In the World Trade Organization

Panel Proceedings

Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products

(DS583)

Response of the European Union

to Turkey's request

for a preliminary ruling

Geneva, 05 June 2020

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TABLE OF ABBREVIATIONS

Abbreviation	Full Name
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIMs Agreement	Agreement on Trade-Related Investment Measures
WTO	World Trade Organization

1. INTRODUCTION

1. A few days before the filing of the European Union's first written submission in this dispute, Turkey submitted a request for a preliminary ruling that alleges that the EU's request for the establishment of a panel ("panel request") is inconsistent with Article 6.2 of the DSU.

2. As the EU will explain below, Turkey's request is a transparent litigation technique. It is untimely, and in any event there is no merit to Turkey's assertions. The EU's panel request fulfils all the requirements of the DSU, and nothing impedes Turkey's ability to defend its measures. Instead of Turkey's entirely unjustified request, the parties and the Panel should now be addressing the substance of the EU's claims in order to reach a positive solution to the dispute.

3. In Section 2 of this request, the EU explains that Turkey's request is untimely and inadmissible. Section 3 deals with Turkey's assertions regarding the identification of the measures at issue, and Section 4 with the summary of the legal basis of the complaint provided in the panel request.

2. TURKEY'S HAS FAILED TO MAKE ITS REQUEST IN A TIMELY MANNER

4. For the reasons set out below, the European Union submits that Turkey's request for a preliminary ruling has not been made at the "earliest possible opportunity" and is, for that reason, in breach of point 4.1 a) of the Panel's Working Procedures and, more fundamentally, of the principles of good faith and due process. Therefore, Turkey's request is untimely and inadmissible.

5. Point 4.1 of the Working Procedures adopted by the Panel lays down the procedure applicable in the event that:

> "Turkey considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the panel."

6. Letter a) of point 4.1 of the Working Procedures prescribes the time limits within which Turkey must file any request for a preliminary ruling within the scope of paragraph 4.1. It provides that:

> "Turkey shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel."[1]

7. Paragraph 4.1.a) is worded in mandatory terms. Failure to comply with the applicable time limit pursuant to that provision renders Turkey's request inadmissible by the Panel.

8. Paragraph 4.1 a) stipulates two different, but cumulative time limits. The first clause of that provision prescribes that requests must be filed "at the earliest possible opportunity"; the second clause adds that "in any event" the requests must be filed "no later than in its first written submission" to the Panel.

9. The first time limit is a dynamic one. The timing of the "earliest possible opportunity" may vary in each case according to the circumstances. It is, nonetheless, an objective time limit, compliance with which is subject to review by the Panel. Turkey is not allowed to make a request for a preliminary ruling whenever it considers that it is most convenient for Turkey in view of Turkey's own litigation interests. Rather, by virtue of the first clause of paragraph 4(1)a, Turkey is under the obligation to file a request for a preliminary ruling as soon as it is objectively possible for Turkey to do so.

10. The second time limit is a fixed one, because it is linked to the submission by Turkey of its first written submission. The connecting terms "in any event" make it clear that this time limit is without prejudice to the dynamic time limit provided for in the first clause of paragraph 4(1)a. In other words, Turkey is bound by both. Whenever it is objectively possible for Turkey to file a request before the filing of its first written submission, Turkey is under an obligation to do so. On the other hand, once Turkey has filed its first written submission, it is precluded from filing a request for a preliminary ruling by arguing that it would be the "earliest possible opportunity" for Turkey to do so.

11. The second clause of paragraph 4.1 a) reflects the implicit presumption that the "earliest possible opportunity" for Turkey to make a request for a preliminary ruling will arise, at the latest, at the time where Turkey files its first written submission. But from this presumption it cannot be logically inferred that the filing of Turkey's first written submission constitutes in each and every case the earliest possible opportunity to file a request for a preliminary ruling. In practice, much will depend on the type of request. Where the request is based

[1] Underlining supplied.

on the inadequacy of the panel request the "earliest possible opportunity" will arise much earlier; where the request is based on the lack of consistency between the panel request and the complainant's first written submission, the "earliest possible opportunity" will not arise until the complainant's first written submission has been filed and the respondent has had a reasonable opportunity to analyse it and prepare a request for a preliminary ruling. This will usually coincide with the time required for preparing the respondent's first written submission. Hence the deadline provided for in the second clause of paragraph 4.1 a).

12. For the above reasons, it would be mistaken to read the clause "… in any event no later than its first written submission to the Panel" as meaning that Turkey is free to make its requests for a preliminary ruling at any moment of its choice up to and including the filing of its first written submission. That reading would fail to give any meaning to the express terms of the first clause of paragraph 4.1 a). As stressed by the Appellate Body in its very first report in *US – Gasoline*:

> "One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[2]

13. Had the drafters of the Working Procedures meant to allow Turkey to file a request for a preliminary ruling at any moment of its choice no later than the first written submission to the Panel, they would have stipulated instead in paragraph 4.1 a) that "Turkey shall submit any such request no later than in its first written submission to the Panel". By including the first clause of paragraph 4.1 a), the drafters meant to impose an additional obligation on Turkey, which cannot be ignored by the Panel.

14. Moreover, the rule contained in paragraph 4.1 a) of the Working Procedures purports to give expression to fundamental requirements of the principles of due process and good faith and must be interpreted in the light of those principles. The Appellate Body has emphasised time and again that those principles require:

[2] Appellate Body Report, *US-Gasoline*, p. 23.

> "[…] that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes […] The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[3]

15. The Appellate Body has further clarified that:

> "[…] when a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections."[4]

16. The interpretation of paragraph 4.1 a) of the Working Procedures according to which Turkey would enjoy complete discretion to file a request for a preliminary ruling at any moment no later than its first written submission would be inconsistent with the principles of due process and good faith, as interpreted by the Appellate Body. It cannot be a correct understanding of the Panel's intention when adopting the Working Procedures.

17. The European Union recalls that it requested the establishment of a panel in the present dispute on 2 August 2019. The DSB established the Panel on 30 September 2019. The Panel was composed on 17 March 2020 and adopted its working procedures and timetable on 15 April 2020.

18. Turkey's request is concerned exclusively with the adequacy of the EU's panel request. The alleged deficiencies of the EU's panel request should have been apparent to Turkey following the filing of the EU's panel request on 2 August 2019. Therefore, it was perfectly "possible" for Turkey to file the present request for a preliminary ruling immediately upon the composition of the Panel on 17 March 2020 or at the latest upon the adoption of the working procedures and timetable on 15 April 2010.

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3 Appellate Body Report, *United States – FSC*, para. 166. See also Appellate Body Report, *Korea –Dairy*, footnote 19, paras. 127-131; and Appellate Body Report, *United States – 1916 Act*, footnote 32, para. 54.

4 Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 49-50.

19. There is no conceivable reason that could have made it objectively not "possible" for Turkey to file its request for a preliminary ruling earlier than 15 May 2020 (i.e. on a Friday evening just four days before the date for filing the EU's first written submission on 19 May 2020). Indeed, as of the time of composition of the Panel, Turkey had already had more than seven months to prepare that request. Turkey's delay is even more difficult to understand in view of the fact that it has been assisted by experienced outside legal counsel throughout the proceedings. Turkey's behaviour can only be explained as a deliberate "litigation technique" aimed at maximizing the delay in the proceedings that would result in the event that the Panel granted, as it eventually did, Turkey's planned request to extend the deadline for filing its own first written submission until after the Panel had ruled upon the present request for a preliminary ruling.

20. For the above reasons, the European Union urges the Panel to reject Turkey's request as being untimely and, hence, inadmissible.

3. THE EUROPEAN UNION HAS IDENTIFIED THE SPECIFIC MEASURES AT ISSUE

21. Turkey alleges, first, that the measures at issue are not identified with sufficient precision. This is because, according to Turkey, first, the panel request does not identify their "nature" as "written or unwritten"; second, it does not identify the "content" of the measures at issue because it does not specify the products at issue or the "requirement(s) concerned"; third, it does not identify the legal instruments that are the "source" of each of the measures at issue; fourth, it does not specify whether the prioritisation measure is challenged "as such" or "as applied". Separately, Turkey alleges that any claims that the EU may make against other instruments through which Turkey implements and administers the measures at issue or against implementing measures or any other related measures fall outside the panel's terms of reference.

22. Turkey's assertions are baseless, as the EU will show in the following sections.

3.1. The panel request clearly identifies the measures at issue

23. To recall, Article 6.2 DSU requires panel requests to "identify the specific measures at issue".

24. It is well established that the DSU allows complainants to challenge "any act or omission" attributable to a WTO Member.[5] For example, it is possible to

[5] Appellate Body Report, *EC – Selected Customs Matters*, para. 133.

challenge composite measures consisting of several elements.[6] However, as Turkey recognizes,[7] the existence of a measure and its WTO-consistency are clearly distinct from the issue of the sufficiency of the panel request from the point of view of Article 6.2 of the DSU. The latter issue is the only one raised by Turkey's preliminary ruling request.

25. As the Appellate Body explained in *US – Continued Zeroing*:

> "[T]he specificity requirement under Article 6.2 is intended to ensure the sufficiency of a panel request in 'present[ing] the problem clearly'. The identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction and allows parties to engage in the subsequent panel proceedings. Thus, the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request. …
>
> [T]he identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article

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6 Panel Report, *US – Tuna II (Mexico)*, para. 7.24

7 Panel Report, *US – Tuna II (Mexico)*, para. 7.24

6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure."[8]

26. The live issue, therefore, is not whether the panel request demonstrates the "existence and precise content" of the measures, but whether the measures are specified clearly enough for Turkey and the Panel to understand the "gist of what is at issue." To succeed with its preliminary ruling request, Turkey would ultimately have to show that its rights of defence were impaired by the way in which the EU's panel request defined the measures at issue, [9] i.e. that it could not "reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party."[10] In that respect, it is well established that a panel request is not required to set out the complainant's case in detail, or provide evidence and argument.[11]

27. Moreover, whether a panel request is sufficient to "identify the specific measures at issue" must be assessed with reference to the panel request "taken as a whole"[12] and in light of "attendant circumstances" which may include "the consultations that were held concerning the measure and the DSB's consideration of the requests for a panel and the establishment of the Panel."[13]

28. Based on this legal standard, the EU considers the identification of the measures at issue in the panel request to be irreproachable. It is difficult to believe that Turkey had any real issues in understanding which measures are at issue. Instead, as already explained above, Turkey's preliminary ruling request appears to be a litigation technique, aimed at delay and distraction.

29. To recall, the panel request begins by stating which three measures are at issue: the localisation requirement, the import ban on localised products and the prioritization measure. Each of these three measures is discussed in a separate section of the panel request, and each of those sections contains a sub-section entitled "Identification of the specific measure at issue". In these sub-sections, the three measures at issue are identified in accordance with Article 6.2. To take the example of the localisation requirement, section 1.1 of

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8 Appellate Body Report, *US – Continued Zeroing*, paras. 168 -169.

9 Panel Report, *Colombia – Ports of Entry*, para. 7.35.; Panel Report, *US – FSC (Article 21.5 – EC II)*, paras. 7.72 -7.74. Panel Report, *Japan – Film*, para. 10.8.

10 Panel Report, *Japan – Film*, para. 10.8.

11 For example, Appellate Body Report, *EC – Bananas III*, paras. 141-143; Panel Report, *EU – Energy Package*, para. 7.152.

12 Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 149-152.

13 Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.143-144 and fn 1984.

the panel request explains inter alia the measure's objective, operation (including the use of commitments by companies), consequences (including notably the link to the reimbursement scheme and the possibility of exclusion from reimbursement for imported products), the fact that it is ongoing, and that it is periodically adapted.

30. Apart from these three sections, the identification of the three measures is further bolstered by a detailed list of "legal and other instruments" which, the EU claims, all ("considered alone or in any combination") put in place, evidence, implement and administer each of those three measures. Turkey may disagree, and of course the Panel may also disagree, that a particular instrument contained in that list is relevant evidence, or that it implements each of the three measures. This would, however, be an evidentiary issue, unrelated to the sufficiency of the panel request. Importantly, as the EU will discuss further below, for the purposes of Article 6.2 of the DSU, the EU was not even required to provide any list of "legal or other instruments."

31. In the EU's view, therefore, it is clear on the face of the panel request that there is no inconsistency with Article 6.2 of the DSU.

32. Furthermore, while Turkey's request is limited to the panel request itself, it is useful to note how closely the EU's first written submission hews to the definition of the measures at issue set by the panel request. It addresses the same three measures, defined in the same way - indeed, to a significant extent using precisely the same language – and by reference to substantially the same set of legal and other instruments.[14] This confirms that there is no inconsistency or vagueness in the EU's definition of the measures.

33. In addition, Turkey's assertion that it does not understand the nature and content of the localisation requirement loses all credibility when one takes into account the "attendant circumstances" of the EU's panel request. It is a matter of public record that the EU and other Members repeatedly raised concerns with that very measure in several meetings of the TRIMs Committee.[15] The EU also repeatedly discussed that measure in bilateral exchanges with representatives of the Turkish government.[16] These discussions show that Turkey clearly

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[14] Sections 2.2.2, 3.1 and 3.2. See in particular EU's FWS, paras. 6-8.

[15] See the minutes of the meetings of the Committee on Trade-Related Investment Measures held on 6 November 2017, 1 June 2018, and 17 October 2018 (respectively G/TRIMS/M/43, G/TRIMS/M/44, and G/TRIMS/M/45).

[16] For example, when replying to a letter from the EU Commissioner for Trade dated 5 April 2017, the Turkish Minister of Economy stressed that the "localisation policy" with which the EU is concerned "is carried out as an element of the 10th Development Plan of the Government." (Exhibits EU-28 and EU-29)

understood the measure that is being challenged, and never disputed its existence. Instead, Turkey has confirmed that it understands which measure is at issue, that the measure exists, and has sought to argue that it is WTO-consistent. It is disingenuous for Turkey to plead now ignorance of that measure, or to claim that it is unable to prepare its defence.

3.2 Not describing the measures at issue as "written" or "unwritten" does not make the panel request inconsistent with Article 6.2 of the DSU

34. Turkey alleges that the EU's panel request is inconsistent with Article 6.2 of the DSU because it does not indicate whether the three measures at issue are written or unwritten.

35. Unwritten measures may, of course, pose evidentiary complexities.[17] However, there is no requirement for panel requests to indicate whether a measure is written or unwritten. In fact, there is no requirement to categorise measures as either written or unwritten at any point in WTO proceedings. The DSU does not provide for such a requirement, and no previous panel has suggested that such a requirement exists. Turkey cites to no authority in support of its argument.

36. To be clear, the EU has not categorised any of the three measures at issue as "unwritten" in the panel request or in its first written submission. This does not exclude that the measures may in some instances be put into effect without relying on written instruments. For example, in the context of the localisation requirement it is possible that localisation commitments may be required from companies, and provided, in oral exchanges. This would not make the measure as a whole "unwritten", nor would it mean that the panel request should state that the measure is "unwritten".[18]

3.3 The panel request was not required to identify the products at issue, and in any event it identifies those products

37. Turkey next argues that the panel request fails to identify with sufficient precision the content of the measures at issue because it does not identify the "products that are the subject of the measures" and the "requirements concerned".

See also the letter from the Permanent Delegation of Turkey to the European Union of 29 November 2018, no. B/225 (Exhibit EU-42), and the letter from the Ministry of Health to the EU's Delegation to Turkey in reply to the letter from the Delegation of the EU, 20 April 2016 (Exhibit EU-58).

17 Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 792-794.

18 To recall, even with respect to the question of the existence of a measure, the Appellate Body has explained that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant." Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

38. The EU will first address Turkey's claim as it relates to the products at issue.

39. It is well established in the jurisprudence that Article 6.2 does not require the identification of the products at issue, unless this is necessary in order to identify the measure(s) at issue.

40. As the Appellate Body explained in *EC – Chicken Cuts*:

> "Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the measure at issue that generally will define the product at issue. there is no separate requirement to define the products, services, or sectors at issue, even though this may in some circumstances be necessary to define the measure."[19]

41. Even if it was somehow necessary to separately specify the products at issue, previous panels have held that references to product categories are perfectly sufficient, even if relatively broad. Thus, for example:

- in *Canada – Commercial Aircraft*, the panel recently held that a reference to "commercial aircraft" suffices, even in a dispute under the SCM Agreement in which an important issue is whether a subsidy was actually conferred with respect to particular models of aircraft;[20]
- the panel in *Korea - Commercial Vessels* considered a reference to "commercial vessels" to be sufficiently specific in identifying the products at issue;[21]
- In *US – FSC*, the panel found a reference to "all agricultural products" to be sufficiently specific for the purposes of fulfilling the requirements of Article 6.2 of the DSU;[22]
- the "civil aircraft sector" was a sufficiently specific reference in *Canada – Aircraft*.[23]

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19 Appellate Body Report, *EC – Chicken Cuts*, para. 165.

20 Preliminary Ruling of the Panel of 9 April 2018, *Canada – Commercial Aircraft*, (WT/DS522/12), paras. 3.8 – 3.15.

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

22 Panel Report, *US – FSC*, para. 7.29

42. In *EC – Computer Equipment*, the Appellate Body considered that a "generic" reference to a "commercial term which is readily understandable in the trade", such as "all types of LAN equipment" and "PCs with multimedia capability", sufficed to comply with the specificity requirement, and did not prejudice the respondent's due process rights, regardless of the fact that there may be a disagreement between the parties regarding the "exact definition and precise product coverage" of those terms.[24] The Appellate Body reasoned as follows:

> "[I]f the EC arguments on specificity of product definition are accepted, there will inevitably be long, drawn-out procedural battles at the early stage of the panel process in every proceeding. The parties will contest every product definition, and the defending party in each case will seek to exclude all products that the complaining parties may have identified by grouping, but not spelled out in 'sufficient' detail."[25]

43. With its complaint concerning the allegedly insufficient identification of the products at issue, Turkey appears to be making precisely the kind of argument that the Appellate Body warned against. What is more, Turkey does so without ever explaining why it thinks it was necessary to spell out the products that are (or could be) at issue in greater detail than as "pharmaceutical products." At no point does Turkey explains why it would be necessary to "know precisely" which specific pharmaceutical products are at issue in order to identify the specific measure at issue.[26] Turkey alleges that the product definition is insufficient because "specific legal instruments" have not been identified "with respect to each measure". Apart from the fact that this assertion is incorrect (as will be discussed below), Turkey does not explain why it thinks that these issues are connected at all.

44. The very title of this dispute, as well as approximately 25 references in the panel request, make clear that the products at issue are pharmaceutical products. The panel request refers to "certain" pharmaceutical products in respect of the application of the measures at issue (for example, "once a foreign producer has localised production of a certain pharmaceutical product pursuant to the localisation requirement, applied in conjunction with the Turkish

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23 Panel Report, *Canada – Aircraft*, paras. 9.36-9.37.

24 Appellate Body Report, *EC – Computer Equipment*, paras. 67-68 and 70. 81 See also Panel Report, *Canada – Aircraft Credits and Guarantees*, para.7.40, where the Panel found that the term "export credits" was "readily understandable" in the context of a dispute under Article 3.1(a) of the SCM Agreement.

25 Appellate Body Report, *EC – Computer Equipment*, para. 71.

26 Turkey's request for a preliminary ruling, para. 28.

rules for approving the importation and marketing of pharmaceutical products, that product can no longer be imported"). Given the legal standard explained above, these clear and repeated references to "pharmaceutical products" would be more than sufficient, even if it was necessary to separately identify the products at issue (*quod non*).

45. It is therefore especially hard to understand what sort of product definition Turkey thinks was necessary. Indeed, the reference to "pharmaceutical products" is as specific as the measures themselves. As explained in section 2.2.2 of the EU's first written submission, the localisation requirement is concerned with pharmaceutical products. It has so far been applied to a number of pharmaceutical products, and may be applied to any number of pharmaceutical products in the future. Thus, the only way for the panel request to be more specific would have been to provide a list of individual pharmaceutical products to which the measure has been applied, as well as those to which it may be applied in the future. Even if such a list could have been compiled, it would be entirely unnecessary, not just for the purposes of the panel request but even for the purposes of deciding on the EU's claims. In particular, whether or not the localisation requirement is inconsistent with Article III:4 of the GATT 1994 does not hinge on how many individual products the measure was applied to.

46. Turkey next asserts that the EU's description of the localisation requirement "fails to identify what the requirements of "localisation" imply and what covers the "commitments to localise", which further makes it "impossible" for Turkey to identify the specific measure at issue.[27]

47. If something is difficult to understand, it is Turkey's argument, not the EU's panel request. Under the heading "The localisation requirement", subsection 1.1. ("Identification of the specific measure at issue") of the panel request explains that Turkey "requires foreign producers to commit to localise in Turkey their production of certain pharmaceutical products". Furthermore, the panel request states:

> "[i]n order to comply with the above described localisation requirement (the "localisation requirement"), certain producers of pharmaceutical products commit to localise their production of certain pharmaceutical products in Turkey. In those cases where foreign producers do not give the required commitments to localise (or where their offered commitments are

[27] Turkey's request for a preliminary ruling, para. 29.

rejected, or are considered not to be fulfilled, by the Turkish authorities), the pharmaceutical products concerned are no longer reimbursed. The localisation requirement is designed to apply on an ongoing basis, or at least until the localisation objectives established by the Turkish government are achieved. The localisation requirement is periodically adapted, modified, updated or extended with respect to, *inter alia*, the products it applies to and/or the extent of localisation sought.

The specific commitments to be implemented in order to comply with the localisation requirement are established for each foreign producer in a non-transparent manner and may differ from producer to producer."

48. Thus, "localisation" is a requirement, because it is imposed or required by Turkey; what it "implies" is the production of pharmaceutical products in Turkey; "commitments to localise" that are undertaken in order to comply with that localisation requirement are therefore commitments to produce pharmaceutical products in Turkey. The EU fails to see what is not clear in this description.

49. The same applies to the "the import ban on localised products" measure.[28] Since the panel request is sufficiently specific as regards the products concerned by the localisation requirement, it is equally specific as to this measure that applies to the same products. Further, the panel request identifies the scope of the import ban (products localised in Turkey in accordance with the localisation requirement), the operation of the measure (localisation requirement in conjunction with the rules for approving the importation and marketing of pharmaceutical products) and its consequences (importation of that pharmaceutical product is no longer permitted).

50. As regards the prioritization measure, Turkey complains that the wording "certain cases" fails to identify the cases where Turkey would give priority to the review of applications of domestic pharmaceutical products.[29]

51. However, as explained below (para. 73), the panel request sufficiently specified that this measure concerns "certain cases where imported products are not excluded from the reimbursement scheme by virtue of the localisation requirement". The only way for the panel request to be *more* specific would have been to provide a list of individual pharmaceutical products that *are*/*will* (be) excluded from the reimbursement scheme by virtue of the localisation

[28] Turkey's request for a preliminary ruling, para. 31.

[29] Turkey's request for a preliminary ruling, para. 32.

requirement. However, as explained in the context of the localisation measure, such list is entirely unnecessary, not just for the purposes of the panel request but even for the purposes of deciding on the EU's claims. Finally, it has to be recalled that a panel request is not required to identify "specific aspects" of the "specific measures".[30]

3.4 *The Panel Request is not inconsistent with Article 6.2 because of an alleged failure to "identify with sufficient precision the legal instruments underpinning each of the measures at issue"*

52. It is well-established in the jurisprudence that measures do not need to be defined in terms of specific legal instruments. Indeed, previous panels have found that, regardless of the reference to the legal instrument, "requirements" that have been set out in the panel request are within their terms of reference. For purposes of Article 6.2, what matters is how the measures are described in substantive terms. As the panel in *Argentina – Footwear (EC)* explained:

> "In the dispute before us, while the EC's panel request does cite the numbers of resolutions (226/97 and 987/97) and the promulgations in Argentina's Official Journal that imposed the provisional and the definitive measures, respectively, we consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. "[31]

53. To list a few examples, in *Colombia – Ports of Entry*, the panel found the specificity requirement to have been fulfilled because the panel request " makes clear that the measure at issue is the use of 'indicative prices', which 'apply to specific goods from all countries except those with which Colombia has signed free trade agreements' for the purpose of determining the value of those goods to be used as the basis for levying (a) import duties and (b) sales tax."[32]

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30 Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2. See also Panel Report, *Russia — Railway Equipment*, para. 7.100

31 Panel Report, *Argentina – Footwear (EC)*, para. 8.40

32 Panel Report, *Colombia – Ports of Entry*, para. 7.24.

54. Similarly, in *China – Publications and Audiovisual Products*, the Panel based its assessment on whether or not the "requirements" at issue were clearly identified in the narrative section of the panel request.[33]

55. In *EC – Bananas III*, the panel found a general reference to EU legislation dealing with the importation, sale and distribution of bananas to be sufficient, even when no explicit list of those legal instruments was provided.[34]

56. The panel request in this dispute, on page 1, introduces the list of legal and other instruments as follows:

> "The measures at issue are the localisation requirement, the import ban on localised products and the prioritization measure as explained below. They are put in place and evidenced by, and are implemented and administered through, *inter alia,* the following legal and other instruments, considered alone and in any combination."

57. It is clear from this phrase that all three measures, i.e. each of them, are put in place, as well as evidenced by, as well as implemented and administered through, the legal and other instruments listed immediately below the phrase, considered alone and in any combination. It is also clear that the list is not exhaustive.

58. In that regard, the EU recalls that there is no requirement to list the legal or other instruments that may be relevant to, or connected, to a measure. Nor is there a requirement to refer to any evidence in the panel request.[35] Instead, what matters for the purposes of Article 6.2 is how the complainant conceptualises and describes the measure at issue. If there is in fact no measure, or the measure differs from that description, that could become an evidentiary issue for the Panel during the proceedings, but it is not an issue of jurisdiction.

59. Given that there is no requirement to identify all the legal and other instruments relevant to each measure, the EU submits that the panel request would have been sufficient from the point of view of Article 6.2 of the DSU even if the list was entirely omitted. In providing that list, the EU went beyond the requirements of Article 6.2 of the DSU. If anything, the list provides further clarity and specificity to the EU's panel request. Contrary to Turkey's

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33 Panel Report, *China – Publications and Audiovisual Products*, para. 7.104.

34 Panel Reports, *EC – Bananas III*, para. 7.27

35 Panel Report, *EU – Energy Package*, para. 7.152, "Article 6.2 of the DSU does not require that evidence a complainant relies on in advancing its claims be included in a panel request."

assertions, the fact that the list of instruments is relatively long improves rather than detracts from the identification of the measures at issue. In any event, this multiplicity of legal and other instruments is Turkey's creation, not the EU's.

60. Turkey's argument seems to flow from the following assertion:

> "[W]hether a panel request which challenges different measures identifies those measures with sufficient precision may depend on whether it is sufficiently clear which sources or evidence listed in the panel request relate to each challenged measure."[36]

61. As support for this, Turkey cites the Appellate Body Report in *China – Raw Materials*. However, in the paragraph cited by Turkey (para. 220), the Appellate Body stated as follows:

> "whether a panel request challenging a number of measures on the basis of multiple WTO provisions sets out 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly' may depend on whether it is sufficiently clear which 'problem' is caused by which measure or group of measures".

62. The Appellate Body was dealing with an entirely different question: whether the legal basis of the complaint was identified with sufficient clarity. It did not address the specification of the measures at all. Much less did it suggest that each measure identified in the panel request must be connected to certain "sources" or "evidence". Such a reading would be incorrect as a matter of law.[37] Rather, the point of the cited paragraph is simply that it must be clear which claim ("problem") pertains to which measure at issue. This is certainly the case here, since the panel request contains a separate section for each of the three measures at issue, with separate sub-sections identifying the measures at issue and the claims raised against those measures.

63. Turkey also makes much of the Appellate Body's discussion of the alleged "total prohibition" measure in *US – Gambling*. Turkey misunderstands or misrepresents the Appellate Body's findings. The Appellate Body did not find that, in addition to identifying measures, it is also necessary to identify the sources of measures in the panel request. Rather, it discussed the distinction between measures at issue and the impairment of benefits under the covered

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[36] Turkey's request for a preliminary ruling, para. 35

[37] Panel Report, *EU – Energy Package*, para. 7.152, "Article 6.2 of the DSU does not require that evidence a complainant relies on in advancing its claims be included in a panel request."

agreements, explaining that impairment is the effect of the measure, and that the measure is the source of the impairment. In the specific circumstances of that dispute, the measure was defined solely in terms of the effects of the respondent's action, i.e. the alleged impairment of benefits ("the total prohibition"). What was missing from that panel request, according to the panel and the Appellate Body, was the identification of a measure that produced that effect, i.e. that was the "source" of the impairment.[38]

64. This problem does not present itself in this case. The EU has identified the three measures at issue as the localisation requirement, the import ban on localised products and the prioritisation measure. Neither of these measures is described simply in terms of an "effect" or in terms of an impairment of benefits. Instead, with respect to each of them it is very clear which "actions" by Turkey are the subject of the EU's challenge.

65. Thus, the Appellate Body in *US - Gambling* did not find that Article 6.2 requires, in all cases, the identification of the "sources" of the measures at issue. Nor did the Appellate Body suggest that such a requirement exists in all cases in which a measure consists of, or is related to, multiple legal instruments. Instead, it was addressing a case-specific problem that does not arise in this dispute.

66. Turkey argues that "the import ban on localised products" is described as "the effect" of the combined application of the localisation measure with the Turkish rules for approving the importation and marketing of pharmaceutical products, thus failing to identify the sources of the alleged "import ban".[39] In Turkey's view, the reference to the "rules for approving the importation and marketing of pharmaceutical products" is rather vague and does not amount to an identification of the "precise source" of the alleged import ban.[40]

67. Yet, as explained above (para. 49), the panel request sufficiently identifies the import ban on localised products as the specific measure at issue. The panel request is very clear which "actions" are challenged by the European Union and does not describe the import ban in terms of an "effect". Turkey's request for an identification of the "precise source" of the alleged import ban is, as explained above, not supported by the case law.

3.5 The Panel Request is not inconsistent with Article 6.2 because of an alleged failure to "identify with sufficient precision the "as such" or "as applied" character of the prioritization measure

[38] Appellate Body Report, *US – Gambling*, paras. 120-125.
[39] Turkey's request for preliminary ruling, para. 39.
[40] Turkey's request for preliminary ruling, para. 43.

68. Turkey submits that it is unclear whether the European Union challenges the prioritization measure "as such" or "as applied in certain cases" because of the wording "certain cases" in the panel request.[41]

69. In this case, the panel request identified with clarity that the challenged measure is the prioritization measure 'as such' and not the application of this measure.

70. While the panel request did not use the term 'as such' in the description of the prioritization measure, this does not preclude the European Union from making an "as such" challenge, provided that Turkey is in no doubt that an "as such" challenge is intended.[42]

71. The description in the panel request of the prioritization measure unambiguously shows that it was challenged as a measure that has general and prospective application ("gives priority to the review of applications…over the review of the applications of like imported products…") and not as one or more specific instances of the application of such a measure.

72. Turkey selectively reads the wording "certain cases" to argue that the challenge may be "as applied", thus preventing it from identifying the measure at issue.[43]

73. However, the full wording at issue "even in certain cases where imported products are not excluded from the reimbursement scheme by virtue of the localisation requirement" simply specifies that imported products that still benefit of the reimbursement scheme (for example, because they fall outside of the localisation requirement or localisation commitments were offered) are discriminated compared to domestic like products as regards the review of applications for inclusion in the reimbursement scheme and pricing and licensing policies and processes. This wording does not refer to specific instances of application but merely delineates the scope of the prioritization measure.

3.6 Turkey's challenge to future claims that the EU "may make", as well as to the use of the terms "through which Turkey implements and administers the measures at issue" and "implementing measures or any other related measures" must be rejected

74. Turkey objects to the use of the following terms in the panel request: "other instruments through which Turkey implements and administers the measures at

41 Turkey's request for preliminary ruling, paras. 45-46.

42 Panel Report, *EC — Selected Customs Matters*, para. 7.62.

43 Turkey's request for preliminary ruling, para. 46.

issue" and "implementing measures or any other related measures". Turkey asks the Panel to rule that any claims that the European Union "will make" with respect to either of those categories are outside the Panel's terms of reference.

75. As a preliminary matter, the EU considers that the Panel cannot meaningfully decide whether or not any hypothetical claims that the European Union may or may not make in the future are outside its terms of reference. If and when Turkey considers that the EU has made a claim against a measure that is not covered by the terms of its panel request, the Panel could decide that question by comparing the panel request with the relevant claim. Unless it concerns a specific claim against a specific measure, Turkey's jurisdictional objection is simply without object. This part of the request should therefore be rejected outright.

76. What Turkey seems to be challenging is the use of certain terms in the panel request, *per se*. The EU is not aware of any case in which the use of certain terms, however imprecise, led to a panel request being considered insufficiently specific, or to a certain claim being outside the terms of reference. Article 6.2 calls for the assessment of the panel request as a whole, and in light of the attendant circumstances. It does not call for the *ex ante* condemnation of particular words or phrases.

77. The terms "other instruments through which Turkey implements and administers the measures at issue" refer to a residual category at the end of a non-exhaustive list of legal and other instruments through which the three measures at issue are put in place, evidenced by, and through which they are implemented and administered. It explicitly includes "presentations made by Government officials and letters or other documents making requests, communicating decisions or imparting instructions addressed by the Turkish authorities to individual companies exporting pharmaceutical products to Turkey (or importing pharmaceutical products in Turkey)." Thus, these terms do not indicate a challenge to any measures at issue other than the three identified in the panel request and in the first written submission. As for Turkey's assertion that there is an inconsistency with Article 6.2 because this term does not sufficiently identify the "sources" or the "evidence" of the measures at issue, the EU refers to its explanations above.

78. As for the reference to "implementing measures or any other related measures", the EU notes that this type of language is commonly used in panel requests. In itself, it is unproblematic. Of course, had Turkey identified a

particular measure that the EU has sought to bring within the scope of this dispute by reference to that phrase (*quod non*), the parties could have had a discussion on whether or not that phrase sufficiently covers *that* measure. But Turkey's complaint is different: Turkey takes issue with the phrase itself.

79. Such a complaint is clearly not supported by the jurisprudence. It has previously been found, for example, that "amendments and other related measures" fall within the terms of reference as long as the panel request is drafted in a way that does not prevent that.[44] Similarly, it has been found that "the phrase "any amendments or extensions and any related or implementing measures"… "may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified."[45] In *EC – Trademarks and Geographical Indications (Australia)*, Australia's reference to "related implementing and enforcement measures" was found to be an adequate way of identifying a "large group" of measures.[46]

80. Thus, not only is the use of phrases such as "implementing measures or any other related measures" permissible, but it may suffice to bring within the terms of reference certain measures that have not been explicitly listed in the panel request. Whether it does so depends on the specific measure. In any event, a hypothetical challenge against the mere use of such terms is a dead end.

4. THE EUROPEAN UNION HAS PROVIDED A SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

81. Turkey alleges that the European Union "has failed to properly identify in its Panel Request the legal basis of the complaint sufficient to present the problem clearly in connection with its claims under Article X:1 of the GATT 1994 and Article 3.1(b) of the SCM Agreement with respect to the 'localisation requirement' measure"[47]. Consequently, according to Turkey, "these two claims should be found by the Panel to be outside its terms of reference"[48].

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44 Appellate Body Report, *Chile – Price Band System*, para. 138 ("if the terms of reference in a dispute are broad enough to include amendments…").

45 Panel Report, *EC – IT Products*, para. 7.140.

46 Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.

47 Turkey's request for a preliminary ruling, para. 68.

48 *Ibid*.

82. As explained below, the European Union did provide in the Panel request an adequate summary of the legal basis for its claims under Article X:1 of the GATT 1994 and Article 3.1(b) of the SCM Agreement. The Panel, therefore, should find that those two claims are properly within its terms of reference and reject Turkey's request.

4.1 The requirements imposed by Article 6.2 DSU with regard to the "legal basis of the complaint"

83. The Appellate Body has explained that the reference in Article 6.2 of the DSU to the "legal basis of the complaint" "refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated".[49]

84. The identification of the treaty provision claimed to have been violated by the respondent is a "minimum prerequisite"[50]. Exceptionally, there may be situations in which the mere listing of treaty articles would not satisfy the standard of Article 6.2 of the DSU. In particular, according to the Appellate Body, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[51]

85. Article 6.2 demands only a "brief summary" of the legal basis of the complaint. The Appellate Body has clarified that the "brief summary" of the legal basis of the complaint required by Article 6.2 of the DSU "aims to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question."[52] However, the phrase "how or why" does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU.[53]

86. According to the Appellate Body, in order to "present the problem clearly", a panel request "must plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged inconsistency of the measures at issue with the covered agreements".[54]

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49 *See* Appellate Body Report, *EC–Selected Customs Matters*, para. 130.

50 Appellate Body Report, *Korea –Dairy*, para. 124

51 Appellate Body Reports, *China–Raw Materials*, para. 220.

52 Appellate Body Report, *Russia – Railway Equipment*, para. 5.28.

53 Appellate Body Report, *Korea — Pneumatic Valves (Japan)*, para. 5.7.

54 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

87. At the same time, however, "the requirement to present the problem clearly does not entail an obligation for the complainant to provide arguments in support of its claim"[55] A "claim" is an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[56] On the other hand, an "argument" comprises the statements made in support of a claim to demonstrate that a responding party's measure infringes an identified treaty provision[57]. These statements are "set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties"[58].

88. The Appellate Body has further clarified that Article 6.2 of the DSU "does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the applicability of a given covered agreement"[59]. According to the Appellate Body,

> "These provisions are not directly part of the 'legal basis of the complaint', for they are not 'claimed to have been violated by the respondent'. Instead, the fact that a panel request contains claims of violation under the substantive provisions of a covered agreement logically presupposes that the complainant considers that such provisions are applicable and relevant to the case at hand. […]
>
> Where a measure is not subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's consistency with that agreement. The examination regarding the 'applicability' of certain provisions logically precedes the assessment of a measure's 'conformity' with such provisions. Indeed, as noted by the Appellate Body, a panel may be required to 'determine whether a measure falls within the scope of a particular provision or covered agreement before proceeding to assess the

55 Appellate Body Report, *Russia – Railway Equipment*, para. 5.28.
56 Appellate Body Report, *Korea – Dairy*, para. 139. *See also* Panel Report, *Egypt – Steel Rebar*, para. 7.58
57 Appellate Body Report, *Korea–Dairy*, para. 139
58 Appellate Body Report, *Korea – Dairy*, para. 139. *See also* Panel Report, *Egypt – Steel Rebar*, para. 7.58
59 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.30

consistency of the measure' with that provision or covered agreement."[60]

4.2 Claim under Article X:1 of the GATT 1994

89. Turkey submits that, by referring vaguely to "certain elements, terms and conditions of general application of this measure", the Panel Request does not explain "how" or "why" the measure at issue is considered by the European Union to be inconsistent with Article X:1 of the GATT 1994. This is compounded by the fact that the measure has been defined in vague terms, without reference to any specific legal instrument(s).[61]

90. The European Union disagrees with Turkey's position that it could not understand the problem at issue without precise references to the relevant elements of the localisation requirement.

91. The case law established that requests for establishment do not require the "specific aspects" of the "specific measures" to be identified.[62]

92. Moreover, Article X:1 provides a distinct, not multiple, obligation: it requires that customs laws, regulations etc. should be published "in such a manner as to enable governments and traders to become acquainted with them".

93. In this case, the panel request identifies the measure at issue. It does so with sufficient clarity to allow a reader to discern that the challenged measure is the requirement that foreign producers commit to localise in Turkey their production of certain pharmaceutical products.

94. The panel request also provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" by claiming that Turkey failed to publish (in line with Article X:1 of the GATT 1994) certain elements, terms and conditions of the general application of localisation requirement measure.

95. The amount of detail that Turkey considers necessary would require the European Union to develop arguments in addition to setting out the claims. Indeed, Turkey seems to expect the European Union's panel request to describe the precise and specific manner in which certain elements, terms and conditions of the localisation requirement, not the measure itself, are inconsistent with

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60 Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.30-5.31. Footnotes omitted.

61 Turkey's request for a preliminary ruling, para. 60.

62 Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2. See also Panel Report, *Russia — Railway Equipment*, para. 7.100

Article X:1. Article 6.2 requires that the claims – not the arguments – be set out in a panel request in a way that is sufficient to present the problem clearly.

4.3 Claim under Article 3.1(b) of the SCM Agreement

96. Turkey alleges that the Panel request fails to comply with Article 6.2 of the DSU in connection with the claim under Article 3.1(b) of the SCM Agreement in two respects.

97. In the first place, Turkey contends that "it is unclear what is the measure at issue in the context of this claim"[63] and that "to the extent that the measure is or comprises the reimbursement scheme operated by the Turkish social security system, the European Union should have clearly identified it as one of the measures being challenged"[64].

98. This allegation is groundless and, moreover, disingenuous. The Panel request refers to, and describes in sufficient detail, both the Reimbursement Scheme and the Localisation Requirement, and how the two interact with each other[65]. The Panel request makes it very clear that the European Union does not challenge the Reimbursement Scheme *per se*, either under Article 3.1 (b) of the SCM Agreement or under any other WTO provision. Instead, the Panel request states that the Reimbursement Scheme confers a subsidy and that the Localisation Requirement makes the granting of that subsidy prohibited by Article 3.1(b) of the SCM Agreement. This has been well understood by Turkey, which in its request for a preliminary ruling notes that "the localisation requirement appears to be an element which renders the granting of the subsidy contingent upon the use of domestic over imported pharmaceutical goods". Since it is that "element" which violates Article 3.1(b) of the SCM Agreement, far from being necessary in order to "present the problem clearly", it would have been inaccurate and misleading to identify the Reimbursement Scheme as "one of the measures being challenged", separately from the Localisation Requirement.

99. Second, Turkey contends that the European Union "does not explain 'how' or 'why' the Turkish social security system involves the 'granting of a subsidy'"[66]. More precisely, according to Turkey, the European Union was required to specify which type of "financial contribution" is involved, among those described

63 Turkey's request for preliminary ruling, para. 63.

64 *Ibid*.

65 *See* section 1.1 of the Panel request.

66 Turkey's request for preliminary ruling, para. 64

in Article 1.1 of the SCM Agreement, and who are the "beneficiaries" of the subsidy.

100. Turkey's objections are, again, clearly without merit.

101. The sole legal basis for this claim is Article 3.1(b) of the SCM Agreement. That provision does not stipulate "multiple" and different obligations, depending on who is the beneficiary of the subsidy, or on what type of financial contribution is involved in each case. Article 3.1(b) of the SCM Agreement contains just one single obligation: it prohibits all subsidies that are contingent upon the use of domestic over imported goods, regardless of the specific type of financial contribution and of who is the beneficiary in each case.

102. Article 1.1 of the SCM Agreement is a definitional provision. The mere fact that a Member may provide subsidies that fall within the scope of Article 1.1 does not place that Member in contravention of the SCM Agreement. Therefore, Article 1.1 of the SCM Agreement is not, and cannot be, part of the "legal basis" of the complaint within the meaning of Article 6.2 of the DSU.

103. As confirmed by the case-law of the Appellate Body cited above, Article 6.2 of the DSU does not require that "a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the applicability of a given covered agreement"[67].

104. Accordingly, the European Union was not required by Article 6.2 of the DSU to cite a definitional provision such as Article 1.1 of the SCM Agreement, let alone any of its subparagraphs.

105. Turkey's allegations fail to recognise the distinction between claims made in a panel request and the arguments that must be made in support of those claims in subsequent submissions during the course of a proceeding.

106. The precise reasons why the European Union considers that the Reimbursement Scheme confers a subsidy within the meaning of Article 1.1 of the SCM Agreement is part of the EU's arguments in support of its claim under Article 3.1(b) of the SCM Agreement, rather than constituent elements of that claim.

107. The European Union recalls that the objection raised by Turkey is essentially the same raised by Canada in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* [68]. The Panel in that case rejected Canada's objection in a

[67] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.30.

[68] Preliminary Ruling by the Panels, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 17-25.

comprehensive and cogent manner. The European Union, therefore, would invite the Panel to follow the reasoning of the panel in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* and reject Turkey's objection in this case on analogous grounds.

5. CONCLUSION

108. For the foregoing reasons, the EU submits that Turkey's request for a preliminary ruling must be rejected.