

ANNEX A

Responses of the United States to Mexico's request for a preliminary ruling

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RESPONSES OF THE UNITED STATES

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III. THE REQUIREMENTS OF DSU ARTICLE 6.2

7. Article 6.2 of the DSU requires, in relevant part, that a request for the establishment of a panel “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”.

8. Mexico’s Request contains a number of quotations from Appellate Body reports that explain this provision and emphasize its role and importance in dispute settlement. It has entirely missed, however, one aspect of these reports that is critical to the issue now before this Panel: **the key distinction between *claims* – which must be included in the panel request – and the *arguments in support of those claims* – which need not be included.** As the Appellate Body explained in *EC Bananas*:

In our view, there is a significant difference between a request for a panel to consider a claim and a request for a panel to consider a claim in support of a claim. The former need not be

11. Therefore, in evaluating claims that a panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by DSU Article 6.2, the Panel may consider the particular circumstances of the dispute, including whether the responding party has been prejudiced.

12. Mexico asserts that the US panel request (1) does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly; and (2) does not identify the “specific measure at issue” with respect to Article 366 of the FCCP, and that Mexico has thereby been prejudiced. As detailed in the sections that follow, Mexico’s objections are wrong on both counts.

IV. CONTRARY TO MEXICO’S ALLEGATIONS, THE US PANEL REQUEST PROVIDES A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

13. The first of Mexico’s complaints about the US panel request is that the request is too vague, and that it allegedly does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as Article 6.2 requires. Mexico’s complaint is groundless.

14. It is important to note at the outset that Mexico only challenges the sufficiency of the US panel request with respect to a few of the US claims.⁸ Accordingly, the United States is proceeding under the assumption that Mexico considers the other claims that it did not challenge in its preliminary ruling request as being sufficient for purposes of Article 6.2.⁹

15. With respect to the claims that Mexico does challenge, the US panel request does provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2. It both lists the specific provisions of the AD Agreement and the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) alleged to be violated, and provides, in addition, a brief textual explanation of the basis of the complaint.

16. Turning first to subsections 1(f) and (g) of the US p -75 Tf 0.Tc 0.1875 0d Trning f first clalsectionre55

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problem clearly – and the *arguments* supporting those claims. The claims must be set forth in the panel request. The arguments need not be.¹¹

18. Mexico's challenge to the US claim that the injury and causation analyses breached Article 4.1 of the AD Agreement suffers from a similar flaw.¹² Mexico does not argue that the claim should have been more specific; the request cites clearly to the first paragraph of Article 4. Mexico even concedes that the United States included a narrative description that provided further information with respect to the claim. It objects, however, that it is unable to understand which of the statements in the narrative description results in a breach of Article 4.1. Thus, its concern is with the US *arguments*, and not with the specificity of the claim itself.

19. Turning next to Mexico's objection to the US claim under Article VI of GATT 1994, it is true that Article VI has several paragraphs.¹³ However, Mexico cannot argue that it was unable to understand which paragraphs were relevant to the matters in dispute. In the US panel request, the

for the following reason: although Korea had asserted prejudice, it offered no supporting particulars and failed to demonstrate that the panel request had prejudiced its ability to defend itself during the panel proceedings.¹⁵ Mexico categorically asserts that it is prejudiced by the US panel request, but only in the vaguest and most conclusory manner.

24. Mexico's only explanation of how it has been prejudiced is its assertion that the alleged deficiencies in the panel request are impeding its ability to prepare a defence.¹⁶ It has failed completely, however, to provide any supporting particulars as to why this is so. Moreover, its assertion is contradicted by the facts, since Mexico's first written submission contains a lengthy response to each of the challenged US claims.¹⁷

25. In light of the Appellate Body's reasoning in *Korea Dairy*, Mexico's mere assertion of prejudice is plainly insufficient to establish prejudice. As was the case for Korea in that dispute, Mexico has "offered no supporting particulars" and has "failed to demonstrate" that its ability to defend itself in the panel proceedings has been prejudiced.

VI. MEXICO'S ASSERTION THAT THE US PANEL REQUEST DOES NOT IDENTIFY ARTICL

28. Mexico focuses solely on the first sentence, which refers to the assertions made by the Mexican officials. It ignores completely, however, the second sentence, which plainly states that it is the “provisions” themselves – including Article 366 of the FCCP

As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have "fail[ed] to settle a dispute within 60 days of receipt of the request for consultations ...". Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel.²⁹

37. In the present case, the United States and Mexico spent two full days in Mexico City consulting at length on each of the specific measures at issue in this dispute. In addition, more than sixty days elapsed from the time the United States requested consultations to the time the request for the panel was made.³⁰ Therefore, there is no basis for Mexico's assertion that the United States has acted inconsistently with Articles 4.5 and 4.7 of the DSU with respect to consultations over the disputed measures.

38. Finally, Mexico also claims that the US panel request is inconsistent with Articles 17.4 and 17.5 of the AD Agreement. Neither claim has merit. First, to the extent that Article 17.4 creates any obligation with respect to consultations, it is that the requesting Member "consider" that the consultations have failed to achieve a mutually agreed solution. The United States so considered in this dispute. In the view of the United States, the consu