WORLD TRADE ORGANIZATION

WT/DS522/12

17 April 2018

(18-2326)

CANADA – MEASURES CONCERNING TRADE IN COMMERCIAL AIRCRAFT

COMMUNICATION FROM THE PANEL

The following communication, dated 17 April 2018, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body.

On 24 October 2017, Canada submitted to the Panel a request for a preliminary ruling concerning the inconsistency of certain aspects of Brazil's panel request with the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

On 9 April 2018, the Panel issued the attached preliminary ruling to the parties and third parties.

At the joint request of 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 OF THE PANEL

9 APRIL 2018

1 INTRODUCTION

1.1. On 24 October 2017 Canada requested the Panel to find that certain aspects of Brazil's request for the establishment of a panel fail to meet the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and that certain measures in that request fall outside the Panel's terms of reference.[1]

1.2. Canada asks the Panel to consider its request for a preliminary ruling at an early stage of the proceedings, prior to the filing of the parties' first written submissions.[2] In particular, Canada argues that an early decision of the Panel would have an impact on the scope of the dispute and on the scope of the information-gathering process under Annex V to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[3]

1.3. In a letter dated 13 February 2018, Brazil informed the Panel that it did not object to an early ruling of the Panel. Brazil submitted its comments on Canada's request on 5 March 2018.

1.4. On 9 March 2018, the Panel adopted a partial timetable reflecting procedural steps to be taken until the issuance of its preliminary ruling. On 19 March 2018, the Panel received third-party comments from the European Union and the United States.

2 MAIN ARGUMENTS OF THE PARTIES

2.1 Canada

2.1. Canada argues that Brazil's request for the establishment of a panel:

a. fails to provide a brief summary of the legal basis of the serious prejudice claims sufficient to present the problem clearly by not identifying the allegedly subsidized product and the corresponding like product;

b. identifies measures for which no consultations were held; and

c. fails to identify the specific measure(s) at issue with respect to the Centre technologique en aérospatiale (CTA), the National Research Council (NRC), and the Natural Sciences and Engineering Research Council of Canada (NSERC).[4]

2.2. Specifically, Canada argues that, in the context of serious prejudice claims, panel requests must identify the subsidized product and the corresponding like product in order to "present the problem clearly".[5] According to Canada, an analysis of serious prejudice necessarily focuses on the relationship between a subsidy, a subsidized product, and a like product.[6] Canada claims that its due process rights to prepare its defence are being impaired due to Brazil's failure to identify the allegedly subsidized products and corresponding like products in its panel request. For this reason, Canada requests the Panel to rule that Brazil's serious prejudice claims are outside its terms of reference.[7]

2.3. Canada further argues that Brazil's panel request refers to four measures that were not identified in Brazil's request for consultations: (a) the provision of up to CAD 950 million for

[1] Canada's request for a preliminary ruling, para. 1.
[2] Canada's request for a preliminary ruling, para. 55.
[3] Canada's request for a preliminary ruling, para. 55.
[4] Canada's request for a preliminary ruling, para. 1.
[5] Canada's request for a preliminary ruling, para. 12.
[6] Canada's request for a preliminary ruling, para. 16.
[7] Canada's request for a preliminary ruling, para. 23.

Superclusters[8]; (b) the City of Montreal's PR@M Industry programme[9]; (c) the energy efficiency programmes administered by Hydro-Québec[10]; and (d) the Government of Québec's "Tax Credit for Investment Relating to Manufacturing and Processing Equipment".[11] According to Canada, the inclusion of these four programmes in the request for the establishment of a panel broadens the scope of the dispute beyond that of the request for consultations.

2.4. Finally, Canada argues that Brazil's panel request fails to identify the specific measures at issue with regard to "the provision of funding, technology transfer, in-kind goods and services, and other support through the CTA, the … NRC, and the … NSERC".[12] Canada asserts that the description provided in the panel request is extremely broad and that the reference to various external sources in footnotes does not contribute to the precise identification of the measures at issue.[13]

2.5. Accordingly, Canada requests the Panel to find that its terms of reference do not include the following legal claims and measures:

a. Brazil's claims with regard to serious prejudice under Articles 5(c), 6.3, 6.4, and 6.5 of the SCM Agreement;

b. Canada's provision of up to CAD 950 million for Superclusters;

c. City of Montreal PR@M Industry programme;

d. Hydro-Québec Energy Efficiency programmes;

e. Government of Québec Tax credit for investment relating to manufacturing and processing equipment; and

f. support provided by the CTA, the NRC, and the NSERC.

2.2 Brazil

2.6. Brazil responds that its panel request is consistent with the requirements laid down in Article 6.2 of the DSU, as interpreted in previous reports of WTO panels and the Appellate Body, and that all measures are properly within the panel's terms of reference.[14]

2.7. Brazil asserts that Article 6.2 of the DSU does not require complainants to identify the allegedly subsidized product and the corresponding like product in their panel requests.[15] According to Brazil, a party's panel request must identify "claims" rather than "arguments"[16]: complainants do not have to develop all elements of their case in their panel requests, especially in the context of serious prejudice claims under the SCM Agreement, for which special information-gathering provisions are envisaged in Annex V.[17] The identification of the product market in which the serious prejudice allegedly occurs is part of the evidentiary basis that should support a complaining party's arguments in the substantive stage of the dispute.[18]

2.8. In any event, Brazil considers that it sufficiently identified the product at issue in its request for the establishment of a panel. First, Brazil argues that the reference to "commercial aircraft" in the title and in the text of the panel request is specific enough.[19] Second, Brazil indicates that its request contains claims with regard to prohibited and actionable subsidies granted to

[8] Canada's request for a preliminary ruling, paras. 27-30.
[9] Canada's request for a preliminary ruling, paras. 31-34.
[10] Canada's request for a preliminary ruling, paras. 35-38.
[11] Canada's request for a preliminary ruling, paras. 39-43.
[12] Canada's request for a preliminary ruling, para. 44.
[13] Canada's request for a preliminary ruling, paras. 45-52.
[14] Brazil's response to Canada's preliminary ruling request, paras. 26-30.
[15] Brazil's response to Canada's preliminary ruling request, paras. 31 and 39.
[16] Brazil's response to Canada's preliminary ruling request, paras. 37-39.
[17] Brazil's response to Canada's preliminary ruling request, para. 38.
[18] Brazil's response to Canada's preliminary ruling request, para. 39.
[19] Brazil's response to Canada's preliminary ruling request, para. 43.

Bombardier, Inc. ("Bombardier") and that the subsidized product is the Bombardier's C-Series commercial aircraft program.[20]

2.9. Moreover, Brazil argues that the attendant circumstances surrounding its panel request demonstrate that Canada's due process rights are not being impaired. The attendant circumstances referred to by Brazil are: the reference to "measures affecting commercial aircraft" and the "C-Series aircraft program" in the request for consultations; the various references to "C-Series" in the statement of available evidence annexed to the request for consultations; the references made by Brazil to the C-Series programme at the DSB meetings of 31 August 2017 and 29 September 2017 where the panel request was presented; and the lack of objections by Canada in those circumstances.[21]

2.10. Concerning Canada's allegations that the panel request broadens the scope of the dispute, Brazil responds that the four measures at issue were only announced after consultations were held or were not known to Brazil until information circulated concerning the United States' countervailing investigation on commercial aircraft from Canada.[22] For Brazil, their inclusion in the panel request does not change the essence or scope of the dispute.[23]

2.11. Finally, Brazil argues that the panel request, read as a whole and in light of the attendant circumstances, sufficiently identifies the CTA/NRC/NSERC measures.[24]

2.12. For the foregoing reasons, Brazil asks the panel to confirm that its serious prejudice claims and the measures at issue are within its terms of reference.

2.3 Main arguments of the third parties

2.3.1 The European Union

2.13. The European Union argues that a respondent in a dispute involving serious prejudice claims would expect the panel request to specify the like product.[25] In this respect, the European Union stresses the importance for a respondent to know in which market the serious prejudice is caused.[26] Against this background, the European Union asserts that the Panel should assess whether Brazil's panel request is sufficiently precise for the respondent to understand which products are experiencing a serious prejudice allegedly caused by the challenged measures.[27]

2.14. Concerning the alleged failure by Brazil to consult on specific measures, the European Union argues that although the contested measures may be similar in nature, they appear to be "separate and legally distinct" from the other measures listed in the request for consultations.[28]

2.15. Finally, as regards the identification of the specific measures at issue in relation to the CTA/NRC/NSERC measures, the European Union notes that the narrative of the panel request is broad.[29] However, the European Union also notes that Brazil's panel request contains a general section identifying "Quebec's Aerospace Strategy" and a contextual explanation concerning the list of measures which follows; and that the panel request also provided important clarifications and details in footnotes.[30]

[20] Brazil's response to Canada's preliminary ruling request, para. 44.
[21] Brazil's response to Canada's preliminary ruling request, paras. 46-55.
[22] Brazil's response to Canada's preliminary ruling request, para. 56.
[23] Brazil's response to Canada's preliminary ruling request, paras. 61-74.
[24] Brazil's response to Canada's preliminary ruling request, paras. 10-25.
[25] European Union's comments on Canada's preliminary ruling request, para. 25.
[26] European Union's comments on Canada's preliminary ruling request, paras. 25-26.
[27] European Union's comments on Canada's preliminary ruling request, para. 30.
[28] European Union's comments on Canada's preliminary ruling request, para. 38 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.13).
[29] European Union's comments on Canada's preliminary ruling request, paras. 10-12.
[30] European Union's comments on Canada's preliminary ruling request, paras. 14-15.

2.3.2 The United States

2.16. The United States does not comment on the merits of Canada's request for a preliminary ruling, but supports the resolution of the request prior to the filing of substantive submissions by the parties.[31]

3 ANALYSIS BY THE PANEL

3.1 Relevant provisions of the DSU

3.1. Article 6.2 of the DSU provides, in relevant part:

> 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.

3.2. Requests for the establishment of a panel must thus fulfil four requirements to be consistent with Article 6.2 of the DSU. They must: (a) be made in writing; (b) indicate whether consultations were held; (c) identify the specific measures at issue; and (d) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. All these requirements must be discernible from the text of the request for the establishment. Any defect in the panel request cannot be cured at a later stage in the proceedings.[32]

3.3. We shall first address Canada's claim that Brazil's panel request fails to provide a brief summary of the serious prejudice claims sufficient to present the problem clearly. We shall then turn to Canada's contention that Brazil's panel request expands the scope of the dispute beyond that of the request for consultations. Finally, we shall examine whether Brazil's panel request fails to identify the specific measures at issue as regards certain alleged subsidies provided by Canada.

3.2 Whether Brazil's panel request provided a brief summary of the serious prejudice claims sufficient to present the problem clearly

3.4. The parties disagree as to whether Brazil's panel request provides a brief summary of the legal basis of the serious prejudice claims sufficient to present the problem clearly, as required under Article 6.2 of the DSU.

3.5. Previous panel and Appellate Body reports have clarified that the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly can be subdivided into two elements: (a) a panel request must identify with a brief summary the "legal basis" of the complaint; and (b) that summary must be "sufficient to present the problem clearly".[33] Concerning the first element, a panel request provides a "brief summary of the legal basis of the complaint" when it: (a) identifies the legal provision that has allegedly been violated; and (b) indicates how or why that provision has been violated.[34] With regard to the second element, a summary of the legal basis of the complaint is considered to be "sufficient to present the problem clearly" when the panel request plainly connects the challenged measure with the provision claimed to have been violated. This ensures that a respondent can "know what case it has to answer, and … begin preparing its defence".[35]

3.6. This requirement has been read as referring to the description, in the panel request, of a complainant's "claims" as opposed to its "arguments".[36] A "claim" is an allegation that a measure adopted or maintained by the complainant is inconsistent with a certain provision of the WTO

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[31] United States' comments on Canada's preliminary ruling request, para. 2.
[32] Appellate Body Report, *US – Carbon Steel*, para. 127.
[33] Panel Report, *US – OCTG (Korea)*, para. 7.81.
[34] Panel Report, *US – OCTG (Korea)*, para. 7.82 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130).
[35] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.29 (quoting Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162, in turn quoting *Thailand – H-Beams*, para. 88).
[36] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.381 (quoting Appellate Body Reports, *Guatemala – Cement I*, para. 72; and *EC – Bananas III*, paras. 141-143).

agreements. The complainant will then support its claims with "arguments", which consist in the evidence and reasoning that it deems relevant to make its case.[37] While claims must be identified with sufficient precision in the request for the establishment, the same does not apply to arguments. Parties, in fact, have the opportunity to develop their arguments (and to address the arguments of the other party and third parties) in their written submissions, in the substantive meetings with the panel, and in response to questions posed by the panel.

3.7. A "brief summary" of the legal basis of the complaint aims to succinctly explain *how* or *why* the measure at issue is considered by the complainant to be violating the WTO obligation in question, and the narrative part of the panel request serves this function.[38] To determine whether a panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, a panel must conduct "an objective examination of the panel request as a whole, as it existed at the time of filing, and on the basis of the language used therein".[39]

3.8. Concerning Canada's claim that Brazil failed to properly identify the allegedly subsidized products at issue, we note that although Article 6.2 of the DSU requires a complainant to "identify the specific measures at issue", it does not require a complainant to identify the specific products at issue. This is because the identification of the products concerned would normally flow from the description of the measures at issue.[40] Although the Appellate Body found in *EC – Chicken Cuts* that, with respect to certain WTO obligations, *in order to identify the specific measures at issue*, it may be necessary also to identify the products at issue[41], we note that, for this element of its request for a preliminary ruling, Canada has not claimed that Brazil's panel request failed to properly identify the specific measures at issue.[42]

3.9. Canada refers to the statement by the panel in *India – Agricultural Products* that there might be circumstances in which the failure to identify the products renders a panel request "so vague and broad that a respondent would not be able to know the case against it and thus would not be able to begin preparing its defence".[43] However, that case again concerned the alleged failure by the complainant to "identify the specific measures at issue" in its panel request. We emphasize that Canada does not challenge the manner in which Brazil identified the "specific measures" in its panel request. Canada's request for a preliminary ruling is based rather on an alleged failure by Brazil to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

3.10. The first paragraph of Brazil's panel request indicates that the parties held consultations on "measures affecting trade in commercial aircraft".[44] The third paragraph of Brazil's panel request identifies the subject of the panel request as "prohibited and actionable subsidies provided to Bombardier … and its suppliers as well as legislation, regulations, other instruments, and amendments thereto providing such subsidies to these recipients".[45]

3.11. Thus, the plain text of the first and third paragraphs of the request for the establishment indicates that the claims of serious prejudice concern subsidies allegedly bestowed by Canada to Bombardier (and its suppliers) affecting trade in commercial aircraft. That Brazil is challenging measures affecting trade in commercial aircraft is further clarified by other specific references in the panel request to the aerospace industry[46] and to the commercial aircraft sector.[47] We consider

[37] Appellate Body Report, *Korea – Dairy*, para. 139.

[38] Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26.

[39] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.27 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641).

[40] Appellate Body Report, *EC – Chicken Cuts*, para. 165.

[41] Appellate Body Report, *EC – Chicken Cuts*, para. 166.

[42] Furthermore, that case concerned individual tariff classification decisions, and the Appellate Body considered that it may be necessary to identify the products at issue in order to distinguish the contested measures (for example, individual classification decisions by customs authorities) from other measures (different individual classification decisions by customs authorities). We are not dealing with such measures in the present case.

[43] *India – Agricultural Products*, preliminary ruling of the Panel, WT/DS430/5, para. 3.36 (referring to Panel Reports, *Korea – Alcoholic Beverages*, para. 10.16; and *EC – IT Products*, paras. 7.194-7.197).

[44] Request for the establishment of a panel by Brazil, WT/DS522/6, p. 1.

[45] Request for the establishment of a panel by Brazil, WT/DS522/6, p. 1.

[46] Request for the establishment of a panel by Brazil, WT/DS522/6, pp. 3-5.

[47] Request for the establishment of a panel by Brazil, WT/DS522/6, p. 2.

this characterization of the measures which are the basis of Brazil's serious prejudice claims and the products which are covered by those measures to be sufficiently clear for the purpose of summarizing the legal basis of Brazil's complaint. We also note that Brazil submits that the context and attendant circumstances surrounding the panel request – including the request for consultations, the statement of available evidence annexed thereto and the parties' statements at meetings of the DSB – contribute to the clarification of the product scope of the serious prejudice claims. Having concluded that the panel request, on its face, identifies the product scope of the serious prejudice claims in a manner that is sufficient to present the problem clearly, we do not consider it useful to examine the attendant circumstances surrounding it.

3.12. Canada also contends that Brazil's panel request, by referring to a wide range of products, fails to identify an allegedly subsidized product in its summary of the legal basis of the complaint.[48] In this respect, we observe that Article 6.2 of the DSU does not prevent complainants from bringing claims relating to a broad range of products.[49] As Canada itself notes, the panel in *Canada – Aircraft* found that the notion of "civil aircraft industry" was not too broad to meet the requirements of Article 6.2 of the DSU.[50] Nevertheless, Canada asserts that the present case is different because it deals with serious prejudice claims, whereas *Canada – Aircraft* was about claims of prohibited subsidies.[51]

3.13. In particular, Canada argues that claims of serious prejudice place the onus on the complainant to "demonstrate that the measures constitute subsidies and that they, through identified subsidized product(s), cause serious prejudice to like product(s)".[52] The elements identified by Canada will be necessary for the Panel's evaluation of Brazil's serious prejudice claims. However, this evaluation will take place on the basis of the parties' arguments. As explained above, these arguments do not need to be reflected in the complaining party's panel request. Article 6.2 of the DSU does not require complainants to "demonstrate" the WTO inconsistencies alleged in their claims.

3.14. In any event, we observe that the panel in *Korea – Commercial Vessels* dealt with a similar issue while examining the compatibility of a panel request's serious prejudice claims with Article 6.2 of the DSU. In that dispute, the respondent argued that the complainant's panel request was not sufficiently clear because it listed claims of serious prejudice relating to "commercial vessels". The respondent considered such reference to be "overly broad".[53] The panel in that dispute concluded that the reference to "commercial vessels" in the panel request was a sufficiently precise specification of the product scope of the serious prejudice claims to comply with the standard of Article 6.2 of the DSU.[54]

3.15. Based on the foregoing, we consider that the description provided by Brazil in its panel request of the scope of its serious prejudice claims concerning alleged actionable subsidies provided to Bombardier and its suppliers affecting trade in commercial aircraft properly provides a succinct explanation of the legal basis of the complaint sufficient to present the problem clearly.[55]

[48] Canada's request for a preliminary ruling, para. 10.

[49] The panel in *US – FSC* found that a request for the establishment of a panel listing violations of the Agreement on Agriculture with respect to "any" agricultural product was sufficient to put the respondent on notice as regards the case against it. (Ibid. para. 7.29). However, the same panel further clarified that "the fact that a complainant in its request for establishment complains about violations relating to a broad range of products does not discharge it from its obligation to present such evidence and argument as is necessary to raise a presumption of a violation of the WTO Agreement". (Ibid. para 7.31).

[50] Panel Report, *Canada – Aircraft*, paras. 9.36-9.37.

[51] Canada's request for a preliminary ruling, fn 12.

[52] Canada's request for a preliminary ruling, fn 12.

[53] Panel Report, *Korea – Commercial Vessels*, para. 7.2, para. 31 of the preliminary rulings.

[54] Panel Report, *Korea – Commercial Vessels*, para. 7.2, para. 31 of the preliminary rulings.

[55] We further note that Brazil stated in its response to Canada's request for a preliminary ruling (para. 44) that the product scope of its serious prejudice claims is the "Bombardier's C-Series commercial aircraft program". Based on this clear statement, we understand that Brazil's submissions will address serious prejudice claims relating to this product alone, and not any other programmes or models of commercial aircraft. In this respect, we note that the panel in *Korea – Commercial Vessels* (para. 7.2, fn 18 of the preliminary rulings) made a similar remark concerning the European Communities' clarifications on the product scope of its serious prejudice claims.

3.16. We now turn to Canada's contention that Brazil's panel request failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly by not specifying the Brazilian like products allegedly suffering serious prejudice.

3.17. The plain text of Article 6.2 of the DSU does not require complainants to specify the "like products" that experience serious prejudice. The identification of the like products would normally flow from the description of the allegedly subsidized products. Provided the complainant clarifies that it is alleging serious prejudice in respect of like products, a detailed description of the specific nature of those like products is not needed in order for the summary of the legal basis of the complaint to be sufficient to present the problem clearly. By describing the allegedly subsidized products, a complainant also circumscribes the scope of the corresponding like products experiencing serious prejudice. Since we have already found that Brazil has described the allegedly subsidized products in a sufficiently clear manner, we also conclude that the reference to like products of Brazil in the panel request provides a succinct explanation sufficient to present the problem clearly.

3.18. In any event, we note that footnote 46 of the SCM Agreement establishes the following probative standard for the consideration of whether two products are "like":

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

3.19. Determining whether a product is "alike in all respects" or "has characteristics closely resembling" as compared to another requires the evaluation of a considerable amount of "arguments" and evidence. Clearly, complainants cannot be requested to submit such "arguments" and evidence in their panel requests. A thorough assessment of the subsidized products and of the corresponding like products experiencing serious injury should take place at the substantive stage of the proceedings. Therefore, our conclusion that Brazil's panel request provides a brief summary of the serious prejudice claims sufficient to present the problem clearly does not discharge Brazil from the burden to prove at the substantive stage, *inter alia*, the existence of a Brazilian product or various Brazilian products that are "alike in all respects" or have "characteristics closely resembling" Bombardier's commercial aircraft.

3.20. In view of the foregoing, the Panel finds that Brazil's panel request fulfils the requirement to provide a brief summary of the legal basis of the serious prejudice claims sufficient to present the problem clearly.

3.3 Whether Brazil's panel request expands the scope of the dispute beyond that of the request for consultations

3.21. We now turn to Canada's contention that Brazil's panel request expands the scope of the dispute beyond that of its request for consultations by including measures that were not mentioned in the request for consultations, and on which no consultations were held.[56] In particular, Canada argues that the following measures fall outside the Panel's terms of reference: Canada's provision of up to CAD 950 million for Superclusters; the City of Montreal's Pr@m Industry programme; Hydro-Québec Energy Efficiency programmes; and the Government of Québec's Tax credit for investment relating to manufacturing and processing equipment.[57]

3.22. Brazil states that the four measures at issue were not included in its request for consultations because Brazil was not aware of those measures at the time it filed that request.[58] For Brazil, the four measures fall within the terms of reference of the Panel because they do not

[56] Canada's request for a preliminary ruling, para. 25.
[57] Canada's request for a preliminary ruling, paras. 24 and 25.
[58] Brazil's response to Canada's preliminary ruling request, para. 56. The request for consultations is dated 8 February 2017 and consultations were held on 10 March 2017. Brazil indicates that the Innovation Superclusters initiative was announced on 23 March 2017 (Brazil's panel request, fn 11) and that it became aware of the other measures when Québec and Bombardier disclosed the programmes to the US Department of Commerce in July 2017.

expand the "scope and essence" of the dispute as it was characterized in the request for consultations.[59] In particular, Brazil argues that its request for consultations identified the essence and scope of the dispute as including a list of measures as well as "[o]ther federal, provincial, and local subsidy programs benefiting Bombardier and the C-Series aircraft program … and … [a]ny other existing or future measures … that involve a financial contribution by Canadian federal, provincial or local government entities or by any entity controlled by such Canadian government entities that benefit Bombardier or the C-Series program".[60]

3.23. Article 4.4 of the DSU provides that any request for consultations must identify the measures at issue. However, it is well established that Articles 4 and 6 of the DSU, or Article 4 and 7 of the SCM Agreement do not require a precise and exact identity between the measures that were the subject of consultations and those identified in the panel request, *provided that the scope and essence of the dispute has not been changed*.[61]

3.24. Whether a complaining party has expanded the scope or essence of the dispute by including in the panel request a measure that was not covered in its request for consultations must be determined on a case-by-case basis. We therefore assess whether the four measures expand the scope and essence of the dispute as it was characterized in Brazil's request for consultations.

3.25. We start by noting that, according to Brazil, "the scope and essence of this dispute have been clear from the date Brazil requested consultations with Canada. The dispute involves the following: 'Canada's federal, provincial, and local government have provided substantial subsidies to Bombardier to develop, launch, and preserve its C-Series aircraft program. Canada's support to Bombardier for the C-Series program includes loans, grants, equity infusions, tax credits, and other financial contributions'".[62] Brazil also states that it explicitly identified the essence and scope of the dispute as including the listed measures and "[o]ther federal, provincial, and local subsidy programs benefiting Bombardier and the C-Series aircraft program … and … [a]ny other existing or future measures … that involve a financial contribution by Canadian federal, provincial or local government entities or by any entity controlled by such Canadian government entities that benefit Bombardier or the C-Series program".[63] In the Panel's view, this provides a sufficient basis for additional measures to be included in the panel request provided the measures do not expand the scope or change the essence of the dispute.

3.26. We now consider whether the measures at issue expand the scope of the dispute as claimed by Canada.

3.27. We note that Brazil states that the Innovation Superclusters Initiative "clearly falls within the essence of this dispute and does not expand the scope of the dispute *beyond measures providing subsidies to Bombardier's C-Series aircraft program*".[64] In relation to the other three measures, Brazil states that the three identified bodies "provided support to the C-series program" and that the measures "fall under the types of measures that Brazil listed in its request for consultations".[65] Brazil then explains that "[b]ecause the scope and essence of [this dispute] is Canada's provision of support to Bombardier's C-Series program through various types of measures, including grants, loans, tax credits and others, the inclusion of the above-referenced measures … will not expand the scope or change the essence of this dispute".[66]

3.28. For its part, Canada has sought to explain how the measures are different from those included in the request for consultations. With regard to Superclusters, Canada argues that "it is a new program unrelated to any measures that Brazil identified in its request for consultations" being funded through different sources.[67] Concerning the City of Montreal's Pr@M Industry Program, Canada argues that the request for consultations does not mention any programme

[59] Brazil's response to Canada's preliminary ruling request, para. 61.
[60] Brazil's response to Canada's preliminary ruling request, para. 60 (quoting Brazil's consultation request, p. 5).
[61] Appellate Body Report, *Argentina – Import Measures*, para 5.13.
[62] Brazil's response to Canada's preliminary ruling request, para. 59.
[63] Brazil's response to Canada's preliminary ruling request, para. 60 (quoting Brazil's consultation request, p. 5).
[64] Brazil's response to Canada's preliminary ruling request, para. 64. (emphasis added)
[65] Brazil's response to Canada's preliminary ruling request, para. 71.
[66] Brazil's response to Canada's preliminary ruling request, para. 72.
[67] Canada's request for a preliminary ruling, para. 29.

administered by the City of Montreal.[68] With regard to Hydro-Québec Energy Efficiency programmes, Canada observes that Brazil's request for consultations does not identify any energy efficiency programmes, nor refers to any Hydro-Québec measure.[69] Finally, Canada argues that Brazil's request for consultations does not refer to the Government of Quebec's Tax credit for investment relating to manufacturing and processing equipment.[70]

3.29. We are not persuaded by Canada's arguments that the scope of the dispute (which Brazil describes as Canada's provision of support to Bombardier's C-Series program through various types of measures, including grants, loans, tax credits, and others) will have in fact been expanded by the inclusion of these measures. The Panel agrees with Brazil that the four measures at issue fit within the scope and essence of the dispute as described by Brazil, so that the scope of the dispute is not expanded by Brazil's panel request.

3.30. In view of the foregoing, the Panel concludes that Canada's provision of up to CAD 950 million for Superclusters, the City of Montreal Pr@m Industry programme, Hydro-Québec Energy Efficiency programmes, and the Government of Québec's Tax credit for investment relating to manufacturing and processing equipment are within its terms of reference.

3.4 Whether Brazil's panel request fails to identify the specific measures at issue as regards certain alleged subsidies granted by Canada

3.31. We now turn to Canada's claim that Brazil's panel request failed to identify the specific measure at issue with respect to the CTA, the NRC, and the NSERC.

3.32. Canada argues that the description of these alleged subsidy programmes is "extremely broad" and could cover thousands of measures for each of these organizations.[71]

3.33. Brazil responds that the language in its panel request "as a whole contained far more detail than is required to provide Canada 'with sufficient particularity so as to indicate the nature of the measures and the gist of what is at issue'" (footnote omitted).[72] Brazil states that its panel request identified the commercial aircraft industry as the relevant industry, identified the relevant measures, identified the specific organizations providing the support, and described the type of support provided. Brazil notes that the panel request also included footnotes referencing outside sources (websites) about the alleged subsidy programmes at issue.[73]

3.34. The European Union, in its comments regarding Canada's preliminary ruling request, agrees with Brazil that the footnotes and certain other aspects of its panel request "certainly add specificity to the CTA, NRC and NSERC measures".[74] However, the European Union "wonders why such important clarification was only made in a footnote and whether Canada could be sure that these were the specific and only measures that Brazil sought to challenge in its Panel Request".[75] The European Union suggests that Brazil may have been hampered by the lack of public information on the precise measures it sought to challenge.[76]

3.35. We observe that the identification of a measure within the meaning of Article 6.2 of the DSU need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.[77] We also recall that, although compliance with Article 6.2 of the DSU must be "'demonstrated on the face' of the panel request"[78], a panel may supplement its analysis

[68] Canada's request for a preliminary ruling, para. 33.
[69] Canada's request for a preliminary ruling, para. 37.
[70] Canada's request for a preliminary ruling, para. 40.
[71] Canada's request for a preliminary ruling, para. 45.
[72] Brazil's response to Canada's preliminary ruling request, para. 11.
[73] Brazil's response to Canada's preliminary ruling request, paras. 12 and 13.
[74] European Union's comments on Canada's preliminary ruling request, paras. 13-15.
[75] European Union's comments on Canada's preliminary ruling request, para. 15.
[76] European Union's comments on Canada's preliminary ruling request, para. 16.
[77] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[78] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; and *US – Continued Zeroing*, para. 161).

by looking at external sources referenced in the request, such as websites referencing the measures at issue.[79]

3.36. In the present case, the Panel finds that the panel request, on its face, contains a description of the measures at issue, which is sufficient to indicate the nature of the measure and the gist of what is at issue.

3.37. We understand from the text of the panel request that the reference to "Canada's and Quebec's provision of funding, technology transfer, in-kind goods and services, and other support through the CTA, the National Research Council ('NRC') and the Natural Sciences and Engineering Research Council of Canada ('NSERC')" forms part of Brazil's challenge to subsidies granted to Bombardier for its C-Series aircraft.[80] These measures appear under the heading "Other Research and Development Subsidies" at page 3 of the panel request, which is an indication of the nature of the measures at issue under that heading. Read in the context of Brazil's panel request as a whole, we consider that this description is specific enough for Canada to know which measures are being challenged in the present dispute.

3.38. We note that the websites referenced in footnotes 8, 9, and 10 of Brazil's panel request supplement the information in the text of the panel request by providing additional information regarding the measure at issue. We agree with Brazil however, that the text of its panel request *alone* is sufficient to meet the requirements of Article 6.2.[81]

3.39. In view of the foregoing, we conclude that Canada's and Québec's provision of funding, technology transfer, in-kind goods and services, and other support through the CTA, the NRC, and the NSERC is identified with sufficient particularity in Brazil's panel request and therefore falls within the Panel's terms of reference.

4 FINDINGS AND CONCLUSION

4.1. For the reasons set out in this preliminary ruling, the Panel concludes that Brazil's panel request complies with the requirements of Article 6.2 of the DSU such that:

a. Brazil's claims with regard to serious prejudice under Articles 5(c), 6.3, 6.4, and 6.5 of the SCM Agreement;

b. Canada's provision of up to CAD 950 million for Superclusters;

c. City of Montreal PR@M Industry programme;

d. Hydro-Québec Energy Efficiency programmes;

e. Government of Québec Tax credit for investment relating to manufacturing and processing equipment; and

f. support provided by the CTA, the NRC, and the NSERC

are within the terms of reference of the Panel.

4.2. 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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[79] Appellate Body Report, *Argentina – Import Measures*, para. 5.50.

[80] Brazil's response to Canada's preliminary ruling request, paras. 11-12 (quoting Brazil's panel request, p. 3).

[81] Brazil's response to Canada's preliminary ruling request, para. 16.