

***TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION,
IMPORTATION AND MARKETING OF PHARMACEUTICAL PRODUCTS***

(DS583)

**COMMENTS OF THE UNITED STATES
ON TURKEY’S PRELIMINARY REQUEST**

June 12, 2020

1. The United States thanks the Panel for the opportunity to provide comments on Turkey’s request for preliminary findings by the Panel (“preliminary ruling request”) and makes this submission because of its systemic interest in the correct interpretation of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

2. In its request for a preliminary findings, Turkey asserts that the panel request of the European Union fails to meet the requirements of Article 6.2 of the DSU with respect to certain claims because it does not provide an explanation of the legal bases of its claims “sufficient to present the problem clearly.”¹ Turkey argues that the obligation under Article 6.2 “is to explain succinctly *how or why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question.”² In its request, Turkey submits that the European Union’s panel request fails to explain “how or why” the localization requirement measure at issue is inconsistent with Article X:1 of the *General Agreement on Tariffs and Trade* 1994 (GATT 1994) and Article 3.1(b) of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).³ Turkey concludes that this failure means that the European Union has not met its obligation under Article 6.2 of the DSU and therefore those claims should be found to be outside the terms of reference of the panel.⁴

3. Article 6.2 of the DSU sets forth the requirements for a request for the establishment of a panel to bring a “matter” (in the terms of Article 7.1 of the DSU) within a panel’s terms of reference. In relevant part, Article 6.2 of the DSU provides that a request to establish a panel:

[S]hall indicate whether consultations were held, identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4. The relevant text of Article 6.2 is that a panel request shall “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” Neither of the terms “how” nor “why” appears in Article 6.2. Instead, to provide the brief summary required by Article 6.2, it is sufficient for a complaining Member to specify in its panel request the legal claims under the WTO provisions with respect to the identified measures.

5. According to the text, two basic requirements in Article 6.2 are that the panel request (1) identify the specific measure at issue and (2) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. To provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, the panel request need only specify the legal claims under the WTO provisions that it considers are breached by the identified measure.⁵ Article 6.2 does not require that a panel request include arguments. Instead,

¹ Turkey’s request for a preliminary ruling, Section V.

² Turkey’s request for a preliminary ruling, para. 57 (emphasis in original).

³ Turkey’s request for a preliminary ruling, paras. 60, 64.

⁴ Turkey’s request for a preliminary ruling, para. 68.

⁵ See *Argentina – Import Measures (AB)*, para. 5.39 (noting that a panel request meets the element of DSU 6.2 to “present the problem clearly” by connecting the challenged measure with the provisions claimed to have been infringed).

the DSU indicates that a complaining party’s arguments are to be made in the submissions, oral statements, and other filings with a panel.⁶

6. Past references in Appellate Body reports of a requirement to explain “how” or “why” a measure is inconsistent were unsupported by the text of Article 6.2. Under the Appellate Body’s approach, a complaining party would be required to include in a panel request the arguments that the complaining party will present to the panel regarding each claim of inconsistency with a provision of a covered agreement.⁷ But Article 6.2 plainly does not require the inclusion of arguments in a panel request.

7. Before the Appellate Body read these requirements into Article 6.2, this provision had never been understood this way. It is notable that the text for Article 6.2 was drawn from, and does not differ materially from, the 1989 GATT Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. These Montreal Rules provided: “The [panel request] shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis for the complaint sufficient to present the problem clearly.”⁸

8. The fact that the Article 6.2 language comes from the Montreal Rules suggests that its incorporation in the DSU was not meant to change the standard that would be applied to panel requests. Panel requests subsequent to the Montreal Rules did not include an explanation of “how or why” the measure at issue was inconsistent with the GATT 1947 provision at issue. Rather, GATT panel requests identified the relevant GATT legal provision, or one of its obligations. The practice of Contracting Parties under the GATT 1947 with respect to panel requests therefore also demonstrates that the “how or why” approach is in error.

9. A panel recently attempted to faithfully apply the “how” or “why” approach of the Appellate Body to a panel request, and in so doing, rejected several claims as outside its terms of reference.⁹ The complaining party appealed, arguing that the panel had effectively required that it present the arguments supporting its claims that certain legal provisions were breached, and the appellate report reversed the panel’s application of the Appellate Body’s own approach. The appellate report stated that “the reference to the phrase ‘how or why’ in certain past disputes does not indicate a standard different from the requirement that a panel request include a ‘brief summary of the legal basis ... sufficient to present the problem clearly’ within the meaning of Article 6.2 of the DSU.”¹⁰ The United States would agree that Article 6.2 – and not a requirement without textual basis – presents the legal requirements for a panel request, and Article 6.2 does not require a complaining party to explain “how” or “why” a measure breaches an identified WTO commitment.

⁶ See, e.g., DSU Appendix 3, para. 4: “Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.”

⁷ The dictionary definition of “how” is “in what way or manner” and of “why” is “the reason for which”. In the context of a claimed breach of a legal provision, the answer to each question requires an explanation or argument.

⁸ GATT, *Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989*, L/6489, 13 April 1989, Section F(a) (“Montreal Rules”).

⁹ *Korea – Pneumatic Valves (Panel)*, para. 8.1.

¹⁰ *Korea – Pneumatic Valves (AB)*, para. 5.12.

10. The United States appreciates the opportunity to submit its views on Turkey's request.