[77] The Panel must therefore "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".[78] 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".[79]

5.11. 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.

5.12. 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

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[69] (footnote original) Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US –Carbon Steel*, para. 127).

[70] (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).

[71] (footnote original) See e.g. Appellate Body Report, *US – Carbon Steel*, para. 127.

[72] (footnote original) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

[73] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

[74] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.12 (citing Appellate Body Report, *EC – Selected Customs Matters*, para. 130).

[75] Appellate Body Report, *EC – Chicken Cuts*, para. 155.

[76] Appellate Body Report, *EC – Selected Customs Matters*, para. 152.

[77] 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.

[78] 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).

[79] Appellate Body Reports, *China – Raw Materials*, para. 220 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641).

provisions of the Framework Agreement on bananas, which *implement, supplement and amend* that regime".[80] 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".[81] 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.

5.13. 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.[82] 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.[83] 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 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.[84]

5.14. 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[85] and thereby assist in ensuring that a positive solution to the dispute can be secured.[86] 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.[87] 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.[88]

5.15. 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

[80] WT/DS27/6 (emphasis added).

[81] Panel Report, *EC – Bananas III*, para. 7.27; Appellate Body Report, *EC – Bananas III*, para. 140.

[82] 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.

[83] Panel Reports, *China – Raw Materials*, Annex F-1, para. 17.

[84] Preliminary Ruling, *India - Agricultural Products*, paras. 3.45-3.47.

[85] Australia's comments on responses to Australia's requests for preliminary rulings, para. 28.

[86] 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).

[87] See for example Appellate Body Report, *Chile – Price Band System*, paras. 137-138.

[88] 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.

> 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.[89]

5.16. 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".[90]

5.17. 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,[91] which informs various provisions of the DSU.[92] 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[93] 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.[94]

5.18. We further note that these requirements of due process continue to manifest themselves in the course of panel proceedings, after the establishment of the panel. 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.[95] (emphasis added)

[89] 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* found that a particular 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).

[90] Panel Report, *Japan – Film*, para. 10.8.

[91] 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).

[92] 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.

[93] 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).

[94] 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).

[95] Appellate Body Report, *Chile – Price Band System*, para. 144.

5.19. 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.[96] We note that the panel in *China – Raw Materials* considered that the same approach applied in respect of "replacement measures".[97]

5.20. 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.

5.21. Bearing in mind these elements, we now turn to Indonesia's panel request to determine whether it is consistent with Article 6.2 of the DSU and, specifically, whether it sufficiently identifies the "specific measures at issue".

5.2 Whether Indonesia's panel request identifies the specific measures at issue

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

5.23. 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".[98] We therefore start our analysis with a consideration of the text of Indonesia's panel request.

5.24. Section A of the Indonesia's panel request is entitled "Specific Measures at Issue". That section provides as follows:

> This request for establishment of a Panel concerns the following measures:
>
> - *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

[96] 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 - 139).

[97] 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 Reports, *China – Publications and Audiovisual Products*, para. 7.60 footnote 105).

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

- 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.[99]

5.25. The panel request then states that "[t]he measures apply to the retail sale of cigarettes, cigars, and other tobacco products. The measures establish comprehensive requirements regarding the appearance and form of the retail packaging of tobacco products, as well as the tobacco products themselves. The measures also establish penalties, including criminal sanctions, for the violation of these requirements".[100] The panel request then proceeds to elaborate on the manner in which the cited measures regulate the enumerated products.[101]

5.26. Australia's challenge focuses on the fourth "dot point" of Indonesia'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"[102] 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 considers 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".[103]

5.27. 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.

5.28. Second, we understand the panel request as indicating that the "measures" that it concerns are the measures identified under the title "Specific Measures at Issue". The panel request defines these measures in three 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, the panel request provides that the measures at issue are also "any related measures adopted by Australia including measures that implement, complement or add to these laws and regulations and any measures that amend or replace these laws and regulations". Third, the description immediately following these bullet points describes the types of requirements and "penalties" that the "measures" establish. We understand this language to indicate that, to the extent that only measures that fit this description are "measures" to which the panel request refers and are thus "specific measures at issue" within the meaning of Section A of the panel request. This description therefore has the effect of further circumscribing the scope of the measures at issue by reference to what the measures actually do.

5.29. 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 the measures at issue further clarifies that the measures are defined *only* as measures that "apply to the retail sale of cigarettes, cigars, and other tobacco products", "establish comprehensive requirements regarding the appearance and form of the retail packaging of tobacco products, as well as the tobacco products themselves", or "establish penalties, including criminal sanctions, for the violation of these requirements". 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 "apply to the retail sale of cigarettes, cigars, and other tobacco products", "establish comprehensive requirements regarding the appearance and form of

[99] Indonesia's request for the establishment of a panel, p. 1.
[100] Indonesia's request for the establishment of a panel, pp. 1-2.
[101] Indonesia's request for the establishment of a panel, p. 2.
[102] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 27.
[103] Australia's comments on responses to Australia's requests for preliminary rulings, para. 29.

the retail packaging of tobacco products, as well as the tobacco products themselves", or "establish penalties, including criminal sanctions, for the violation of these requirements" in order to fall within our terms of reference.

5.30. 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 Indonesia, 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.[104] Specifically, Australia has identified a range of "tobacco control" measures that it argues could fall within the scope of the language of Indonesia'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.[105] 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.

5.31. Recalling our discussion in Section 5.1 above, we further observe that the language used by Indonesia 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".[106] 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".[107] 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, 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").[108]

5.32. As discussed, Indonesia 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, Indonesia has further identified the measures at issue by reference to their application ("[t]he measures apply to the retail sale of cigarettes, cigars, and tobacco products") and their effect ("[t]he measures establish comprehensive requirements regarding the appearance and form of the retail packaging of tobacco products, as well as the tobacco products themselves" and "[t]he measures also establish penalties, including criminal sanctions, for the violation of these requirements".[109] 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 Indonesia in its panel request,

[104] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 9.
[105] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 17.
[106] WT/DS27/6. (emphasis added)
[107] Appellate Body Report, *EC – Fasteners (China)*, para. 562.
[108] WT/DS27/6.
[109] WT/DS467/15.

and that endorsed by the panel and Appellate Body in *EC – Bananas III*.[110] This confirms us in our view that this language is sufficiently specific to satisfy Article 6.2 of the DSU.

5.33. 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".[111] 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".[112] Australia submits that the language used by Indonesia 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".[113]

5.34. As discussed above, the language in Indonesia's panel request establishes parameters that circumscribe the measures at issue through reference to (i) the narrative description of the measures at issue, (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 Indonesia'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.

5.35. In light of the above, we consider that the terms "including", "complement" and "add to", as used in Indonesia'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.

5.36. 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 Indonesia in the course of these proceedings as "related" to the plain packaging measures as described above, including measures that may "add to or complement" the listed measures, is or is not within our terms of reference.

5.37. 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"[114] and recall the important due process role played by the panel request, as discussed in paragraphs 5.17 to 5.20 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".[115] Similarly, in the present proceedings, the use of such terms would not provide a legitimate basis for seeking to expand or otherwise 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.

5.38. Finally, we take note of Indonesia's clarification that it does not intend to challenge every current or future tobacco control measure implemented in Australia, and that the measures at issue are limited to those measures relating to plain packaging requirements.[116] We also take note of Indonesia's indication that the challenged language is important to protect Indonesia's rights, "should Australia adopt measures closely-related to the plain packaging measures listed in Indonesia's panel request or change the legal nature of the existing plain packaging measures

[110] 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).
[111] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 10.
[112] Panel Reports, *China – Raw Materials*, Annex F-1, para. 12.
[113] Australia's request for a preliminary ruling in relation to Indonesia's panel request, para. 10.
[114] See para. 5.10 above.
[115] Panel Report, *EC – IT Products*, para. 7.140.
[116] Indonesia's response to Australia's request for a preliminary ruling, para. 12.

(e.g. by withdrawing and re-issuing measures in a slightly different form) during the course of the Panel proceedings."[117]

5.39. 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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[117] Indonesia's response to Australia's request for a preliminary ruling, para. 18.