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**PANAMA – MEASURES CONCERNING THE IMPORTATION OF
CERTAIN PRODUCTS FROM COSTA RICA**

COMMUNICATION FROM COSTA RICA

The following communication, dated 11 February 2025, was received from the delegation of Costa Rica with the request that it be circulated to the Dispute Settlement Body (DSB).

Costa Rica takes note that, on 24 January 2025, Panama notified the WTO Secretariat and Costa Rica of its decision to appeal the report of the panel in "*Panama – Import Measures (Costa Rica)* (WT/DS599)" by filing a Notice of Appeal and an Appellant Submission.

Given that the Appellate Body remains non-operational, Costa Rica considers that all subsequent procedural deadlines set out in the Appellate Body's Working Procedures are properly to be considered as suspended.

When the Appellate Body resumes its functions, it should set the schedule for this appeal. Costa Rica intends to file a written submission in this appeal within the deadline to be determined by the Appellate Body once it resumes its functions. Costa Rica also intends to participate and make oral statements at the hearing to be convened by the Appellate Body.

Costa Rica disagrees with all of Panama's allegations of error concerning the Panel report. Without prejudice to Costa Rica's right to present detailed arguments in a written submission within the deadline to be established by the Appellate Body, Costa Rica presents below preliminary comments on the reasons why Panama's appeal must be dismissed.

Costa Rica notes that Panama's appeal addresses the Panel's findings on three of the four measures at issue. These are the measures concerning the importation of: (i) dairy and meat products; (ii) plantains and bananas; and (iii) strawberries. Panama does not challenge any of the Panel's findings on the measures concerning the importation of pineapples.

1. Measure concerning the importation of dairy and meat products (Measure 2)

The Panel found that Panama maintains an import prohibition on dairy and meat products from Costa Rica by virtue of the non-renewal of the sanitary approvals for 16 Costa Rican processing plants (hereinafter, "establishments").¹ The Panel found that this measure is inconsistent with the following provisions of the SPS Agreement: (i) Annex C(1)(a) and Article 8, because Panama incurred undue delays in the course of the renewal procedures; (ii) Annex C(1)(c) and Article 8, because Panama required more information than necessary for renewing the sanitary approvals of Costa Rican establishments; (iii) Article 2.3, because Panama arbitrarily or unjustifiably discriminates against Costa Rican establishments compared to establishments from other countries; (iv) Articles 5.6 and 2.2, because the measure is more trade-restrictive than necessary to achieve Panama's appropriate level of protection (ALOP); and (v) Articles 1.1 and 2.1 because the measure is inconsistent with other provisions of the SPS Agreement.

¹ Panel Report, para. 7.506.

Panama appeals only the Panel's findings under Articles 2.3 and Articles 5.6 and 2.2 of the SPS Agreement.² For the reasons explained below, Panama's appeal must be rejected.

(i) The Panel did not err in finding a violation of Article 2.3, first sentence, of the SPS Agreement

The Panel found a violation of Article 2.3, first sentence, of the SPS Agreement because Panama's treatment of Costa Rican establishments results in an arbitrary or unjustifiable discrimination compared to the treatment afforded to establishments of certain other countries. Following the legal standard of Article 2.3, the Panel found that: (i) similar conditions prevail in the territories of Costa Rica and the other countries in question with respect to the procedure for renewing the sanitary approvals of their establishments³; (ii) Panama accorded discriminatory treatment to the detriment of Costa Rica's establishments;⁴ and (iii) this discriminatory treatment is arbitrary or unjustifiable.⁵

Panama appeals only the Panel's findings concerning the first element of the Panel's analysis, that is, the finding that similar conditions prevail in the territories of the Members in question.⁶ Panama states that, for purposes of determining whether the establishments in question have identical or similar conditions, the relevant conditions must relate to the measure's objective. According to Panama, the Panel should have considered the regulatory objective of the approval procedures, which it describes as "the risk of non-fulfilment of Panama's sanitary or zoo sanitary requirements"⁷, rather than the objective of Panama's substantive requirements, which refers to the safety of imported food in Costa Rica and the protection of animal and human life and health.

Panama's arguments are without merit. Under Panama's logic, when identifying the objective of Panama's sanitary approval procedures, the Panel should have completely disregarded the objective pursued by the substantive measures, that is, the measures which are enforced by the approval procedures. This argument was examined in detail and rejected by the Panel. The Panel correctly noted that "[g]iven that Measure 2 concerns the non-renewal of the *sanitary* approvals of 16 Costa Rican establishments, the Panel considers that the objective of Measure 2 relates to the purpose of those *sanitary* approvals".⁸ The Panel then examined Panama's regulations, official communications, manuals governing the approval procedures, and the questionnaires used by Panama in the approval procedures. The Panel concluded that these sources refer repeatedly to "sanitary approval", "sanitary eligibility", "food safety", "sanitary status"; that the procedures were carried out by Panama's "food safety authority"; that Panama's questionnaires seek to ensure the safety of food imported into Panama and contain questions about zoonoses; and that Panama's manuals refer to "animal health eligibility".⁹ The Panel, thus, correctly concluded that Panama's approval procedures have the objective of ensuring the food safety of imported products by checking the sanitary conditions in Costa Rica and protecting the life and health of humans and animals against animal diseases transmissible to humans.¹⁰ Costa Rica also considers that, because Panama is challenging factual findings made by the Panel, Panama's appeal is beyond the scope of Appellate review, as provided in Article 17.6 of the DSU.

(ii) The Panel did not err in finding a violation of Articles 5.6 and 2.2 of the SPS Agreement

The Panel found that Panama's measure is more trade-restrictive than required to achieve Panama's ALOP, and, thus, inconsistent with Article 5.6 of the SPS Agreement, given the existence of an alternative measure that is reasonably available taking into account technical and economic feasibility, achieves Panama's ALOP, and is significantly less restrictive to trade.¹¹ The alternative measure consists of assessing Costa Rica's sanitary system and its establishments using written procedures, subject to subsequent on-site audits, as Panama did with establishments in other comparable exporting countries.¹²

² Panama's Notice of Appeal, para. 8.

³ Panel Report, para. 7.765.

⁴ Panel Report, para. 7.777.

⁵ Panel Report, para. 7.796.

⁶ Panama's Notice of Appeal, para. 10.

⁷ Panama's Notice of Appeal, para. 10.

⁸ Panel Report, para. 7.514. (emphasis added)

⁹ Panel Report, paras. 7.516-7.518.

¹⁰ Panel Report, para. 7.728.

¹¹ Panel Report, para. 7.855.

¹² Panel Report, para. 7.817.

Panama alleges two errors in the Panel's findings.¹³

First, Panama considers that the Panel erred in finding that the disciplines under Articles 5.6 and 2.2 of the SPS Agreement are applicable to Panama's approval procedures.¹⁴ Panama argues that its approval procedures for establishments are subject exclusively to the disciplines of Annex C of the SPS Agreement but not Articles 5.6 and 2.2.

Panama's interpretation of Articles 5.6 and 2.2 is without legal foundation. The Panel correctly found that Panama's measure is subject, not only to Annex C and Article 8 of the SPS Agreement, but also to other provisions of the SPS Agreement raised by Costa Rica, i.e. Articles 2.2, 2.3, 5.5, and 5.6.¹⁵ The Panel found that Article 8, which regulates approval procedures, expressly states that Members shall "otherwise ensure that their [control, inspection and approval] procedures are not inconsistent with the provision of this Agreement", which implies that "any approval procedure must be consistent with the obligations set forth in the other provisions of the SPS Agreement".¹⁶ The Panel saw no reason for the obligations under Articles 5.6 and 2.2 not to apply to Panama's measure, noting that there might be a procedure that is more trade-restrictive than required to achieve the relevant ALOP, contrary to Article 5.6 of the SPS Agreement.¹⁷ Costa Rica considers that the Panel's reasoning was fully correct as a matter of law.

Second, Panama alleges that "the Panel erred in finding that Costa Rica's proposed alternative would achieve Panama's ALOP".¹⁸ Given that Panama's second argument is a corollary of its first argument, Costa Rica refers to its comments above. As noted, the Panel correctly found that Articles 5.6 and 2.2 are applicable to Panama's approval procedures because, *inter alia*, Article 8 explicitly states that approval procedures are also subject to other provisions of the SPS Agreement.

In summary, Panama's appeal against the Panel's findings under Article 2.3 and Articles 5.6 and 2.2 must be rejected.

2. Measure concerning the importation of plantains and bananas (Measure 4)

- (i) The Panel did not err in finding that the objective of the measure was not to protect against the risk of introduction of the pest Foc TR4

The Panel found that Measure 4 consists of the deactivation of the resolutions containing the phytosanitary import requirements (PIR) for Costa Rican plantains and bananas.¹⁹ Panama disagrees with the Panel's conclusion that this measure does not pursue the objective of protecting against the risk of introduction of the pest Foc TR4.²⁰

Following prior practice, the Panel began its assessment by examining the *text* of the notes through which Panama notified Measure 4 to Costa Rica in October 2019.²¹ The Panel observed that these notes do not mention any specific pest, such as Foc TR4, or refer to any event that may be related to that pest or the management of any concomitant risk.²² The notes indicate that the adoption of Measure 4 was prompted by the initiation of the review of the resolutions containing the relevant PIR and the approval of the plantain packing plants. Accordingly, the Panel correctly found that "the objective of Measure 4 is to protect against the risks that Panama sought to address through this review and approval".²³

The Panel did not, however, conclude its assessment there. It proceeded to examine whether, as claimed by Panama, some evidence in the record showed that the objective of Measure 4 was to protect against the risk of introduction of Foc TR4.²⁴ The Panel examined certain factual events that

¹³ Panama's Notice of Appeal, para. 11.

¹⁴ Panama's Notice of Appeal, para. 11.

¹⁵ Panel Report, para. 7.553.

¹⁶ Panel Report, para. 7.547.

¹⁷ Panel Report, para. 7.551.

¹⁸ Panama's Notice of Appeal, para. 11.

¹⁹ Panel Report, para. 7.1203.

²⁰ Panama's Notice of Appeal, para. 13.

²¹ Panel Report, para. 7.1207.

²² Panel Report, para. 7.1212.

²³ Panel Report, para. 7.1213.

²⁴ Panel Report, para. 7.1214.

occurred *prior* to the adoption of Measure 4, including the presence of Foc TR4 in Colombia, OIRSA's alert²⁵, and Panama's resolutions concerning Foc TR4. After careful review, the Panel correctly concluded that these events, together with Costa Rica's phytosanitary status with respect to Foc TR4 (i.e. absence of the pest), "do not make it possible to link the adoption of Measure 4 to the objective of preventing the entry of this pest into Panamanian territory".²⁶

In addition, the Panel examined the communications sent by Panama to Costa Rica *following* the adoption of Measure 4. The Panel examined the references in these communications and it also noted that Panama never asked Costa Rica for information on Foc TR4.²⁷ Overall, the Panel properly concluded that "the text of Panama's subsequent communications, together with the time that elapsed between the notification of Measure 4 (in October 2019) and those communications (in December 2019 and in 2021), do not make it possible to conclude that the objective of this measure is to protect against the risk of introduction of Foc TR4 into Panama".²⁸

In conclusion, the Panel considered all the relevant evidence as a whole when determining the objective of Measure 4 and correctly found that "neither the events which, in Panama's view, constitute the 'context' of Measure 4, nor Panama's communications after the adoption of Measure 4, demonstrate that the objective of Measure 4 is to protect against the risk of introduction of Foc TR4 into Panamanian territory".²⁹ Panama's appeal has no merit and thus should be rejected.

(ii) The Panel did not err in finding that the measure is not covered by Article 5.7 and is therefore inconsistent with Articles 2.2, 5.1, 5.2, and 5.3 of the SPS Agreement

In Panama's view, because the Panel "erred by applying Article 5.7 to a measure with a different phytosanitary objective than the one actually pursued"³⁰, it also erred in finding that the measure is not covered by Article 5.7 of the SPS Agreement and is inconsistent with Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement.

Panama's arguments are untenable. The Panel correctly found that nothing suggests that Measure 4 aims to protect against the risk of introduction of Foc TR4. The Panel recalled that, as communicated to Costa Rica in the notes of October 2019, the reason why Panama adopted Measure 4 was to protect against the risks that Panama sought to address through the review of the resolutions containing the PIR for Costa Rican plantains and bananas and the approval of plantain packing plants.³¹ The Panel then noted that "there was no situation of insufficient relevant scientific evidence concerning the risks that Panama was seeking to address".³² Thus, it rightly concluded that Measure 4 does not constitute a provisional measure under Article 5.7 of the SPS Agreement.³³ In addition, because Measure 4 is not based on a risk assessment, as Panama expressly admitted, the Panel correctly concluded that it is inconsistent with Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement.³⁴ Panama's appeal should be rejected.

(iii) The Panel did not err in finding that the measure is inconsistent with Article 5.6 of the SPS Agreement

According to Panama, the Panel erred by applying Article 5.6 to a measure with a different phytosanitary objective than the one actually pursued, which led it to articulate an erroneous ALOP and subsequently find that the measure at issue is more trade-restrictive than required to achieve Panama's ALOP.³⁵ Panama's arguments have no merit.

The Panel reiterated that "the evidence in the record does not demonstrate that the objective of Measure 4 is to protect against the risk of introduction of Foc TR4".³⁶ It noted that Panama itself

²⁵ OIRSA is an International Regional Organization for Plant and Animal Health

²⁶ Panel Report, para. 7.1227.

²⁷ Panel Report, para. 7.1231.

²⁸ Panel Report, para. 7.1233.

²⁹ Panel Report, para. 7.1234.

³⁰ Panama's Notice of Appeal, para. 16.

³¹ Panel Report, para. 7.1274.

³² Panel Report, para. 7.1291.

³³ Panel Report, para. 7.1293.

³⁴ Panel Report, paras. 7.1304-7.1309.

³⁵ Panama's Notice of Appeal, para. 17.

³⁶ Panel Report, para. 7.1329.

"identified a generic ALOP for preventing the entry, establishment and spread of pests".³⁷ It also noted that "nothing in the record indicates that new or unexpected phytosanitary circumstances have arisen with respect to imports of Costa Rican plantains and bananas".³⁸ Consequently, the Panel correctly found that the alternative measure proposed by Costa Rica (i.e. applying the PIR provided for in the deactivated resolutions) is reasonably available taking into account technical and economic feasibility, achieves Panama's ALOP, and is significantly less restrictive to trade.³⁹ The Panel properly concluded, therefore, that Measure 4 is inconsistent with Articles 5.6 and 2.2 of the SPS Agreement.⁴⁰ Panama's appeal should be dismissed entirely.

3. Suspension of imports of Costa Rican strawberries (Measure 1)

This measure concerns Panama's decision to prohibit imports of Costa Rican strawberries due to the detection of the pesticide oxamyl in shipments from Costa Rica. The Panel found that this measure is not a provisional measure under Article 5.7 of the SPS Agreement. The Panel also found violations of the following provisions of the SPS Agreement: (i) Articles 5.1 and 5.2 because Panama's measure is not based on a risk assessment; (ii) Articles 5.6 and 2.2 because Panama's measure is more trade-restrictive than necessary to achieve Panama's ALOP; and (iii) Articles 1.1 and 2.1 because the measure is inconsistent with other provisions of the SPS Agreement.

Panama's appeal concerns only the Panel's finding under Article 5.7 of the SPS Agreement.⁴¹

First, Panama contends that the two Codex Guidelines at issue (Codex Guidelines CAC/GL 26-1997 and CAC/GL 47-2003) do not constitute "pertinent information" under Article 5.7 of the SPS Agreement because they address risk management, not the particular risk at issue, that is, the risk of adverse effects on human health arising from the presence of oxamyl in Costa Rican strawberries.

Costa Rica disagrees with Panama's assertions. The Panel correctly found that "pertinent information" under Article 5.7 does not refer exclusively to information that addresses a particular risk, as argued by Panama, but may also refer to information relating to the management of that risk.⁴² The Panel recalled that Article 5 and Annex A of the SPS Agreement make no distinction between "risk assessment" and "risk management", which means that "the risk assessment referred to in the SPS Agreement also includes the risk management phase".⁴³ Costa Rica, therefore, agrees with the Panel's conclusion that the two Codex Guidelines at issue are "pertinent information" under Article 5.7 of the SPS Agreement. Hence, Panama's appeal must be dismissed.⁴⁴

Second, Panama alleges that "the Panel erred in its application of Article 5.7 in finding that the measure at issue is not 'based on' these Guidelines".⁴⁵ According to Panama, the Codex Guidelines at issue do not prescribe an order of action in non-conformity cases that would require the importing country to first exhaust all other measures before resorting to an import suspension. In Costa Rica's view, the Panel properly ruled on this issue by stating that the terms of the two Codex Guidelines "illustrate [] the order in which [...] the mitigation measures should be applied".⁴⁶ The Panel referred, *inter alia*, to the text of the Codex Guidelines CAC/GL 47-2003, which "indicate[s] that the suspension of imports 'should be reserved only' for situations involving a 'serious food safety risk'", which means a risk that "has not been managed by other means".⁴⁷

Panama also asserts on appeal that, under the Codex Guidelines CAC/GL 26-1997, the concept of *most serious or pertinent cases* must be one involving repeated non-compliance of great importance. Panama claims that the situation at issue is a serious one that involves repeated non-compliance. Panama omits to mention, however, the Panel's finding that "Panama has failed to demonstrate that it adopted Measure 1 on the basis of information indicating repeated non-compliance, because

³⁷ Panel Report, para. 7.1340.

³⁸ Panel Report, para. 7.1346.

³⁹ Panel Report, para. 7.1354.

⁴⁰ Panel Report, paras. 7.1355-7.1358.

⁴¹ Panama's Notice of Appeal, para. 20.

⁴² Panel Report, para. 7.225.

⁴³ Panel Report, para. 7.224.

⁴⁴ Panama's additional ground of appeal (contained in Panama's Notice of Appeal, p. 4, second bullet) must equally be dismissed as it is consequential to the first ground of appeal.

⁴⁵ Panama's Notice of Appeal, para. 20.

⁴⁶ Panel Report, para. 7.247.

⁴⁷ Panel Report, para. 7.247.

Measure 1 was triggered by a single instance of non-compliance".⁴⁸ Panama's appeal, therefore, is without legal foundation. Additionally, because Panama is appealing a factual finding made by the Panel, Panama's claim falls outside the scope of Appellate review in accordance with Article 17.6 of the DSU.

⁴⁸ Panel Report, para. 7.261.