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PANAMA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN PRODUCTS FROM COSTA RICA (DS599)

REPORT OF THE PANEL

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Short Title	Full Case Title and Citation
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
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Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, p. 2031
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
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Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
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EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
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Costa Rica – Avocados (Mexico)	Panel Report, *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, WT/DS524/R and Add.1, adopted 31 May 2022
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
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US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
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US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
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US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
Philippines – Distilled Spirits	Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
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India – Additional Import Duties	Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008, DSR 2008:XX, p. 8223
India – Export Related Measures	Panel Report, *India – Export Related Measures*, WT/DS541/R and Add.1, 31 October 2019, mutually agreed solution reported
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
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Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
Indonesia – Chicken (Article 21.5 – Brazil)	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS484/RW and Add.1, circulated to WTO Members 10 November 2020, appealed 17 December 2020
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, p. 125
Japan – Apples	Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, p. 4481
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Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117

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US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
US – Tobacco	GATT Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, adopted 4 October 1994, BISD 41S/131

EXHIBITS FREQUENTLY CITED IN THIS REPORT[1]

Exhibit	Short title	Title
CRI-2	National Assembly of Panama, Decree-Law No. 11 (2006)	Asamblea Nacional de Panamá, Decreto Ley Nº 11, que crea la Autoridad Panameña de Seguridad de Alimentos y dicta otras disposiciones, de 22 de febrero de 2006
CRI-5	SFE, Certification of pesticides for use in strawberries, AE-REG-C-0035-2022	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Unidad de Registro de Agroquímicos, Certificación de plaguicidas para uso en fresas, AE-REG-C-0035-2022, de 11 de julio de 2022
CRI-6	Costa Rica's responses to Panama's questionnaire verifying the sanitary status of a country (19 February 2020)	Respuestas de Costa Rica del 19 de febrero de 2020 al cuestionario de Panamá para la verificación del estatus fitosanitario de un país, que solicite la renovación de la elegibilidad o el reconocimiento de un área, lugar o sitio de producción libre o de baja prevalencia de una enfermedad cuarentenaria, para la exportación de productos lácteos a la república de Panamá
CRI-7	Note AUPSA-AG-051-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-051-2020, de 20 de febrero de 2020
CRI-8	Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulations (2007)	Ministerio de Salud de Panamá, Decreto Ejecutivo Nº 467, por el cual se adopta el Reglamento Sanitario que establece los límites máximos de residuos de plaguicidas y otros contaminantes en frutas y vegetales de consumo nacional y de exportación, de 7 de noviembre de 2007
CRI-9	Memorandum DSFE-0343-2020	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-0343-2020, de 5 de mayo de 2020
CRI-11	Memorandum DSFE-0525-2020	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-0525-2020, de 12 de junio de 2020
CRI-13	Note DNSV-0111-2021-OIAR	Dirección Nacional de Sanidad Vegetal (DNSV) de Panamá, Nota DNSV-0111-2021-OIAR, de 22 de febrero de 2021
CRI-14	Paso Canoas Bilateral Agreement (12 February 2021)	Acuerdo bilateral resultante de la Reunión binacional entre la República de Costa Rica y la República de Panamá (12 de febrero de 2021)
CRI-15	Bilateral Technical Working Commission, Aide-Mémoire, Session No. 1 (18 February 2021)	Ayuda memoria de la Sesión Nº 1 de la Comisión Técnica Bilateral de Trabajo en asuntos de medidas sanitarias y fitosanitarias entre Costa Rica y Panamá el 18 de febrero de 2021
CRI-16	Bilateral Technical Working Commission, Aide-Mémoire, Session No. 2 (25 February 2021)	Ayuda memoria de la Sesión Nº 2 de la Comisión Técnica Bilateral de Trabajo en asuntos de medidas sanitarias y fitosanitarias entre Costa Rica y Panamá el 25 de febrero de 2021
CRI-17	Memorandum DSFE-0128-2021	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-0128-2021, de 1 de marzo de 2021
CRI-18	Note DNSV-0128-2021	Dirección Nacional de Sanidad Vegetal (DNSV) de Panamá, Nota DNSV-0128-2021, de 1 de marzo de 2021
CRI-19	Note AUPSA-AG-151-2021	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Administración General, Nota AUPSA-AG-151-2021, de 17 de marzo de 2021
CRI-21	Memorandum DSFE-0393-2021	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-0393-2021, de 18 de mayo de 2021

[1] This table only includes exhibits which are cited more than three times in the Report.

Exhibit	Short title	Title
CRI-22	AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), *Manual de Procedimientos para la elegibilidad sanitaria de países, regiones, zonas y compartimentos; el reconocimiento fitosanitario de: áreas, lugares, sitios libres de plagas cuarentenarias y áreas de baja prevalencia de plagas reglamentadas; y la aprobación de cadenas de producción y/o plantas procesadoras, para que exporten alimentos hacia la República de Panamá* (5 de diciembre de 2013)
CRI-23	AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), *Manual de Procedimiento para la aprobación de establecimientos, cadenas de producción y/o plantas procesadoras, para que exporten alimentos hacia la República de Panamá* (5 de diciembre de 2013)
CRI-24	Ministry of Agricultural Development, Executive Decree No. 49 (2001)	Ministerio de Desarrollo Agropecuario, Decreto Ejecutivo Nº 49, por el cual se establece el procedimiento, requisitos y tarifas para la elegibilidad zoosanitaria, de regiones, países, zonas, plantas procesadoras y otras instalaciones relacionadas con la producción de animales, sus productos y subproductos, de 16 de abril de 2001
CRI-26	Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA DINAN-092 2007, por medio del cual se emite la resolución que aprueba la elegibilidad sanitaria de países, regiones, zonas, compartimentos, cadenas de producción y/o plantas y las condiciones fitosanitarias de áreas, lugares, sitios, cadenas de producción y/o plantas; para que exporten sus productos hacia Panamá, de 2 de marzo de 2007
CRI-27	Annex to Resolution AUPSA-DINAN-092-2007, modified July 2014	Anexo al Resuelto AUPSA-DINAN-092-2007, actualización de julio de 2014
CRI-29	Costa Rica's responses to Panama's questionnaire for the sanitary evaluation of Costa Rica (3 June 2021)	Respuestas de Costa Rica del 3 de junio de 2021 al cuestionario de Panamá para la evaluación sanitaria de Costa Rica, DINASAC01-2020
CRI-31	Memorandum AUPSA-DINAN-009-2017	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Oficio AUPSA-DINAN-009-2017, de 24 de enero de 2017
CRI-32	Note AUPSA-DINAN-154	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-DINAN-154, de 9 de agosto de 2017
CRI-35	Note AUPSA-AG-399-2019	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-399-2019, de 15 de octubre de 2019
CRI-37	Memorandum SENASA DG-0159-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-0159-2017, de 14 de febrero de 2017
CRI-38	Note AUPSA-AG-001-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-001-2020, de 2 de enero de 2020
CRI-39	Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020)	Correo electrónico del 19 de febrero de 2020 de Byron Gurdian García, Director de Cuarentena Animal del Servicio Nacional de Salud Animal (SENASA) de Costa Rica, a Raúl Saucedo, Administrador General de Autoridad Panameña de Seguridad de Alimentos (AUPSA)
CRI-40	Note AUPSA-AG-059-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-059-2020, de 27 de febrero de 2020
CRI-41	Note AUPSA-AG-078-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-078-2020, de 9 de marzo de 2020
CRI-42	Memorandum SENASA-DG-1420-2020	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-1420-2020, de 24 de noviembre de 2020

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CRI-43	Memorandum SENASA-DG-721-2020	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-721-2020, de 12 de junio de 2020
CRI-44	Memorandum DM-COR-CAE-0330-2020	Ministra de Comercio Exterior de Costa Rica, Oficio DM-COR-CAE-0330-2020, de 8 de julio de 2020
CRI-45	Note AUPSA-AG-0229-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-229-2020, de 10 de julio de 2020
CRI-46	Resolution No. 015-AG-AUPSA-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 015-AG-AUPSA-2020, de 27 de julio de 2020 (sobre establecimientos de Perú)
CRI-47	Resolution No. 014-AG-AUPSA-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 014-AG-AUPSA-2020, de 24 de julio de 2020 (sobre establecimientos de México)
CRI-48	Resolution No. 018-AG-AUPSA-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 018-AG-AUPSA-2020, de 30 de julio de 2020 (sobre establecimientos de Nueva Zelandia)
CRI-50	Memorandum SENASA-DG-946-2020	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-946-2020, de 11 de agosto de 2020
CRI-51	Note AUPSA-AG-395-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-395-2020, de 21 de agosto de 2020
CRI-52	Note AUPSA-AG481-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-481-2020, de 9 de octubre de 2020
CRI-53	Memorandum SENASA-DG-1233-2020	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-1233-2020, de 13 de octubre de 2020
CRI-55	Note AUPSA-AG-571-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-571-2020, de 23 de noviembre de 2020
CRI-57	Note AUPSA-AG-100-2021	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-100-2021, de 22 de febrero de 2021
CRI-58	Memorandum SENASA-DG-191-2021	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio-SENASA-DG-191-2021, de 24 de febrero de 2021
CRI-60	Memorandum SENASA-DG-340-2021	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-340-2021, de 24 de marzo de 2021
CRI-61	Costa Rica's updated responses to Panama's questionnaire verifying the sanitary status of a country (24 March 2021)	Respuestas actualizadas de Costa Rica del 24 de marzo de 2021 al cuestionario de Panamá para la verificación del estatus fitosanitario de un país, que solicite la renovación de la elegibilidad o el reconocimiento de un área, lugar o sitio de producción libre o de baja prevalencia de una enfermedad cuarentenaria, para la exportación de productos lácteos a la república de Panamá
CRI-62	Note AUPSA-AG-176-2021	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-176-2021, de 1 de abril de 2021
CRI-63	Memorandum SENASA-DG-725-2021	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-725-2021, de 3 de junio de 2021
CRI-64	Note DSA-335-2021	Dirección Nacional de Salud Animal de Panamá, Despacho del Director, Nota DSA-335-2021, de 12 de julio de 2021
CRI-65	Note AUPSA-AG-032-2019	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-032-2019, de 29 de enero de 2019
CRI-66	Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-116-2008, de 4 de julio de 2008, por medio del cual se emite el Requisito Fitosanitario para la importación de Piñas (*Ananas comosus*) frescas, para consumo humano y/o transformación

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CRI-68	Memorandum DSFE-261-2014	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-261-2014, de 7 de mayo de 2014
CRI-69	Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014)	Informe de *Maconellicoccus hirsutus* (cochinilla rosada del hibisco) de Costa Rica para la Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF) del 12 de mayo de 2014, actualizado el 25 de octubre de 2018
CRI-70	OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018)	Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA), *Informe técnico sobre la situación actual de la cochinilla rosada del hibisco (crh) Maconellicoccus hirsutus (Green) en los países de la región del OIRSA* (mayo 2018)
CRI-71	CABI, Datasheet on the pink hibiscus mealybug (2021)	Centro de Biociencia Agrícola Internacional (CABI), Ficha técnica sobre *Maconellicoccus hirsutus* (cochinilla rosada del hibisco) (2021)
CRI-72	OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010)	P.E. Echegoyén Ramos y H. González Hernández, Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA), *Plan de contingencia ante un brote de cochinilla rosada del hibisco (Maconellicoccus hirsutus)* (mayo 2010)
CRI-73	Martínez Rivero (2007)	M.A. Martínez Rivero, "La Cochinilla rosada del hibisco, *Maconellicoccus hirsutus* (Green), un peligro potencial para la agricultura cubana" (2007), volumen 22, Nº 3, *Revista Protección Vegetal*, páginas 166-182
CRI-74	USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003)	Departamento de Agricultura de los Estados Unidos (USDA) e Instituto Inter Americano de Cooperación en Agricultura (IICA), D.E. Mayerdirk, R. Warkentin, B. Attavian, E. Gersabeck, A. Francis, M. Adams, and G. Francis, *Manual del Proyecto para el Control Biológico de la Cochinilla Rosada del Hibisco* (febrero de 2003)
CRI-75	IPPC, ISPM 5	Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF), Glosario de términos fitosanitarios, NIMF 5, adoptada en 2018, publicada en 2018
CRI-77	INEC, Pineapple imports into Panama (2010-2020)	Instituto Nacional de Estadística y Censo (INEC) de Panamá, Datos oficiales de importaciones de piña en Panamá para el periodo 2010-2020
CRI-78	Memorandum DSFE-083-2019	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-083-2019, de 6 de febrero de 2019
CRI-91	SFE, *Information required to assess the risks associated with importing pineapples from Costa Rica into Panama* (2021)	Servicio Fitosanitario del Estado (SFE) de Costa Rica, *Información requerida para evaluar los riesgos asociados a la importación de fruta fresca de piña (Ananas comosus) de Costa Rica a la República de Panamá* (23 de abril de 2021)
CRI-95	Note AUPSA-AG-392-2019	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-392-2019, de 10 de octubre de 2019
CRI-96	Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-106-2009, de 27 de noviembre de 2009, por medio del cual se emite el Requisito Fitosanitario para la importación de plátanos (*Musa paradisiaca*) frescos, para consumo humano y/o transformación, originarios de Costa Rica
CRI-97	Note AUPSA-AG-424-2019	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-424-2019, de 25 de octubre de 2019
CRI-98	Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-019-2012, de 26 de abril de 2012, por medio del cual se deroga el Resuelto AUPSA-DINAN-003-2009 y en su lugar se establecer los requisitos fitosanitarios para la importación de frutos de banano (*Musa balbisiaca acuminata, Musa paradisiaca o Musa fapientum*) frescos, para consumo humano y/o transformación, originarios de Costa Rica

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CRI-101	IPPC, ISPM 2	Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF), Marco para el análisis de riesgo de plagas, NIMF 2, adoptada en 2007
CRI-103	Note DM-N-1352-2019	Ministro de Comercio e Industrias de Panamá, Nota DM-N-1352-2019, de 18 de diciembre de 2019
CRI-104	Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019	Ministerio de Desarrollo Agropecuario de Panamá, Resolución Nº OAL-102-ADM-2019, de 12 de septiembre de 2019
CRI-105	Memorandum DSFE-0079-2020	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-0079-2020, de 30 de enero de 2020
CRI-106	Memorandum DFSE-0080-2020	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DFSE-0080-2020, de 30 de enero de 2020
CRI-109	Note DNSV-0113-2021-OIAR	Dirección Nacional De Sanidad Vegetal (DNSV) de Panamá, Nota DNSV-0113-2021-OIAR, de 22 de febrero de 2021
CRI-111	Note DNSV-0129-2021	Dirección Nacional De Sanidad Vegetal (DNSV) de Panamá, Nota DNSV-0129-2021, de 1 de marzo de 2021
CRI-112	Note DNSV-0207-2021	Dirección Nacional De Sanidad Vegetal (DNSV) de Panamá, Nota DNSV-0207-2021, de 17 de marzo de 2021
CRI-113	Memorandum DSFE-0533-2021	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Oficio DSFE-0533-2021, de 6 de agosto de 2021
CRI-114	INEC, Banana imports into Panama (2000)	Instituto Nacional de Estadística y Censo (INEC) de Panamá, Datos oficiales de importaciones de banano en el año 2000
CRI-123	OIRSA, *Foc TR4 risk analysis* (2019)	Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA), *Análisis de Riesgo: Fusarium oxysporum f. sp. cubense raza 4 tropical (Foc R4T) Plaga cuarentenaria* (octubre de 2019)
CRI-124	OIRSA, *Contingency plan for an outbreak of Foc TR4 in a country of the OIRSA region* (2013)	Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA), *Plan de contingencia ante un brote de la raza 4 tropical de Fusarium oxysporum f. sp. cubense en un país de la región del OIRSA* (julio de 2013)
CRI-125	Codex Alimentarius, Pesticide Index, "Oxamyl"	Codex Alimentarius, Índice de plaguicidas, "Oxamyl"
CRI-126	Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010)	Comisión del Codex Alimentarius (Codex), Directrices para la formulación, aplicación, evaluación y acreditación de sistemas de inspección y certificación de importaciones y exportaciones de alimentos, CAC/GL 26-1997, 5ª edición, revisión de 2010
CRI-127	Codex, Guidelines for Food Import Control Systems (2006)	Comisión del Codex Alimentarius (Codex), Directrices sobre sistemas de control de las importaciones de alimentos, CAC/GL 47-2003, 5ª edición, revisión de 2006
CRI-129	European Union Regulation No. 2018/1660	Reglamento de Ejecución (UE) Nº 2018/1660 de la Comisión, de 7 de noviembre de 2018, por el que se imponen condiciones especiales a la importación de determinados alimentos de origen no animal procedentes de determinados terceros países debido a los riesgos de contaminación por residuos de plaguicidas, por el que se modifica el Reglamento (CE) Nº 669/2009 y por el que se deroga el Reglamento de Ejecución (UE) Nº 885/2014 (Texto pertinente a efectos del EEE)
CRI-130	European Union Regulation No. 669/2009	Reglamento (CE) Nº 669/2009 de la Comisión, de 24 de julio de 2009, por el que se aplica el Reglamento (CE) Nº 882/2004 del Parlamento Europeo y del Consejo en lo que respecta a la intensificación de los controles oficiales de las importaciones de determinados piensos y alimentos de origen no animal y se modifica la Decisión 2006/504/CE
CRI-131	European Union Regulation No. 885/2014	Reglamento de Ejecución (UE) Nº 885/2014 de la Comisión, de 13 de agosto de 2014, por el que se establecen las condiciones específicas aplicables a la importación de quingombó y hojas de curry de la India y se deroga el Reglamento de Ejecución (UE) Nº 91/2013

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CRI-132	USFDA, "Import Operations and Actions" (2022)	Administración de Alimentos y Medicamentos de los Estados Unidos (USFDA), "Chapter 9: Import Operations and Actions", *Regulatory Procedures Manual* (enero 2022)
CRI-133	USFDA, *Pesticide Residue Monitoring Program Fiscal Year 2019 Pesticide Report*	Administración de Alimentos y Medicamentos de los Estados Unidos (USFDA), *Pesticide Residue Monitoring Program Fiscal Year 2019 Pesticide Report*
CRI-135	Codex, Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (2016)	Comisión del Codex Alimentarius (Codex), Directrices para el intercambio de información entre países sobre casos de rechazo de alimentos importados, CAC/GL 25-1997, revisión de 2016
CRI-141	Memorandum SENASA-DG-0160-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-0160-2017, de 14 de febrero de 2017
CRI-142	IPPC, ISPM 11	Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF), Análisis de riesgo de plagas para plagas cuarentenarias, NIMF 11, adoptada en 2013, publicada en 2019
CRI-144	EPPO, Datasheet on the pink hibiscus mealybug (2021)	Organización Europea y Mediterránea para la Protección Vegetal (EPPO), Ficha técnica sobre *Maconellicoccus hirsutus* (cochinilla rosada del hibisco) (2021)
CRI-145	IPPC (1997)	Organización de las Naciones Unidas para la Agricultura y la Alimentación (FAO), Convención Internacional de Protección Fitosanitaria de 1997
CRI-147	SAGARPA, SENASICA, *Pink hibiscus mealybug*, Datasheet No. 6 (2016)	Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación (SAGARPA) de México, Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria (SENASICA) de Costa Rica, Dirección General de Sanidad Vegetal, *Cochinilla rosada del hibisco, Maconellicoccus hirsutus (Green),* Ficha Técnica Nº 6 (marzo de 2016)
CRI-149	Chong et al. (2015)	J.H. Chong, L.F. Aristizábal, y S.P. Arthurs, "Biology and Management of *Maconellicoccus hirsutus* (Hemiptera: Pseudococcidae) on Ornamental Plants" (2015), volumen 6, Nº 1, *Journal of Integrated Pest Management*
CRI-150	Culik et al. (2013)	M.P. Culik, M.J. Fornazier, D. dos Santos Martins, J. Salazar Zanuncio, J. Aires Ventura, A.L. B.G. Peronti, et al., "The invasive mealybug *Maconellicoccus hirsutus*: lessons for its current range expansion in South America and invasive pest management in general" (2013), volumen 86, Nº 3, *Journal of Pest Science*
CRI-159	SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008)	Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria (SENASICA) de México, Dirección de Protección Fitosanitaria, *Manual Técnico Operativo de la campaña contra la cochinilla rosada del hibisco (Maconellicoccus hirsutus Green)*, MP-DPF-CRH (2008)
CRI-161	IPPC, ISPM 20	Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF), Directrices sobre un sistema fitosanitario de reglamentación de importaciones, NIMF 20, adoptada en 2004
CRI-163	Directorate Resolution No. 0042-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh avocados from Colombia	Dirección de Sanidad Vegetal del Servicio Nacional de Sanidad Agraria del Perú, Resolución Directoral Nº 0042-2016-MINAGRI-SENASA-DSV, de 5 de octubre de 2016, por la que se establecen requisitos fitosanitarios para la importación de palta fruto fresco variedad Hass de origen y procedencia Colombia
CRI-164	Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-122-2009, de 22 de diciembre de 2009, por medio del cual se modifica el requisito fitosanitario AUPSA-DINAN-026-2007, para la importación de aguacates (*Persea americana*) frescos, para consumo humano y/o transformación, originarios de Colombia

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CRI-165	EPPO, Distribution of the pink mealybug in the United States (2022)	Organización Europea y Mediterránea para la Protección Vegetal (EPPO), Base de datos: Detalles de distribución de cochinilla rosada en los Estados Unidos (2022)
CRI-167	EPPO, Distribution of the pink mealybug in Colombia (2022)	Organización Europea y Mediterránea para la Protección Vegetal (EPPO), Base de datos: Detalles de distribución de cochinilla rosada en Colombia (2022)
CRI-170	IPPC, ISPM 12	Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF), Certificados fitosanitarios, NIMF 12, adoptada en 2001
CRI-174	EPPO, Distribution of the pink mealybug in Costa Rica (2022)	Organización Europea y Mediterránea para la Protección Vegetal (EPPO), Base de datos: Detalles de distribución de cochinilla rosada en Costa Rica (2022)
CRI-176	Memorandum AUPSA-AG-025-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Oficio AUPSA-AG-025-2020, de 3 de febrero de 2020
CRI-180	Note AUPSA-AG-049-2020	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-049-2020, de 20 de febrero de 2020
CRI-185	"Colombia confirms presence of Fusarium TR4 in banana plantations in La Guajira" (8 August 2019), *BananoTecnia*	"Colombia confirma presencia de Fusarium R4T en plantaciones de banano en La Guajira" (8 de agosto de 2019), *BananoTecnia*
CRI-186	OIRSA, "Phytosanitary alert to exclude and prevent fusarium wilt in bananas and plantains in the OIRSA region" (2019)	Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA), "Alerta fitosanitaria para exclusión y prevención de marchitez por fusarium del banano y plátano en región del OIRSA" (julio de 2019)
CRI-188	OIRSA, *Pest Risk Analysis for Foc TR4* (2018)	Organismo Internacional Regional de Sanidad Agropecuaria (OIRSA), *Análisis de Riesgo de Plagas Fusarium oxysporum f. sp. cubense raza 4 Tropical (FocR4T), como plaga cuarentenaria para la región del OIRSA*, versión 1.0 (febrero de 2018)
CRI-190	SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019)	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Certificado fitosanitario de exportación de banano de Costa Rica, Nº 6382415-1 (4 de julio de 2019)
CRI-191	SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019)	Servicio Fitosanitario del Estado (SFE) de Costa Rica, Certificado fitosanitario de exportación para envío de plátano de Costa Rica, Nº 6440692-2 (21 de septiembre de 2019)
CRI-204	Memorandum SENASA-DG-0161-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-0161-2017, de 14 de febrero de 2017
CRI-206	AUPSA, Resolution No. 43 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 43, de 21 de julio de 2014
CRI-213	Note AUPSA-AG-428-2021	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-428-2021, de 16 de agosto de 2021
CRI-215	AUPSA, Resolution No. 10 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 10, de 3 de abril de 2014
CRI-216	Memorandum SENASA-DG-0139-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-0139-2017, de 9 de febrero de 2017
CRI-217	AUPSA, Approval of processing plants: Costa Rica (July 2022)	Captura de pantalla de la página web de AUPSA, Consulta de países elegibles con aprobación de plantas procesadoras para la exportación hacia Panamá: Costa Rica (julio de 2022)
CRI-219	AUPSA, Resolution No. 48 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 48, de 7 de noviembre de 2014
CRI-220	Memorandum SENASA-DG-840-2020	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-840-2020, de 16 de julio de 2020
CRI-225	AUPSA, Resolution No. 16 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 16, de 3 de marzo de 2014

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CRI-226	Memorandum SENASA-DG-046-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-046-2017, de 17 de enero de 2017
CRI-228	AUPSA, Resolution No. 11 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 11, de 3 de abril de 2014
CRI-229	Memorandum SENASA-DG-047-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-047-2017, de 13 de enero de 2017
CRI-231	AUPSA, Resolution No. 12 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 12, de 3 abril de 2014
CRI-232	Memorandum SENASA-DG-512-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-512-2017, de 3 de mayo de 2017
CRI-234	AUPSA, Resolution No. 028-2014	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 028-2014, de 7 de mayo de 2014
CRI-235	Memorandum SENASA-DG-805-2020	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-805-2020, de 3 de julio de 2020
CRI-236	AUPSA, Resolution No. 029-2014	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 029-2014, de 23 de enero de 2013
CRI-237	AUPSA, Resolution No. 030-2014	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 030-2014, de 7 de mayo de 2014
CRI-238	AUPSA, Resolution No. 10-CTI-16	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 10-CTI-16, de 15 de febrero de 2016
CRI-239	Memorandum SENASA-DG-1587-2018	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-1587-2018, de 4 de diciembre de 2018
CRI-241	AUPSA, Resolution No. 14 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 14, de 3 de marzo de 2014
CRI-242	Memorandum SENASA-DG-140-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-0140-2017, de 9 de febrero de 2017
CRI-244	AUPSA, Resolution No. 15 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 15, de 3 de marzo de 2014
CRI-245	Memorandum SENASA-DG-170-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-170-2017, de 16 de febrero de 2017
CRI-247	AUPSA, Resolution No. 039-2014	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 039-2014, de 18 de junio de 2014
CRI-248	Memorandum SENASA-DG-246-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-246-2017, de 2 de febrero de 2017
CRI-250	AUPSA, Resolution No. 46 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 46, de 7 de noviembre de 2014
CRI-251	Memorandum SENASA-DG-983-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-983-2017, de 9 de agosto de 2017
CRI-253	AUPSA, Resolution No. 45 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 45, de 7 de noviembre de 2014
CRI-254	Memorandum SENASA-DG-704-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-704-2017, de 21 de junio de 2017
CRI-256	AUPSA, Resolution No. 44 (2014)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 44, de 7 de noviembre de 2014
CRI-257	Memorandum SENASA-DG-963-2017	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-963-2017, de 4 de agosto de 2017
CRI-259	AUPSA, Resolution No. 008-CTI-16	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 008-CTI-16, de 15 de febrero de 2016

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CRI-260	Memorandum SENASA-DG-1512-2018	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-1512-2018, de 12 de noviembre de 2018
CRI-262	AUPSA, Resolution No. 007-CTI-16	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 007-CTI-16, de 15 de febrero de 2016
CRI-263	Memorandum SENASA-DG-1511-2018	Servicio Nacional de Salud Animal (SENASA) de Costa Rica, Oficio SENASA-DG-1511-2018, de 12 de noviembre de 2018
CRI-268	Animal health evaluation questionnaire (22 February 2021)	Ministerio de Desarrollo Agropecuario (MIDA), Dirección Nacional de Salud Animal (DINASA), Cuestionario preliminar para determinar la elegibilidad zoosanitaria de un país, a efecto de comprobar si sus medidas logran el mismo nivel de protección establecido en las leyes y reglamentos de la República de Panamá en la materia (rige solo para leche y productos lácteos) (22 de febrero de 2021), anexo a la Nota AUPSA-AG-100-2021
CRI-273	Office of the President of the Republic of Costa Rica, "Extended opening hours for beaches and additional flights from Central America and Panama will create more jobs" (October 2020)	Presidencia de la República de Costa Rica, Comunicado de prensa, "Horario ampliado en playas y apertura de vuelos de Centroamérica y Panamá generarán mayores empleos" (8 de octubre de 2020)
CRI-274	Note AUPSA-AG-078-2021	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Nota AUPSA-AG-078-2021, de 15 de febrero de 2021
CRI-284	Resolution AUPSA-DINAN-007-2010 concerning the importation of dairy products	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-007-2010, de 26 de enero de 2010, por medio del cual se modifica el Resuelto AUPSA-DINAN-154-2008, en el cual se emiten los requisitos sanitarios de inocuidad y calidad para la importación de productos lácteos para consumo humano, y se derogan los Resueltos AUPSA-DINAN-093-2007 y AUPSA-DINAN-107-2007
CRI-285	Resolution AUPSA-DINAN-032-2010 concerning the importation of flours, meals and "pellets", of meat or meat offal, greaves, of fish or of crustaceans, molluscs, or other aquatic invertebrates, and other preparations, for animal consumption	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-032-2010, de 12 de mayo de 2010, por medio del cual se emiten los requisitos sanitarios para la importación de harinas, polvo y "pellets", de carne, despojos, chicharrones, pescado o de crustáceos, moluscos o demás invertebrados acuáticos y otras preparaciones, para consumo animal y se deroga el Resuelto AUPSA-DINAN-083-2008
CRI-286	Resolution AUPSA-DINAN-045-2011 concerning the introduction of feed containing protein of ruminant origin, for consumption by dogs and cats only	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-045-2011, de 6 de octubre de 2011, por medio del cual se deroga el Resuelto AUPSA-DINAN-003-2011 y en su lugar se emiten los requisitos sanitarios para la Introducción de alimentos, que contengan proteína de origen rumiante, para consumo exclusivo de perros y gatos
CRI-287	Resolution AUPSA-DINAN-017-2009 concerning the importation of meat or meat offal of swine for human consumption	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-017-2009, de 23 de marzo de 2009, por medio del cual se emite el requisito sanitario para la introducción de carne y despojos de animales de la especie porcina fresca, refrigerada o congelada para consumo humano
CRI-288	Resolution AUPSA-DINAN-059-2013 concerning the importation of meat products of bovine animals for human consumption	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-059-2013, de 8 de agosto de 2013, por medio del cual se emiten los requisitos sanitarios para la importación de productos cárnicos de origen bovino, para consumo humano, sometidos a un proceso de inactivación de agentes infecciosos de importancia y envasados herméticamente al vacío
CRI-289	Resolution AUPSA-DINAN-016-2009 concerning the importation of meat or meat offal of bovine animals for human consumption	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-016-2009, de 23 de marzo de 2009, por medio del cual se emite el requisito sanitario para la introducción de carne y

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		despojos de animales de la especie Bovina fresca, refrigerada o congelada para consumo humano
CRI-290	Resolution AUPSA-DINAN-035-2011 concerning the importation of pork products for human consumption	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-035-2011, de 25 de agosto de 2011, por medio del cual se deroga el Resuelto AUPSA-DINAN-085-2007, de 12 de marzo de 2007, por medio del cual se emite el Requisito Sanitario para la importación de alimento preenvasado de carne de porcino para consumo humano y a su vez, se emiten los requisitos sanitarios para la importación de productos cárnicos porcinos, para consumo humano, sometidos a un proceso de inactivación de agentes infecciosos de importancia
CRI-292	Resolution AUPSA-DINAN-061-2013 concerning the importation of (*Bovidae*) dairy products, for human consumption	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-061-2013, de 8 de agosto de 2013, por medio del cual se deroga el Resuelto AUPSA-DINAN-028-2011, y se emiten los Requisitos Sanitarios para la importación de productos lácteos (Familia *Bovidae* / Género: *Bos, Bubalus, Capra, Ovis*) para consumo humano, sometidos a un proceso de inactivación de agentes infecciosos de importancia
CRI-368	USDA, U.S. fresh pineapple exports (2018-2022)	Departamento de Agricultura de los Estados Unidos (USDA), Estadísticas sobre exportaciones de piña fresca de los Estados Unidos (2018-2022)
CRI-369	ICCA, *Manual on good agricultural and production practices for strawberry crops* (2017)	Instituto Interamericano de Cooperación para la Agricultura (IICA), *Manual de buenas prácticas agrícolas y de producción para el cultivo de la fresa* (2017)
CRI-370	Codex, Maximum residue limits (MRLs) (2021)	Codex Alimentarius, Límites máximos de residuos para residuos de medicamentos veterinarios en los alimentos (2021)
CRI-393	Communications between Biomar and AUPSA (2017-2019)	Comunicaciones entre Biomar y AUPSA (diciembre de 2017-octubre de 2019)
CRI-397	Note APA-DD-410-2023	Agencia Panameña de Alimentos (APA), Nota APA-DD-410-2023, de 18 de mayo de 2023
CRI-398	AUPSA, Approval of processing plants: Costa Rica (July 2020)	Captura de pantalla de la web de AUPSA, de julio de 2020, Consulta de países elegibles con aprobación de plantas procesadoras para la exportación hacia Panamá: Costa Rica
CRI-402	IPPC, ISPM 12 (2022)	Secretaría de la Convención Internacional de Protección Fitosanitaria (CIPF), Certificados fitosanitarios, NIMF 12, adoptada en 2022
CRI-403	SIVUCE, Exporters of strawberries to Panama (2019-2020)	Sistema de Ventanilla Única de Comercio Exterior de Costa Rica (SIVUCE), extracto de información fresas exportadas a Panamá en 2019 y 2020
PAN-1	AUPSA, Resolution No. 28 (2009)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 28, de 2 de abril de 2009, que aprueba la elegibilidad sanitaria de Costa Rica para que exporten productos cárnicos derivados de bovinos para consumo humano hacia Panamá
PAN-2	AUPSA, Resolution No. 145-AG-2019	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 145-AG-2019, de 26 de diciembre de 2019, que aprueba la extensión de la habilitación de establecimientos de productos de origen bovino, porcino, aviar y acuícola de Costa Rica
PAN-3	Ministry of Health of Panama, Resolution No. 75 (2020)	Ministerio de Salud de la República de Panamá, Resolución Nº 75, de 23 de enero de 2020, que ordena la Activación del Centro de Operaciones de Emergencias en Salud en el marco de la Alerta Internacional de Salud declarada por la OMS/OPS en relación con el COVID-19
PAN-14	Ministry of Health of Panama, Executive Decree No. 507 (2020)	Ministerio de Salud de la República de Panamá, Decreto Ejecutivo Nº 507, de 24 de marzo de 2020, que amplía el toque de queda decretado mediante el Decreto Ejecutivo Nº 490 de 17 de marzo de 2020 y dicta otras disposiciones

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PAN-19	Ministry of Health of Panama, Executive Decree No. 466 (2020)	Ministerio de la Presidencia de la República de Panamá, Decreto Ejecutivo Nº 466, de 5 de junio de 2020, que adopta el protocolo para preservar la higiene y salud en el ámbito laboral para la prevención ante el COVID-19 en el Sector Público
PAN-34	Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA-DINAN-006-2008, de 15 de enero de 2008, por medio del cual se emite el Requisito Fitosanitario para la importación de Fresas (Fragaria ananassa) frescas, para consumo humano y/o transformación, originarias de Costa Rica
PAN-36	DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Reception of Samples and Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-003-2020	Dirección Nacional de Sanidad Vegetal (DINASA) de Panamá, Departamento de Coordinación de Servicios Técnicos de Análisis Químicos, Laboratorio de Análisis de Residuos de Plaguicidas en Plantas y Productos Vegetales, Recepción de Muestras e Informe de Análisis CSTAQ-LRT-PON-F-30, Muestra LRT-003-2020
PAN-37	DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-009-2020	Dirección Nacional de Sanidad Vegetal (DINASA) de Panamá, Departamento de Coordinación de Servicios Técnicos de Análisis Químicos, Laboratorio de Análisis de Residuos de Plaguicidas en Plantas y Productos Vegetales, Informe de Análisis CSTAQ-LRT-PON-F-30, Muestra LRT-009-2020
PAN-39	EPA, Oxamyl Facts (2000)	Agencia de Protección Ambiental de los Estados Unidos (EPA), Hechos sobre Oxamyl (2000)
PAN-40	EFSA, Reasoned Opinion (2010)	Autoridad Europea de Seguridad Alimentaria (EFSA), Dictamen, "Review of the existing maximum residue levels (MRLs) for oxamyl according to Article 12 of Regulation (EC) No 395/2005" (2010), volumen 8, Nº 10, *EFSA Journal*
PAN-41	FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008)	Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO), *FAO Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008)
PAN-42	EPA, Pesticide Database, oxamyl MRL search	Agencia de Protección Ambiental de los Estados Unidos (EPA), Base de datos de pesticidas, Búsqueda de LMR para Oxamyl
PAN-43	New Jersey Department of Health and Senior Services, *Hazardous Substance Fact Sheet – Oxamyl* (1999)	Departamento de Salud y Servicios para las Personas Mayores del Estado de Nueva Jersey, *Hoja informativa sobre sustancias peligrosas – Oxamyl* (julio 1999)
PAN-44	Extoxnet, Pesticide Information Profiles – Oxamyl (1996)	Extension Toxicology Network (Extoxnet), Pesticide Information Profiles – Oxamyl (1996)
PAN-45	DNSV, Internal communication of 19 August 2021, "Report and annexes setting out the analysis carried out on strawberries from Costa Rica"	Dirección Nacional de Sanidad Vegetal (DNSV) de Panamá, Comunicación interna del 19 de agosto de 2021, "Informe y anexos evidencias de los análisis realizados a la fresa de Costa Rica"
PAN-50	Chong et al. (2015)	J.H. Chong, F. Aristizábal, y S.P. Arthurs, "Biology and Management of *Maconellicoccus hirsutus* (*Hemiptera: Pseudococcidae*) on Ornamental Plants" (2015), volumen 6, Nº 1, *Journal of Integrated Pest Management*
PAN-53	Hodgson and Łagowska (2011)	C.J. Hodgson y B. Łagowska, "New scale insect (*Hemiptera: Sternorrhyncha: Coccoidea*) records from Fiji: three new species, records of several new invasive species and an updated checklist of *Coccoidea*" (2011) volumen 2766, Nº 1, *Zootaxa*
PAN-58	Olivares et al. (2021)	B.O. Olivares, J.C. Rey, D. Lobo, J.A. Navas-Cortés, J.A. Gómez, y B.B. Landa, "Fusarium Wilt of Bananas: A Review of Agro-Environmental Factors in the Venezuelan Production System Affecting Its Development" (2021), volume 11, Nº 986, *Agronomy*
PAN-59	EFSA, Panel on Plant Health, "Scientific opinion on the pest categorisation of *Fusarium oxysporum f. sp. cubense* Tropical Race 4" (2022)	Autoridad Europea de Sanidad Alimentaria (EFSA) Panel sobre sanidad vegetal, C. Bragard, P. Baptista, E. Chatzivassiliou, F. Di Serio, P. Gonthier, et al., "Scientific Opinion on the pest categorisation of *Fusarium oxysporum f. sp. cubense* Tropical Race 4", volumen 20, Nº 1, *EFSA Journal*

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PAN-61	FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014)	Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO), L. Pérez-Vicente, M.A. Dita, y E. Martínez-de la Parte, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (mayo de 2014)
PAN-62	Stellenbosch University, "Brief History of Banana Fusarium Wilt"	Stellenbosch University, "Brief History of Banana Fusarium Wilt"
PAN-73	Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019	Ministerio de Desarrollo Agropecuario de la República de Panamá, Resolución Nº OAL-106-ADM-2019 Panamá, de 1 de octubre de 2019, que crea la Comisión Técnica de Apoyo para prevenir la entrada del Hongo *Fusarium oxysporum f.sp. cubense* Raza 4 Tropical (Foc R4T), en la República de Panamá
PAN-75	Bai et al. (2020)	T. Bai, M. Qin, X. Li, H. Fan, S. Xu, L. Zeng, y S.J. Zheng, "An Additional Threat to 'Cavendish' Banana Growers and Traders: The Infection of Banana Peduncles *by Fusarium oxysporun f. sp. Cubense* Tropical Race 4 (Foc TR4)" (2020), volumen 21, No 4, *Plant Health Progress*
PAN-86	Ministry of the Interior of Panama, Executive Decree No. 244 (2020)	Ministerio de Gobierno de la República de Panamá, Decreto Ejecutivo Nº 244, de 19 de marzo de 2020, que suspende temporalmente todos los vuelos internacionales y dictas otras disposiciones
PAN-98	Legislative Assembly of Panama, Law No. 47 of 9 July 1996	Asamblea Legislativa de la República de Panamá, Ley Nº 47 del 9 de julio de 1996, por la cual se dictan Medidas de Protección Fitosanitaria y se adoptan otras disposiciones
PAN-105	Legislative Assembly of Panama, Law No. 23 (1997)	Asamblea Legislativa de la República de Panamá, Ley Nº 23, de 15 de julio de 1997, por la cual se aprueba el Acuerdo de Marrakech, constitutivo de la Organización Mundial del Comercio; el Protocolo de Adhesión de Panamá a dicho Acuerdo junto con sus anexos y lista de compromisos; se adecua la legislación interna a la normativa internacional y se dictan otras disposiciones, artículos 1 y 64-68
PAN-107	DINASA, Note DSA-212-2022	Dirección Nacional de Salud Animal (DINASA) de Panamá, Nota DSA-212-2022, de 17 de marzo de 2022
PAN-112	Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019	Ministerio de Desarrollo Agropecuario de la República de Panamá, Resolución Nº OAL-102-ADM-2019, de 12 de septiembre de 2019
PAN-116	Ministry of Agricultural Development of Panama, Resolution OAL-001-ADM-2015	Ministerio de Desarrollo Agropecuario de la República de Panamá, Resolución Nº OAL-001-ADM-2015, de 6 de enero de 2015, que declara el hongo *Fusarium oxysporum f. sp. cubense* Raza 4 Tropical como plaga cuarentenaria en el territorio nacional y se prohíbe el ingreso al país de plantas, material de reproducción y de material vegetal de musáceas y heliconias procedentes de áreas donde la plaga haya sido reportada
PAN-118	USDA, U.S. pineapple exports (2019-2023)	Departamento de Agricultura de los Estados Unidos (USDA), Estadísticas sobre exportaciones de piña de los Estados Unidos (2019-2023)
PAN-119	European Union Regulation No. 396/2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin	Reglamento (CE) Nº 396/2005 del Parlamento y del Consejo Europeo, de 23 de febrero de 2005, relativo a los límites máximos de residuos de plaguicidas en alimentos y piensos de origen vegetal y animal y que modifica la Directiva 91/414/CEE del Consejo (Texto pertinente a efectos del EEE, páginas 1 y 24).
PAN-121	ITC, Trade Map – List of supplying markets for fresh strawberries imported by Panama (2015-2022)	Centro de Comercio Internacional (ITC), Trade Map: Estadísticas del comercio para el desarrollo internacional de las empresas, Datos comerciales mensuales, trimestrales y anuales. Consulta de mercados proveedores de fresa fresca importada por Panamá (2015-2022)

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PAN-122	DNSV, MRL compliance history results for shipments from Costa Rica (2016-2020)	Ministerio de Desarrollo Agropecuario de Panamá (MIDA), Dirección Nacional de Sanidad Vegetal (DNSV), Cuadro: Resultados de historial de cumplimiento de los LMR de los envíos de Costa Rica (2016-2020)
PAN-123	Ministry of Agricultural Development, Executive Decree No. 63 (1997)	Ministerio de Desarrollo Agropecuario, Decreto Ejecutivo Nº 63, por el cual se reglamenta el Capítulo V del Título III de la Ley Nº 47 del 9 de julio de 1996, sobre control de plaguicidas y fertilizantes: registro, aplicación, actividad y servicio y se crea la Comisión Técnica de Plaguicidas, de 1 de septiembre de 1997
PAN-125	USFDA, "FDA's Pesticide Residue Monitoring and Enforcement" (2018)	Administración de Alimentos y Medicamentos de los Estados Unidos (USFDA), presentación titulada "FDA's Pesticide Residue Monitoring and Enforcement", de 30 de mayo de 2018
PAN-128	AUPSA, *Procedure manual: Sampling for the control of pesticide residues in products of plant origin* (2013)	Autoridad Panameña de Seguridad de Alimentos (AUPSA), *Manual de procedimiento: Muestreo para el control de residuos de plaguicidas en productos de origen vegetal* (MPDNAC-006-09) (8 de octubre de 2013)
PAN-129	AUPSA, Resolution No. 143-AG-2019	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resolución Nº 143-AG-2019, de 26 de diciembre de 2019
PAN-130	Legislative Assembly of Panama, Law No. 23 (1997)	Asamblea Legislativa de la República de Panamá, Ley Nº 23, por la cual se aprueba el Acuerdo de Marrakech, constitutivo de la Organización Mundial del Comercio; Protocolo de Adhesión de Panamá a dicho Acuerdo junto con sus anexos y la lista de compromisos; se adecúa la legislación interna a la normativa internacional y se dictan otras disposiciones, de 15 de julio de 1997
PAN-131	AUPSA, Questionnaire for the introduction of meat products	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Cuestionario de verificación del estatus sanitario de un país, zona/región o compartimento que solicite la elegibilidad para la introducción de productos cárnicos a la República de Panamá (FDNN-009-09/13.04.09)
PAN-132	AUPSA, Questionnaire for the introduction of dairy products	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Cuestionario de verificación del estatus sanitario de un país, zona/región o compartimento que solicite la elegibilidad para la introducción de productos lácteos a la República de Panamá (FDNN-010-09/13.04.09)
PAN-136	Resolution AUPSA-DINAN-026-2007 concerning the importation of avocados from Colombia	Autoridad Panameña de Seguridad de Alimentos (AUPSA), Resuelto AUPSA DINAN-026-2007, por medio del cual se emite el requisito fitosanitario para la importación de Aguacates (*Persea americana*) frescos, para consumo humano y/o transformación, originario de Colombia, de 25 de enero de 2007
PAN-141	Customs declarations for pineapple imports into Panama (2014-2016)	Autoridad Nacional de Aduanas de Panamá, Estadísticas de importación de piña de Estados Unidos y Colombia en Panamá (2014-2016) y declaraciones aduaneras de dichas importaciones
PAN-151	Customs declarations for pineapple imports into Panama (2020-2022)	Autoridad Nacional de Aduanas de Panamá, Estadísticas de importación de piña de Estados Unidos y Colombia en Panamá (2020-2022) y declaraciones aduaneras de dichas importaciones

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ALOP	Appropriate level of protection
AUPSA	Panamanian Food Safety Authority
BSE	Bovine spongiform encephalopathy
CABI	Centre for Agriculture and Bioscience International
c.i.f.	Cost, insurance and freight
Codex	Codex Alimentarius Commission
CPM	Commission on Phytosanitary Measures
CTI	Institutional Technical Commission
DECA	Executive Directorate of Agricultural Quarantine
DNSV	Directorate of Plant Health
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes)
DWPE	Detention without physical examination
EFSA	European Food Safety Authority
EPA	U.S. Environmental Protection Agency
EPPO	European and Mediterranean Plant Protection Organization
FAO	Food and Agriculture Organization of the United Nations
FDA	Food and Drug Administration
GAP	Good agricultural practices
GAPP	Good animal production practices
GMP	Good manufacturing practices
GATT 1994	General Agreement on Tariffs and Trade 1994
ICA	Colombian Agricultural Institute
IICA	Inter-American Institute for Cooperation on Agriculture
ILC	International Law Commission
INEC	National Institute of Statistics and Censuses
IPPC	International Plant Protection Convention
ISPM	International Standards for Phytosanitary Measures
MAG	Ministry of Agriculture and Livestock of Costa Rica
MIDA	Ministry of Agricultural Development of Panama
MRL	Maximum residue limit
MRL Regulation	Health Regulation of Panama establishing maximum residue limits for pesticides and other contaminants in fruit and vegetables for domestic consumption and export
NPPO	National plant protection organization
OIE	International Office of Epizootics
OIRSA	International Regional Organization for Plant and Animal Health
PFA	Pest free area
PIR	Phytosanitary import requirements
PRA	Pest risk analysis
SENASA	National Animal Health Service of Costa Rica
SFE	State Phytosanitary Service of Costa Rica
SIVUCE	Single Window for Foreign Trade of Costa Rica
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
UNESYF	Sanitary and Phytosanitary Evaluation Unit
USD	United States dollar
USDA	United States Department of Agriculture
WHO	World Health Organization

1 INTRODUCTION

1.1 Complaint by Costa Rica

1.1. On 11 January 2021, Costa Rica requested consultations with Panama pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 19 of the Agreement on Agriculture, Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), with respect to the measures and claims set out below.[2]

1.2. Consultations were held on 8 February 2021 but failed to resolve the dispute.

1.2 Establishment and composition of the Panel

1.3. On 19 August 2021, Costa Rica requested the establishment of a panel pursuant to Article 6 of the DSU, with the standard terms of reference.[3] At its meeting on 27 January 2021, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Costa Rica in document WT/DS599/4, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Costa Rica in document WT/DS599/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 12 January 2022, Costa Rica requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 24 January 2022, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Mario MATUS
Members:	Ms Delilah CABB AYALA Ms María Manuela MOCCERO

1.6. Australia, Brazil, Canada, China, the European Union, Guatemala, Honduras, India, Mexico, Nicaragua, the Russian Federation, Chinese Taipei, the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 7 April 2022.[6] After consulting with the parties, the Panel adopted its Working Procedures[7] and partial timetable on 19 April 2022. On the same date, in response to Panama's request and having consulted the parties, the Panel also adopted its Additional Working Procedures Concerning Business Confidential Information.[8] The Panel revised its timetable several times, after consultations with the parties, most recently on 30 January 2024.[9]

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[2] Request for consultations by Costa Rica, WT/DS599/1 (Costa Rica's consultation request).
[3] Request for the establishment of a panel by Costa Rica, WT/DS599/4 (Costa Rica's panel request).
[4] DSB, Minutes of the meeting held on 27 September 2021, WT/DSB/M/456, para. 4.6.
[5] Constitution note of the Panel, WT/DS599/5, para. 2.
[6] The beginning of the Panel's work was delayed due to a lack of Spanish-speaking personnel in the Secretariat available to assist the Panel in this dispute.
[7] See the Panel's Working Procedures in Annex A-1.
[8] See the Panel's Additional Working Procedures concerning Business Confidential Information in Annex A-2. Neither party designated any information as business confidential information.
[9] The Panel revised its timetable, after consultations with the parties, on 27 April 2022, 15 June 2022, 10 and 27 January 2023, 2 and 16 October 2023, and 30 January 2024.

1.8. Costa Rica and Panama filed their first written submissions on 14 July 2022 and 12 September 2022, respectively. On 3 October 2022, the Panel received third-party submissions from Brazil, the European Union, and the United States.

1.9. Following a request from Panama to postpone the first substantive meeting with the parties, originally scheduled for the week of 28 November 2022, the Panel held the meeting on 12 and 13 December 2022.[10] A session with the third parties took place on 13 December 2022. Prior to the first substantive meeting with the parties, on 5 December 2022, the Panel sent the parties a list of advance questions to be answered at the meeting. Following the meeting, on 18 January 2023, the Panel sent written questions to the parties and the third parties.

1.10. On 23 January 2023, Costa Rica requested that the deadline for the parties' second written submissions be extended from 6 April 2023 to 21 April 2023. On the same date, Panama requested that the date for the submission of responses to the Panel's questions following the first substantive meeting with the parties be postponed from 15 February 2023 to 1 March 2023. Neither party objected to the other's request, and the Panel agreed to modify the timetable on 27 January 2023 to reflect the changes requested.

1.11. On 15 February 2023, Australia, Brazil, Canada, the European Union, and the United States submitted their third-party responses to the Panel's questions. On 1 March 2023, the Panel received responses from Costa Rica and Panama.

1.12. Costa Rica and Panama filed their second written submissions on 21 April 2023. The Panel held the second substantive meeting with the parties on 19 and 20 September 2023. Prior to the second substantive meeting with the parties, on 11 September 2023, the Panel sent the parties a list of advance questions to be answered at the meeting. Following the meeting, on 6 October 2023, the Panel sent written questions to the parties.

1.13. On 13 October 2023, Costa Rica requested an extension of two weeks to the deadlines for receipt of the parties' responses to the Panel's questions and the parties' comments on the other party's responses. Costa Rica also suggested that the integrated executive summaries be filed on 15 January 2024 instead of 4 December 2023. Panama stated that it had no objection in this regard. The Panel accepted the extensions requested by Costa Rica. On 10 November 2023, the Panel received the responses of Costa Rica and Panama. On 15 December 2023, the Panel received the comments of Costa Rica and Panama on the other party's responses.

1.14. On 31 January 2024, the Panel issued the draft descriptive part of its report to the parties. The Panel issued its Interim Report to the parties on 14 August 2024.[11] The Panel issued its Final Report to the parties on 16 October 2024.

1.3.2 Preliminary ruling

1.15. On 13 June 2022, Panama requested the Panel to find that Costa Rica's panel request was inconsistent with Article 6.2 of the DSU. Panama submitted that Costa Rica's panel request did not satisfy the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[12]

[10] On 22 April 2022, Panama requested that the first substantive meeting with the parties be postponed for two weeks. Costa Rica stated that it considered postponing the meeting for one week to be sufficient and, if this were not possible, indicated its availability to hold the meeting on 12 and 13 December 2022. On 17 November 2022, Panama again requested the postponement of the first substantive meeting with the parties. After considering both parties' comments, the Panel rejected Panama's request. The Panel informed the parties that accommodating Panama's request would result in excessive delays to the proceedings. In addition, the Panel considered that, in the circumstances of this case, its decision to reject Panama's request would not prejudice Panama's due process rights. The Panel proposed modalities to facilitate the parties' participation in the meeting on the scheduled date (Panel communication to the parties, 23 November 2022).

[11] According to the Panel's timetable adopted on 16 October 2023, the expected date of issuance of the Interim Report to the parties was "mid-July 2024". At the request of Costa Rica, and in the absence of objections from Panama, the Panel adopted the revised timetable on 30 January 2024, setting 14 August 2024 as the new date to issue the Interim Report to the parties.

[12] Panama's request for a preliminary ruling, para. 1.

1.16. Pursuant to its Working Procedures[13], the Panel requested Costa Rica and the third parties to submit comments on Panama's request by the deadline for the submission of their respective written submissions, i.e. 14 July and 3 October 2022, respectively.[14]

1.17. On 14 July 2022, Costa Rica submitted its response to Panama's preliminary ruling request. In that response, Costa Rica requested the Panel to dismiss Panama's request in its entirety.[15]

1.18. In its first written submission dated 12 September 2022, Panama reiterated its first preliminary ruling request[16] and raised a second issue concerning the Panel's terms of reference, in respect of which it also requested a preliminary ruling.[17] Panama submitted that Costa Rica introduced new claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement that had not been identified in its panel request. Thus, Panama considered that those claims fell outside the Panel's terms of reference pursuant Articles 6.2 and 7.1 of the DSU.[18]

1.19. The United States and Australia commented, as third parties, on Panama's first preliminary ruling request on 3 October and 13 December 2022, respectively.

1.20. Following its first meeting with the parties held on 12 and 13 December 2022, the Panel posed questions to Costa Rica and the third parties on Panama's second preliminary ruling request. On 15 February 2023, Canada, the European Union, and the United States submitted their third-party written responses to the questions on that request. Costa Rica submitted its responses on 1 March 2023.

1.21. The Panel decided to issue a single preliminary ruling addressing both matters raised by Panama, namely:

a. whether Costa Rica's panel request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly, pursuant to Article 6.2 of the DSU; and

b. whether the claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement fell outside the Panel's terms of reference.

1.22. The Panel issued its preliminary ruling on 5 April 2023 and indicated that the ruling would form an integral part of the Panel's final report, subject to any changes that may become necessary in the light of comments received from the parties during the course of the proceedings. The Panel's preliminary ruling is set out in Annex D-1.

1.3.3 Consultations with experts

1.23. At the organizational meeting held on 7 April 2022, Panama stated preliminarily that it considered it necessary to hold a meeting with experts given the technical nature of the dispute. In response to Panama's position, Costa Rica said that it was for the Panel to decide whether this dispute raised scientific or technical issues that required expert advice. Pending a decision on this matter at a later stage[19], the Panel decided to include in its Working Procedures, adopted on 19 April 2022, the possibility of seeking advice from experts and international organizations, pursuant to Article 13 of the DSU and Article 11.2 of the SPS Agreement, as well as provisions regarding consultation with experts.

1.24. Following the first substantive meeting with the parties, on 18 January 2023, the Panel requested comments from the parties about the possibility of the Panel seeking scientific or technical advice in this dispute from individual experts and/or relevant international organizations. Both

[13] Working Procedures of the Panel, paras. 4.1(a) and 4.1(d).
[14] Panel communication to the parties, 15 June 2022, p. 2.
[15] Costa Rica's response to Panama's preliminary ruling request, para. 59.
[16] Panama's first written submission, paras. 23-48.
[17] Panama's first written submission, paras. 49-55 and 58.
[18] Panama's first written submission, paras. 22 and 49.
[19] Paragraph 22 of the Working Procedures states that "[i]n the course of the proceedings, the Panel shall determine, after consultation with the parties, whether it is necessary to seek expert advice".

parties informed the Panel that they did not consider it necessary for the Panel to consult experts or international organizations.[20]

1.25. On 6 April 2023, the Panel informed the parties of its decision to not hold a meeting with experts prior to the second substantive meeting as provided for in paragraphs 32-34 of the Working Procedures. However, the Panel reserved the right to seek information from individual experts and/or relevant international organizations in the course of the proceedings pursuant to Article 13 of the DSU, Article 11.2 of the SPS Agreement and the relevant paragraphs of the Working Procedures, in the event that the Panel deemed it appropriate to do so.[21]

2 FACTUAL ASPECTS

2.1 Measures at issue

2.1.1 Introduction

2.1. This dispute concerns certain measures imposed by Panama on imports of (a) strawberries; (b) dairy and meat products; (c) pineapples; and (d) plantains and bananas from Costa Rica.[22]

2.2. In its request for the establishment of a panel, Costa Rica challenges the following measures:

a. "Measure restricting or prohibiting the importation of strawberries originating in Costa Rica" (Measure 1)[23, 24];

b. "Measure restricting or prohibiting the importation of: (i) dairy products; (ii) meat products of bovine animals; (iii) meat products of swine; (iv) meat products (sausages) of bovine animals, swine and poultry; (v) aquatic animal (fish) food; and (vi) pet (dog) food containing protein of ruminant origin, all originating in Costa Rica" (Measure 2)[25];

c. "Measure restricting or prohibiting the importation of fresh pineapples originating in Costa Rica" (Measure 3)[26]; and

d. "Measure restricting or prohibiting the importation of plantains and bananas originating in Costa Rica" (Measure 4).[27]

2.3. Each of the measures at issue is described below on the basis of Costa Rica's panel request, as are their relevant regulatory contexts. Those matters of fact on which the parties disagree shall be addressed by the Panel in its findings (section 7 of the report) to the extent necessary.

2.1.2 Measure concerning the importation of strawberries (Measure 1)

2.1.2.1 Description

2.4. According to Costa Rica, Measure 1 consists of a "ban on imports of strawberries from Costa Rica"[28], which Panama adopted on 20 February 2020, through Note AUPSA-AG-051-2020.[29]

[20] Costa Rica's response to Panel question No. 1; Panama's response to Panel question No. 1.
[21] Decision of the Panel on the possibility of seeking scientific or technical advice from individual experts and/or relevant international organizations, dated 6 April 2023. The Panel did not consult individual experts and/or relevant international organizations in these proceedings.
[22] The terms "strawberry", "pineapple", "plantain" and "banana" in this report refer to fresh produce, unless otherwise indicated.
[23] The Panel has decided to number the measures to simplify references to them in the report. The numbering used by the Panel is the same as that adopted in Costa Rica's panel request.
[24] Costa Rica's panel request, pp. 1-2.
[25] Costa Rica's panel request, pp. 3-4.
[26] Costa Rica's panel request, pp. 4-5.
[27] Costa Rica's panel request, pp. 5-6.
[28] Costa Rica's panel request, p. 1.
[29] Costa Rica's panel request, p. 1. See also Note AUPSA-AG-051-2020 (Exhibit CRI-7).

2.5. In that communication, the Panamanian Food Safety Authority (AUPSA) informed the State Phytosanitary Service of Costa Rica (SFE) that it had detected situations of non-compliance, in February 2020, with respect to the level of chemical residues permitted in strawberries originating in Costa Rica, in particular of the pesticide oxamyl.[30] AUPSA also indicated that, as a result, imports of strawberries from Costa Rica to the Republic of Panama would be "temporarily disallowed" ("*deshabilita[das] temporalmente*").[31]

2.1.2.2 The relevant Panamanian regulatory framework

2.6. Resolution AUPSA-DINAN-006-2008, the inactivation ("*inhabilitación*") of which was notified to Costa Rica on 20 February 2020[32], establishes the phytosanitary requirements for imports of "fresh strawberries (*Fragaria ananassa*) for human consumption and/or processing, originating in Costa Rica".[33] That Resolution requires, *inter alia*, that consignments of strawberries be accompanied by a phytosanitary certificate, issued by the national plant protection organization (NPPO) of the country of origin, certifying compliance with a series of requirements.[34] The Resolution also requires that the strawberries comply with other applicable national regulations.[35]

2.7. Among the regulations with which compliance is required in order to import strawberries is Executive Decree No. 467 of 7 November 2007. This Decree is the legal instrument by which Panama adopts the "Sanitary regulation establishing maximum residue limits [MRLs][36] of pesticides[37] and other contaminants in fruit and vegetables for domestic consumption and export" (MRL Regulation).

2.8. According to Article 2 of Executive Decree No. 467, the MRLs established in the MRL Regulation are based on those "set by the Codex Alimentarius Commission or, in their absence, those established by the United States Environmental Protection Agency (EPA) and the European Community (EC)".[38] The MRL Regulation does not expressly establish an MRL for oxamyl in strawberries.[39] However, Panama indicates that, pursuant to Article 2 of Executive Decree No. 467, it adopted the MRL of the European Union for oxamyl in strawberries, corresponding to the limit of

[30] Note AUPSA-AG-051-2020 (Exhibit CRI-7).
[31] Note AUPSA-AG-051-2020 (Exhibit CRI-7).
[32] Through Note DNSV-0111-2021-OIAR, of 22 February 2021, Panama points out that, contrary to Costa Rica's statements in its letters of May and June 2020, Note AUPSA-AG-051-2020 does not "use the term 'prohibit'" and "refers to disallowing ('*deshabilitación*') the resolution regulating imports of fresh strawberries for consumption". (Note DNSV-0111-2021-OIAR (Exhibit CRI-13)).
[33] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34).
[34] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Article 3. These requirements are that: (a) the strawberries have been produced and packed in Costa Rica; (b) the strawberries come from areas, places or sites subject to inspections by the NPPO of the country of origin during the current growing period, the picking and packing of the foodstuff; and (c) the consignments are free from the pests *Frankliniella occidentalis* and *Peridroma saucia.*
[35] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Article 12.
[36] The MRL Regulation defines "maximum residue limit" (MRL) as "the maximum concentration of a pesticide residue (expressed as mg/kg), legally permitted in the Republic of Panama in food commodities. MRLs are based on Good Agricultural Practice". (Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulation (2007) (Exhibit CRI-8), Title I, Chapter I, Article 1 of the MRL Regulation). The Codex defines an MRL as the highest level of a pesticide residue that is legally tolerated in or on food or feed when pesticides are applied correctly in accordance with Good Agricultural Practice. (Codex, Maximum Residue Limits (MRLs) (2021) (Exhibit CRI-370)).
[37] The MRL Regulation defines "pesticide" as "any substance or mixture of substances intended for preventing, destroying, attracting, repelling or controlling any pest, including unwanted species of plants or animals during the production, storage, transport, distribution and processing of food, agricultural commodities or animal feeds. The term includes insecticides, fungicides, herbicides, acaricides, molluscicides, nematicides, rodenticides; plant-growth regulators, desiccants, defoliants, fruit thinning agents, agents for preventing the premature fall of fruit, substances applied to crops either before or after harvest. Fertilizers, plant nutrients and food additives are excluded from this definition." (Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulation (2007) (Exhibit CRI-8), Chapter I, Article 1 of the MRL Regulation).
[38] Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulation (2007) (Exhibit CRI-8), Title I, Chapter I, Article 2 of the MRL Regulation. Although Article 2 of the MRL Regulation explicitly refers to the MRLs "set out in the annex to this regulation", the said MRLs are stipulated in Article 17 of the Regulation.
[39] Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulation (2007) (Exhibit CRI-8), Article 17 of the MRL Regulation, p. 18.

detection, namely 0.01 mg/kg, as neither the Codex Commission nor the EPA had established an MRL for oxamyl in strawberries.[40]

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

2.1.3.1 Description

2.9. In its panel request, Costa Rica describes Measure 2 as an "import ban" on animal products from Costa Rica in force since 30 June 2020.[41] Costa Rica states that this "import ban" is maintained by virtue of:

a. the non-renewal of sanitary approvals of various Costa Rican establishments that produce and export the products concerned; and

b. Panama's requirement that Costa Rica undergo a new animal health eligibility procedure as a condition to restore trade in these products, as if it were a country that was exporting for the first time.[42]

2.10. Costa Rica lists in its panel request the 18 Costa Rican establishments that it considers to have been affected by the non-renewal of the sanitary approvals by Panama.[43]

2.11. Given that Panama disagrees with Costa Rica's characterization of Measure 2, the Panel will address this matter in section 7 of its report to the extent necessary, together with other disputed factual matters.

2.1.3.2 The relevant Panamanian regulatory framework

2.12. Pursuant to the Panamanian regulatory framework[44], the following cumulative preconditions must be met in order to import dairy and meat products into Panama.

2.13. The first condition refers to the sanitary eligibility and animal health eligibility of the country or region from which such products are intended to be exported. The *AUPSA Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (hereinafter, the *AUPSA Manual on sanitary eligibility*) establishes the procedures to be followed by countries or regions in order to obtain sanitary eligibility[45] granted by AUPSA, by product

[40] Panama's first written submission, paras. 170 and 202; response to Panel question No. 15, para. 72. See also EPA, Pesticide Database, oxamyl MRL search (Exhibit PAN-42); Codex Alimentarius, Pesticide Index, "Oxamyl" (Exhibit CRI-125).

[41] Costa Rica's panel request, p. 3. See also Costa Rica's first written submission, para. 41; second written submission, para. 9.

[42] Costa Rica's panel request, p. 4.

[43] Costa Rica's panel request, annex, pp. 9-10. See also Costa Rica's first written submission, annex.

[44] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Article 6.6; AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 8, paras. 2-4. See also Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26), Article 1.

The sanitary requirements for imports of the products concerned are set forth in different resolutions on the record. Although not all the resolutions are identical, they all refer to the eligibility of a country and the approval of establishments to export food commodities to Panama. See e.g. Resolution AUPSA-DINAN-007-2010 concerning the importation of dairy products (Exhibit CRI-284), Articles 4.2 and 4.3; Resolution AUPSA-DINAN-032-2010 concerning the importation of flours, meals and pellets, of meat or meat offal, greaves, of fish or of crustaceans, molluscs, or other aquatic invertebrates and other preparations, for animal consumption (Exhibit CRI-285), Articles 2 and 3. See also Resolution AUPSA-DINAN-017-2009 concerning the introduction of meat and meat offal of swine, for human consumption (Exhibit CRI-287), Article 2; Resolution AUPSA-DINAN-016-2009 concerning the introduction of meat and meat offal of bovine animals, for human consumption (Exhibit CRI-289), Article 2.

[45] The Manual defines "sanitary eligibility" as "the recognition by [AUPSA] of the existence of countries, regions, zones or districts free from the disease under consideration, as defined by the competent official authority of the exporting country, for the importation or transit of foodstuffs". (AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 3).

or animal species, that allows them to export their products to Panama.[46] Executive Decree No. 49 of 2001 establishes the procedure for interested parties to obtain animal health eligibility, granted by the National Animal Health Directorate (DINASA) of the Ministry of Agricultural Development of Panama (MIDA).[47]

2.14. The second condition is that the exporting establishment has a sanitary approval and an animal health approval that allows its products to be imported into Panama. The *Manual for the approval of establishments, production chains and/or processing plants* (2013) (hereinafter, the *AUPSA Manual for the approval of establishments*) sets out the conditions and the procedure for the approval of establishments, production chains and/or processing plants in order for them to export their products of animal origin for human and/or animal consumption to Panama.[48] That Manual also lays down the conditions and procedures applicable to the renewal of a sanitary approval.[49] Executive Decree No. 49 of 2001 establishes the procedure for interested parties to obtain, from DINASA, the animal health approval for establishments, processing plants, and other facilities related to livestock production.[50]

2.1.4 Measure concerning the importation of pineapples (Measure 3)

2.1.4.1 Description

2.15. According to Costa Rica, Measure 3 consists of a "ban on imports of fresh Costa Rican pineapples"[51] that Panama adopted on 29 January 2019, through Note AUPSA-AG-032-2019.[52]

2.16. In that communication, AUPSA informed the Ministry of Agriculture and Livestock (MAG) of Costa Rica that, based on its risk assessment, "the phytosanitary status of imports of fresh pineapple (*Ananas comosus*), originating in Costa Rica, [had been verified] which f[ound] the presence of the pest, the pink mealybug (*Maconellicoccus hirsutus*)."[53] AUPSA added that this pest was of quarantine concern for Panama. AUPSA stated that, as a "preventive measure", Panama had decided to "temporarily inactivate" ("*inhabilitar de manera temporal*") Resolution AUPSA-DINAN-116-2008, establishing the "Phytosanitary Requirement[s] for imports of fresh pineapples (*Ananas comosus*) for human consumption and/or processing, originating in Costa Rica".[54]

2.1.4.2 The relevant Panamanian regulatory framework

2.17. Resolution AUPSA-DINAN-116-2008, the inactivation ("*inhabilitación*") of which was notified to Costa Rica on 29 January 2019, establishes the sanitary requirements for the importation of pineapple from Costa Rica.[55] That Resolution requires, *inter alia*, that consignments of pineapples be accompanied by a phytosanitary certificate, issued by the NPPO of the country of origin, certifying

[46] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), pp. 7-9.
[47] Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24), Articles 4-13. See also Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Articles 6.5 and 31.
[48] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 2, sections II and III.
[49] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 14-15, section VII, para. 7.
[50] Ministry of Agricultural Development, Executive Decree No.49 (2001) (Exhibit CRI-24), Articles 14-19. See also Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Articles 6.5 and 31.
[51] Costa Rica's panel request, pp. 4-5.
[52] Costa Rica's panel request, p. 4. See also Note AUPSA-AG-032-2019 (Exhibit CRI-65).
[53] Note AUPSA-AG-032-2019 (Exhibit CRI-65).
[54] Note AUPSA-AG-032-2019 (Exhibit CRI-65). See also Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66).
[55] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66).

compliance with a series of requirements.[56] The Resolution also requires that the fresh pineapples comply with other applicable national regulations.[57]

2.1.5 Measure concerning the importation of plantains and bananas (Measure 4)

2.1.5.1 Description

2.18. According to Costa Rica, Measure 4 consists of a "ban on imports of Costa Rican plantains and bananas"[58], which Panama adopted on 10 October 2019 (in the case of plantains) and 25 October 2019 (in the case of bananas), through Notes AUPSA-AG-392-2019 and AUPSA-AG-424-2019, respectively.[59]

2.19. With respect to imports of plantains, in Note AUPSA-AG-392-2019, AUPSA stated that it had "initiated a technical review process of published resolutions", which had revealed that Resolution AUPSA-DINAN-106-2009 establishes that plantains must come from "production areas or places and packing plants subject to inspection by, and registration with, the [NPPO] of the country of origin and approval of packing plants by [AUPSA]".[60] AUPSA stated that, in view of the fact that it had not "carried out approvals of the packing plants" of plantains, it had proceeded to "temporarily inactivate ("*la inhabilitación temporal*") the requirements" for the importation of fresh plantains (*Musa paradisiaca*) for human consumption and/or processing, originating in Costa Rica, as set out in Resolution AUPSA-DINAN-106-2009.[61]

2.20. With regard to imports of bananas, in Note AUPSA-AG-424-2019, AUPSA informed the SFE that it had "initiated a technical review process" of Resolution AUPSA-DINAN-019-2012 establishing the phytosanitary requirements for the importation of fresh bananas (*Musa balbisiaca acuminata*, *Musa paradisiaca* or *Musa sapientum*) for human consumption and/or processing, originating in Costa Rica.[62] AUPSA stated that subsequently it had "proceeded to temporarily inactivate ("*inhabilitar temporalmente*") [those] requirements".[63]

2.21. The parties disagree over whether the risk of introduction of the pest *Fusarium oxysporum* f. sp. *cubense* tropical race 4 (Foc TR4) is the reason why Measure 4 was adopted. As mentioned above, as a disputed factual matter, the Panel will address this matter, to the extent necessary, in section 7 of this report.

2.1.5.2 The relevant Panamanian regulatory framework

2.22. Resolutions AUPSA-DINAN-106-2009[64] and AUPSA-DINAN-019-2012[65], the inactivation ("*inhabilitación*") of which was notified to Costa Rica on 10 and 25 October 2019, respectively, establish the phytosanitary requirements for imports of plantains and bananas from Costa Rica. These Resolutions require, *inter alia*, that consignments of plantain and banana fruit be accompanied by a phytosanitary certificate, issued by the NPPO of the country of origin, certifying compliance

[56] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 3. These requirements are that: (a) the pineapples have been produced and packed in Costa Rica; (b) the pineapples come from areas, places or sites subject to inspections by the NPPO of the country of origin during the current growing period, the picking and packing of the foodstuff; and (c) the consignments are free from the pest *Paracoccus marginatus.*

[57] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 12.

[58] Costa Rica's panel request, pp. 5-6.

[59] Costa Rica's panel request, p. 5. See also Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97).

[60] Note AUPSA-AG-392-2019 (Exhibit CRI-95). See also Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3.2.

[61] Note AUPSA-AG-392-2019 (Exhibit CRI-95). See also Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96).

[62] Note AUPSA-AG-424-2019 (Exhibit CRI-97). See also Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98).

[63] Note AUPSA-AG-424-2019 (Exhibit CRI-97).

[64] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96).

[65] Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98).

with a series of requirements.[66] Resolution AUPSA-DINAN-019-2012 also requires that the fresh bananas comply with other applicable national regulations.[67]

2.2 Other factual aspects

2.2.1 Introduction

2.23. This section presents the pests and pesticide at issue in this dispute and the international standards cited by Costa Rica in support of its claims.

2.2.2 Pests and pesticide

2.2.2.1 Introduction

2.24. The following pests and pesticide are at issue in this dispute:

Table 1- Pests and pesticide

Pest/pesticide	Measure at issue
The pesticide oxamyl	Measure concerning the importation of strawberries(Measure 1)[68]
The pest *Maconellicoccus hirsutus* (Green) (pink hibiscus mealybug)	Measure concerning the importation of pineapples (Measure 3)[69]
The pest *Fusarium oxysporum* f. sp. *cubense* (Foc), in particular tropical race 4 (Foc TR4)	Measure concerning the importation of plantains and bananas(Measure 4)[70]

2.2.2.2 The pesticide oxamyl

2.25. Oxamyl is a pesticide that belongs to the group of carbamate compounds[71] used as an insecticide, acaricide or nematicide.[72] Oxamyl can be applied as a foliar spray, by soil incorporation, or by watering onto soil in field, fruit and vegetable crops.[73] Oxamyl is taken up by the plants through the roots or by direct contact[74] and controls a broad spectrum of insects, mites, ticks, and roundworms.[75]

[66] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3; Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98), Article 3. These requirements include (a) that the plantains/bananas come from areas or places subject to inspection by and registration with the NPPO of the country of origin; (b) that the consignment be free from any live insects, as well as other biological, chemical and physical contaminants, including soil; and (c) that the consignment contain no ripe units and be free from leaves and any other plant material. In the case of plantains, inspection by, and registration with, the NPPO of the country of origin also extends to the packing plants, and said plants must be approved by AUPSA. See Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3, para. 3.2.

[67] Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98), Article 11.

[68] See e.g. Costa Rica's first written submission, paras. 14-40.

[69] See e.g. Costa Rica's first written submission, paras. 104-127.

[70] See e.g. Costa Rica's first written submission, paras. 128-150.

[71] EPA, Oxamyl Facts (2000) (Exhibit PAN-39), p. 1. The carbamates are a group of pesticides that affect the functioning of the nervous system. (Ibid.). See also New Jersey Department of Health and Senior Services, *Hazardous Substance Fact Sheet – Oxamyl* (1999) (Exhibit PAN-43), p. 1.

[72] EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 7; Extoxnet, Pesticide Information Profiles – Oxamyl (1996) (Exhibit PAN-44), p. 1. See also Codex Alimentarius, Pesticide Index, "Oxamyl" (Exhibit CRI-125) (where it is classified as an insecticide); FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41), p. 16 (where oxamyl is classified as an insecticide/nematicide); and EPA, Oxamyl Facts (2000) (Exhibit PAN-39), p. 3 (where oxamyl is referred to as a systematic and contact insecticide/acaricide and nematicide).

[73] FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41), p. 16. EPA, Oxamyl Facts (2000) (Exhibit PAN-39), p. 2 lists the products on which oxamyl is used in the United States.

[74] EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 7.

[75] Extoxnet, Pesticide Information Profiles – Oxamyl (1996) (Exhibit PAN-44), p. 1. See also FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41), p. 16 (where it is

2.26. In terms of effects on human health, the EPA notes that oxamyl can overstimulate the nervous system causing nausea, dizziness, confusion, and at very high exposures (e.g. accidents or major spills), respiratory paralysis and death.[76] It is also reported that exposure to oxamyl (by inhalation or through the skin) can cause rapid, severe poisoning, with headache, dizziness, blurred vision, tightness in the chest, sweating, nausea and vomiting, among other harmful effects.[77]

2.27. In 2008, the WHO classified oxamyl as highly hazardous.[78] Similarly, the European authorities have deemed oxamyl very toxic when inhaled or ingested, and the EPA considers it highly toxic via the oral, dermal, and inhalation routes.[79] It is included on the list of extremely hazardous substances in the United States.[80]

2.28. As indicated above, Panama applies an MRL for oxamyl in strawberries of 0.01 mg/kg.[81] For its part, Costa Rica indicates that the use of oxamyl is prohibited in its strawberry crops.[82]

2.2.2.3 The pink hibiscus mealybug pest (*Maconellicoccus hirsutus* (Green))

2.29. The pink hibiscus mealybug (*Maconellicoccus hirsutus* (Green)) is a highly polyphagous insect, so-called because of its colour and demonstrated preference for species of the *Hibiscus* genus.[83]

2.30. The pink mealybug is a small, soft-bodied insect. The female, which, unlike the male, is non-flying, lays its eggs in ovisacs, which it deposits on the host, sometimes in great numbers and visible as a whitish covering. The female, the nymphal stages and the male are also very visible on the host, and all stages are reddish to pink in colour, but covered in white mealy wax, with the body colour showing through.[84] The pink mealybug forms dense colonies in cracks and crevices.[85] While feeding, this insect injects saliva, which contains a phytotoxic substance, into the host plant. Host plants differ in their susceptibility and degree of response to the toxin.[86] Symptoms range from deformed flowers, fruits, leaves and stems to the death of the plant.[87]

2.31. The number of host plants[88] of this polyphagous pest fluctuates, according to some sources, between 224 genera in more than 78 families[89] and more than 300 plant genera in over 85 families.[90]

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noted that oxamyl is active against many species of insects, mites and nematodes); EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 7 (where it is indicated that oxamyl is mainly used for the control of nematodes, spider mites, chewing and sucking insects where it will act as a choline esterase inhibitor).

[76] EPA, Oxamyl Facts (2000) (Exhibit PAN-39), p. 3.

[77] New Jersey Department of Health and Senior Services, *Hazardous Substance Fact Sheet – Oxamyl* (1999) (Exhibit PAN-43), pp. 1-2. See also Extoxnet, Pesticide Information Profiles – Oxamyl (1996) (Exhibit PAN-44), p. 2.

[78] FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41), p. 18.

[79] FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41), p. 18.

[80] US Code of Federal Regulations, The List of Extremely Hazardous Substances and Their Threshold Planning Quantities (2008) (Exhibit PAN-38). See also Extoxnet, Pesticide Information Profiles – Oxamyl (1996) (Exhibit PAN-44), pp. 1-2.

[81] Panama's first written submission, paras. 170 and 202; response to Panel question No. 15, para. 72. See para. 2.8 above.

[82] Costa Rica's response to Panel question No. 112, para. 3.6; SFE, Certification of pesticides for use in strawberries, AE-REG-C-0035-2022 (Exhibit CRI-5).

[83] Martínez Rivero (2007) (Exhibit CRI-73), p. 166.

[84] USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74), section 1, p. 3.

[85] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 18.

[86] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 31.

[87] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 3. See also CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), pp. 31 and 38; USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74), section 1, p. 7; and Hoy et al. (2020) (Exhibit PAN-47), pp. 2-3.

[88] As in the parties' submissions and the scientific articles, in the Spanish version of the report, the terms "*huésped*", "*hospedador*", and "*hospedante*" (all meaning "host") are used interchangeably.

[89] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 18. See also USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74), section 1, p. 10.

[90] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), pp. 3 and 11.

Hosts include vegetable, ornamental, fruit, forest, and wild plants.[91] Pineapple is considered a host plant of the pest.[92]

2.32. The pest is present in most tropical and subtropical areas of the world and in some temperate regions.[93] Costa Rica indicates that the pest has been present in some areas of its territory since 2014, is associated with the host *Hibiscus* spp., and is under official control.[94] Panama states that the pest has not yet reached its territory.[95]

2.33. The pink mealybug can be spread through the following means: (a) natural dispersal (by first-instar nymphs (crawlers), which actively walk about or are picked up by wind or on a passing animal); (b) vector transmission (by ants, which may pick up and carry the mealybugs to new sites); (c) accidental introduction (by human transport and, to a lesser extent, produce and flowers); or (d) intentional introduction (although there is no reason for this to occur and no evidence to suggest that it ever has).[96] The pest is identified by visual inspection.[97]

2.34. The pest is considered difficult to eradicate after it becomes established.[98] The sources on the record identify the following pest control methods: (a) chemical controls; (b) biological controls; (c) cultural controls; (d) legal controls; and (e) physical controls.[99] Biological controls are the best long-term solution.[100]

2.35. The pest is considered to be of economic importance because of the direct damage it causes to a wide range of hosts[101], the problems it creates for exports of and trade in agricultural products[102], its impact on crop production, and control costs.[103]

2.2.2.4 The Foc TR4 pest (*Fusarium oxysporum* f. sp. *cubense* tropical race 4)

2.36. *Fusarium oxysporum* f. sp. *cubense* (Foc) is a fungus that causes the disease known as "Fusarium wilt".[104] Foc has been reported in all the banana-producing regions of the world, with a few exceptions.[105] Three races of Foc (R1, R2, and R4) have been identified based on their infection

[91] SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), pp. 5-7; Martínez Rivero (2007) (Exhibit CRI-73), p. 170.

[92] See Hodgson and Łagowska (2011) (Exhibit PAN-53). See also CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 19; Panel on Plant Health, "Scientific opinion on the pest categorisation of *Maconellicoccus hirsutus*" (2022) (Exhibit PAN-48), p. 24.

[93] USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74), section 1, p. 10; OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 3; Martínez Rivero (2007) (Exhibit CRI-73), p. 167; and SAGARPA, SENASICA, Pink hibiscus mealybug, Datasheet No. 6 (2016) (Exhibit CRI-147), p. 5.

[94] Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69). This is corroborated by the CABI and EPPO databases, which reflect the information provided by the country. (CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71); EPPO, Distribution of the pink mealybug in Costa Rica (2022) (Exhibit CRI-174)).

[95] Panama's first written submission, para. 254.

[96] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 35.

[97] EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144), p. 4.

[98] Culik et al. (2013) (Exhibit CRI-150), p. 396.

[99] SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), pp. 15-22. See also SAGARPA, SENASICA, *Pink hibiscus mealybug,* Datasheet No. 6 (2016) (Exhibit CRI-147), pp. 18-20; Chong et al. (2015) (Exhibits CRI-149, PAN-50), pp. 10-12.

[100] USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74), section 1, p. 11; USDA, APHIS, *Pest Alert – The Pink Hibiscus Mealybug* (1999) (Exhibit PAN-49), p. 2.

[101] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 3; SAGARPA, SENASICA, *Pink hibiscus mealybug*, Datasheet No. 6 (2016) (Exhibit CRI-147), p. 4.

[102] SAGARPA, SENASICA, *Pink hibiscus mealybug*, Datasheet No. 6 (2016) (Exhibit CRI-147), p. 4.

[103] See the list of impacts in Martínez Rivero (2007) (Exhibit CRI-73), p. 168.

[104] Olivares et al. (2021) (Exhibit PAN-58), p. 2; OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), p. 18; and OIRSA, *Contingency plan for an outbreak of Foc TR4 in a country of the OIRSA region* (2013) (Exhibit CRI-124), p. xi.

[105] The exceptions are islands in the Pacific, Somalia and Mediterranean countries. See Olivares et al. (2021) (Exhibit PAN-58), p. 2; Stellenbosch University, "Brief History of Banana Fusarium Wilt" (Exhibit PAN-62), pp. 1-2.

of different cultivars of the *Musaceae* species (bananas and plantains)[106], although there are no differences in the symptoms that they produce.[107]

2.37. Race 4 (R4) is considered the most dangerous of the three because it also affects the Cavendish cultivar[108], which today accounts for 99% of world banana exports[109] and is resistant to races 1 and 2 (R1 and R2). Foc R4 is subdivided into two races: tropical (TR4) and subtropical (SR4).[110] The race that Panama considers relevant in this dispute is TR4. Neither Panama nor Costa Rica has reported the presence of this race of Foc in its territory.[111] In Latin America, the pest has been reported only in Colombia (2019), Peru (2021), and Venezuela (2023).[112]

2.38. The most conspicuous and classic external symptom of the disease caused by all Foc races is that the leaves turn yellow and gradually collapse. Internally, there is vascular discoloration.[113]

2.39. Foc infects the plant through the root system and reaches the xylem vessels, where it grows and multiplies, occluding them and limiting the nutrient and water absorption by the plant.[114] The pathogen can also grow in the surrounding tissues as plants die, and produces chlamydospores that contaminate the soil, where they can survive for more than 20 years.[115] These chlamydospores affect the roots of other plants, thus spreading the pest.[116] Foc can be dispersed by plant material for planting, water, soil particles, tools, footwear, and machinery.[117] Dispersal is fast on susceptible cultivars.[118]

2.40. Foc is considered to be the main phytopathological problem of banana plantations in tropical areas.[119] In the Cavendish cultivar, this pest has caused a significant reduction of production and significant increases in production costs.[120] In terms of control, no long-term measures are available other than the planting of resistant cultivars.[121]

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[106] Bai et al. (2020) (Exhibit PAN-75), p. 312.

[107] FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), pp. 4 and 8.

[108] Olivares et al. (2021) (Exhibit PAN-58), pp. 2-3.

[109] FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), p. 4.

[110] Olivares et al. (2021) (Exhibit PAN-58), p. 3; Stellenbosch University, "Brief History of Banana Fusarium Wilt" (Exhibit PAN-62), p. 2.

[111] Olivares et al. (2021) (Exhibit PAN-58), p. 3. CABI, EPPO, and ProMusa are listed as sources of this information.

[112] "Colombia confirms presence of Fusarium TR4 in banana plantations in La Guajira" (8 August 2019), *BananoTecnia* (Exhibit CRI-185); G. Jackson, "Panama Disease Tropical Race 4, Banana – Colombia (Magdalena)" (2022), *Pestnet* (Exhibit PAN-64); EFEAgro "Banana fungus puts Latin America on alert" (9 August 2019) (Exhibit PAN-65); and Foc TR4 detection report by Peru and Venezuela for the IPPC Secretariat (Exhibit PAN-117).

[113] FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), pp. 7-8; ICA, Foc TR4 (Exhibit CRI-152), p. 2.

[114] Olivares et al. (2021) (Exhibit PAN-58), p. 4.

[115] FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), p. 12.

[116] Olivares et al. (2021) (Exhibit PAN-58), p. 4; FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), p. 8.

[117] Olivares et al. (2021) (Exhibit PAN-58), p. 11; FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), pp. 4, 15-16 and 18.

[118] FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), p. 16.

[119] Olivares et al. (2021) (Exhibit PAN-58), p. 1; Bai et al. (2020) (Exhibit PAN-75), p. 312.

[120] FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), p. 4.

[121] Olivares et al. (2021) (Exhibit PAN-58), p. 11; EFSA, Panel on Plant Health, "Scientific Opinion on the pest categorisation of *Fusarium oxysporum* f. sp. *cubense* Tropical Race 4" (2022) (Exhibit PAN-59), p. 20; FAO, *Technical Manual – Prevention and diagnostic of Fusarium Wilt (Panama disease) of banana caused by Fusarium oxysporum f. sp. cubense Tropical Race 4 (TR4)* (2014) (Exhibit PAN-61), p. 22; and Stellenbosch University, "Brief History of Banana Fusarium Wilt" (Exhibit PAN-62), p. 2.

2.2.3 International standards and guidelines cited in this dispute

2.2.3.1 Introduction

2.41. In this dispute, Costa Rica cites the Codex Guidelines and the International Standards for Phytosanitary Measures (ISPM) presented below.

2.2.3.2 The Codex Alimentarius Commission and the Codex Alimentarius

2.2.3.2.1 Institutional information and functions

2.42. Annex A(3)(a) to the SPS Agreement identifies the Codex Alimentarius Commission (Codex) as the relevant international organization that develops standards, guidelines and recommendations for food safety (including standards relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygiene practice).

2.43. Currently, the Codex has 189 members, including Panama and Costa Rica.[122] The Codex adopts and, together with its subsidiary bodies, revises the standards and related texts of the Codex Alimentarius, or "Food Code", to ensure that they reflect the most up-to-date scientific knowledge.[123]

2.44. The Codex Alimentarius is a collection of food standards, guidelines, and codes of practice, and other recommendations, the purpose of which is to protect the health of consumers and ensure fair practices in the food trade.[124] Codex Alimentarius standards can be general or specific. The general standards, guidelines, and codes of practice are the core texts of the Codex Alimentarius and apply to all products and product categories. These texts deal with hygienic practice, labelling, additives, inspection and certification, nutrition, and residues of veterinary drugs and pesticides. Codex Alimentarius commodity standards refer to a specific product, although increasingly Codex now develops standards for food groups.[125] Codex Alimentarius standards are based on sound science provided by independent international risk assessment bodies and *ad hoc* consultations organized by the Food and Agricultural Organization of the United Nations (FAO) and the World Health Organization (WHO).[126]

2.2.3.2.2 Codex Guidelines cited by Costa Rica

2.45. Costa Rica refers in particular to the following Codex Guidelines:

Table 2 - Codex Guidelines

Codex Guidelines[127]	Measure at issue
Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (Guidelines CAC/GL 26-1997)	Measure concerning the importation of strawberries (Measure 1)[128]
Guidelines for Food Import Control Systems (Guidelines CAC/GL 47-2003)	
Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (Guidelines CAC/GL 25-1997)	

[122] Codex Alimentarius, "About Codex - Members", available at: https://www.fao.org/fao-who-codexalimentarius/about-codex/members/en/ (accessed 13 August 2024).
[123] Codex Alimentarius, "About Codex", available at: https://www.fao.org/fao-who-codexalimentarius/about-codex/en/ (accessed 13 August 2024).
[124] Codex Alimentarius, "About Codex", available at: : https://www.fao.org/fao-who-codexalimentarius/about-codex/en/ (accessed 13 August 2024).
[125] Codex Alimentarius, "Codex Texts", available at: https://www.fao.org/fao-who-codexalimentarius/codex-texts/en/ (accessed 13 August 2024).
[126] Codex Alimentarius, "About Codex", available at: : https://www.fao.org/fao-who-codexalimentarius/about-codex/en/ (accessed 13 August 2024); Codex Alimentarius, "About Codex: Science", https://www.fao.org/fao-who-codexalimentarius/about-codex/science/jp/ (accessed 13 August 2024).
[127] The Panel observes that the initialism CAC/GL in the titles of the Codex Guidelines has been replaced by the initialism CXG.
[128] See e.g. Costa Rica's first written submission, paras. 339-351, 408-417, and 425-428 (for Guidelines CAC/GL 26-1997 and CAC/GL 47-2003); and 418-420 and 429-442 (for Guidelines CAC/GL 25-1997). Costa Rica also refers to Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 in the context of the measure

2.2.3.2.2.1 Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems CAC/GL 26-1997

2.46. Guidelines CAC/GL 26-1997 provide a framework for the development of import and export inspection and certification systems consistent with the relevant Codex principles.[129] They are intended to assist countries in the application of requirements and the determination of equivalence, thereby protecting consumers and facilitating trade in foodstuffs.[130]

2.47. Costa Rica refers specifically to paragraphs 34 and 35 of these Guidelines.[131] These paragraphs are found in section 6, entitled "Inspection and certification system infrastructure", and more specifically in the part entitled "Decision criteria and action". These criteria and actions pertain to the establishment and enforcement of import controls, and the response to situations of non-compliance.

2.2.3.2.2.2 Guidelines for Food Import Control Systems CAC/GL 47-2003

2.48. Guidelines CAC/GL 47-2003 provide a framework for the development and operation of an import control system to protect consumers and facilitate fair practices in food trade while ensuring unjustified technical barriers to trade are not introduced.[132] These Guidelines complement the CAC/GL 26-1997 Guidelines, described above.[133]

2.49. Costa Rica refers specifically to paragraph 20 of the appendix to Guidelines CAC/GL 47-2003.[134] This paragraph is found in section 6 of the appendix, entitled "Implementing the import inspection programme based on risk". This paragraph addresses situations where "a failure of food shipments to meet importing country food safety requirements" occurs and sets out possible responses to such situations.[135]

2.2.3.2.2.3 Guidelines for the Exchange of Information between Countries on Rejections of Imported Food CAC/GL 25-1997

2.50. Guidelines CAC/GL 25-1997 provide the basis for structured information exchange on rejections of imported food where the reason for the rejection is related to food safety and fair practices in food trade. These guidelines apply where food has been refused entry to a country due to a failure to comply with importing country requirements.[136]

concerning the importation of plantains and bananas (Measure 4). (Ibid. paras. 1073, 1126, and 1212). Costa Rica makes this reference in relation to the pesticide chlorpyrifos, which Panama reports to have detected in consignments of bananas from Costa Rica. However, during the course of the proceedings, Panama clarified that the detection of chlorpyrifos was not the reason why Measure 4 was adopted or maintained. (Panama's response to question No. 60 of the Panel, para. 171).

[129] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 1, para. 1. That paragraph refers to the Principles for Food Import and Export Inspection and Certification (CAC/GL 20-1995), available at: https://www.fao.org/3/y6396s/y6396s02.htm (accessed 13 August 2024).

[130] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 1, para. 1.

[131] See e.g. Costa Rica's first written submission, paras. 342-344, 411-412, 1073, and 1126.

[132] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), section 1, para. 1.

[133] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), section 1, para. 1. See also the Principles for Food Import and Export Inspection and Certification (CAC/GL 20-1995) available at: https://www.fao.org/3/y6396s/y6396s02.htm (accessed 13 August 2024).

[134] See e.g. Costa Rica's first written submission, paras. 345, 415-416, 1073, and 1126.

[135] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), Appendix, section 6, para. 20.

[136] Codex, Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (2016) (Exhibit CRI-135), section 1.

2.51. Costa Rica cites the guidelines of section 3, entitled "Detailed information".[137] This section sets out the information that should be stated or that should be recorded when a consignment of food is rejected.[138]

2.2.3.2.2.4 Other Guidelines cited by Costa Rica

2.52. Costa Rica also cites the following Guidelines:

a. Guidelines on Good Laboratory Practice in Pesticide Residue Analysis[139];

b. Guidelines for the Assessment of the Competence of Testing Laboratories Involved in the Import and Export Control of Food[140];

c. Guidelines on Estimation of Uncertainty of Results[141]; and

d. Guidelines on Performance Criteria for Methods of Analysis for the Determination of Pesticide Residues in Food and Feed.[142]

2.2.3.3 The Secretariat of the International Plant Protection Convention and International Standards for Phytosanitary Measures

2.2.3.3.1 Institutional information and functions

2.53. Annex A(3)(c) to the SPS Agreement identifies the Secretariat of the International Plant Protection Convention (IPPC) and regional organizations operating within the framework of the IPPC as the relevant international organizations under whose auspices plant health standards, guidelines, and recommendations are developed.

2.54. The IPPC is an intergovernmental treaty under which the contracting parties undertake to secure common and effective action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control.[143] The IPPC has 185 contracting parties, including Panama and Costa Rica.[144]

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[137] See e.g. Costa Rica's first written submission, paras. 420.

[138] Codex, Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (2016) (Exhibit CRI-135), section 3.

[139] Costa Rica's first written submission, para. 436 (quoting Codex, Guidelines on Good Laboratory Practice in Pesticide Residue Analysis (2010) (Exhibit CRI-136)). The Guidelines are intended to assist in ensuring the reliability of analytical results in checking compliance with the MRLs for food moving in international trade. (Codex, Guidelines on Good Laboratory Practice in Pesticide Residue Analysis (2010) (Exhibit CRI-136), p. 1).

[140] Costa Rica's first written submission, fn 1596 (referring to Codex, Guidelines for the Assessment of the Competence of Testing Laboratories Involved in the Import and Export Control of Food (Exhibit CRI-202)). These guidelines provide a framework for the implementation of quality assurance measures to ensure the competence of testing laboratories involved in the import and export control of foods. (Codex, Guidelines for the Assessment of the Competence of Testing Laboratories Involved in the Import and Export Control of Food (Exhibit CRI-202), p. 1).

[141] Costa Rica's response to Panel question No. 12, paras. 2.56-2.57 and 2.70 (quoting Codex, Guidelines on Estimation of Uncertainty of Results (2011) (Exhibit CRI-280)). These Guidelines address the identification of uncertainty sources, the procedures for estimating measurement uncertainty, the guidance values for acceptable uncertainties, and the use of uncertainty information. (Codex, Guidelines on Estimation of Uncertainty of Results (2011) (Exhibit CRI-280), sections 2-5).

[142] Costa Rica's response to Panel question No. 12, para. 2.70 (referring to Codex, Guidelines on Performance Criteria for Methods of Analysis for the Determination of Pesticide Residues in Food and Feed (2017) (Exhibit CRI-281)). The purpose of these guidelines is to define and describe the performance criteria, which should be met by methods to analyse pesticide residues in foods and feed. It addresses the characteristics/parameters to provide scientifically acceptable confidence in the analytical method. (Codex, Guidelines on Performance Criteria for Methods of Analysis for the Determination of Pesticide Residues in Food and Feed (2017) (Exhibit CRI-281), p. 2).

[143] IPPC (1997) (Exhibit CRI-145), Article I:1.

[144] IPPC, "Countries: List of countries", available at: https://www.ippc.int/en/countries/all/list-countries/ (accessed 13 August 2024).

2.55. The development and adoption of standards is one of the main tasks of the Commission on Phytosanitary Measures (CPM)[145], the governing body of the IPPC.[146] To this end, the CPM established the Standards Committee, which oversees the standard setting process.[147] The IPPC Secretariat carries out the technical, operational, and administrative work to support development of international plant health standards and effective implementation of the IPPC.[148] Standards developed in the framework of the IPPC are referred to as ISPM.[149]

2.2.3.3.2 ISPM cited by Costa Rica

2.56. Costa Rica refers in particular to the following ISPM:

Table 3 - ISPM

International standards	Measures at issue
ISPM 2: Framework for pest risk analysis	Measures concerning the importation of pineapples (Measure 3), and of plantains and bananas (Measure 4)[150]
ISPM 20: Guidelines for a phytosanitary import regulatory system	

2.2.3.3.2.1 ISPM 2: Framework for pest risk analysis

2.57. ISPM 2 provides a framework that describes the pest risk analysis (PRA) process within the scope of the IPPC.[151] The ISPM provides detailed guidance on the initiation stage of PRA (Stage 1)[152], as well as the subsequent stages, namely, pest risk assessment (Stage 2) and pest risk management (Stage 3).[153] This ISPM refers to other ISPM for further details on PRA Stages 2 and 3, including ISPM 11 on Pest risk analysis for quarantine pests.[154] ISPM 2 also addresses generic PRA issues relating to information gathering, documentation, risk communication, uncertainty, and consistency.[155]

2.58. Costa Rica specifically refers to the section addressing the need for a new or revised PRA because of a review of phytosanitary policies[156] and the application of new measures until the revision or new PRA has been completed.[157]

[145] IPPC, "Core Activities: Standard setting", available at: https://www.ippc.int/en/about/core-activities/standards-setting/ (accessed 13 August 2024); IPPC (1997) (Exhibit CRI-145), Articles 10.2 and 11.2(b).
[146] IPPC, "The Commission on Phytosanitary Measures (CPM)", available at: https://www.ippc.int/en/commission/cpm/ (accessed 13 August 2024). See also IPPC (1997) (Exhibit CRI-145), Article XI.
[147] IPPC, "Standards Committee", available at: https://www.ippc.int/en/commission/standards-committee/ (accessed 13 August 2024); IPPC, "Core Activities: Standard setting", available at: https://www.ippc.int/en/about/core-activities/standards-setting/ (accessed 13 August 2024).
[148] IPPC, "About: IPPC Secretariat", available at: https://www.ippc.int/en/about/secretariat/ (accessed 13 August 2024). See also IPPC, "History of the IPPC", available at: https://www.ippc.int/en/history-of-the-ippc/ (accessed 13 August 2024).
[149] IPPC, "Adopted Standards (ISPMs)", available at: https://www.ippc.int/en/core-activities/standards-setting/ispms/ (accessed 13 August 2024).
[150] See e.g. Costa Rica's first written submission, paras. 756-757, 783, 855, 836-849, 864, 867, 970, and 976-977 (Measure 3); and 1058-1061, 1068, 1134, 1115-1120, 1122-1124, 1141, 1144, and 1210 (Measure 4).
[151] IPPC, ISPM 2 (Exhibit CRI-101), p. 5.
[152] IPPC, ISPM 2 (Exhibit CRI-101), section 1.
[153] IPPC, ISPM 2 (Exhibit CRI-101), section 2.
[154] IPPC, ISPM 2 (Exhibit CRI-101), section 2, p. 12. ISPM 5, which contains the glossary of phytosanitary terms associated with the implementation of the IPPC and ISPM, defines "quarantine pest" as a "pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled". (IPPC, ISPM 5 (Exhibit CRI-75), p. 19). (emphasis omitted).
[155] IPPC, ISPM 2 (Exhibit CRI-101), section 3.
[156] See e.g. Costa Rica's first written submission, paras. 783, 838, 844, 1041, 1059, and 1068.
[157] IPPC, ISPM 2 (Exhibit CRI-101), section 1.1.3.

2.2.3.3.2.2 ISPM 20: Guidelines for a phytosanitary import regulatory system

2.59. ISPM 20 describes the structure and operation of a phytosanitary import regulatory system and the rights, obligations, and responsibilities which should be considered in establishing, operating, and revising the system.[158]

2.60. Costa Rica focuses on two sections of ISPM 20: (a) section 5.1.6.2 on emergency action; and (b) section 5.1.6.4 on withdrawal or modification of phytosanitary regulation in the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs.[159]

2.2.3.3.2.3 Other ISPM cited by Costa Rica

2.61. Costa Rica also refers to the following ISPM:

a. ISPM 4: Requirements for the establishment of pest free areas[160]:

b. ISPM 5: Glossary of phytosanitary terms[161];

c. ISPM 10: Requirements for the establishment of pest free places of production and pest free production sites[162];

d. ISPM 11: Pest risk analysis for quarantine pests[163];

e. ISPM 12: Phytosanitary certificates[164]; and

f. ISPM 19: Guidelines on lists of regulated pests.[165]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Costa Rica requests that the Panel find that the measures at issue, as described in section 2.1 above, are inconsistent with Panama's obligations under the SPS Agreement, the Agreement on Agriculture and the GATT 1994. In particular, Costa Rica requests that the Panel find that Panama has acted inconsistently with the following provisions:

a. With respect to the measure concerning the importation of strawberries:

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[158] IPPC, ISPM 20 (Exhibit CRI-161), p. 6.

[159] See e.g. Costa Rica's first written submission, paras. 840, 844, and 1060.

[160] Costa Rica's first written submission, para. 868 (referring to IPPC, ISPM 4 (Exhibit CRI-171)). ISPM 4 describes the requirements for the establishment and use of pest free areas (PFAs) as a risk management option for phytosanitary certification of plants and plant products and other regulated articles exported from the PFA or to support the scientific justification for phytosanitary measures taken by an importing country for protection of an endangered PFA. (IPPC, ISPM 4 (Exhibit CRI-171), p. 39).

[161] Costa Rica's first written submission, fn 1119 (quoting IPPC, ISPM 5 (Exhibit CRI-75)). ISPM 5 is the glossary of phytosanitary terms associated with the implementation of the IPPC and ISPM. (IPPC, ISPM 5 (Exhibit CRI-75), p. 5).

[162] Costa Rica's first written submission, para. 868 (referring to IPPC, ISPM 10 (Exhibit CRI-172)). ISPM 10 describes the requirements for the establishment and use of pest free places of production and pest free production sites as pest risk management options for meeting phytosanitary import requirements for plants, plant products and other regulated articles. (IPPC, ISPM 10 (Exhibit CRI-172), p. 5).

[163] Costa Rica's first written submission, paras. 756-757 (referring to IPPC, ISPM 11 (Exhibit CRI-142)). ISPM 11 provides details for the conduct of pest risk analysis (PRA) to determine if pests are quarantine pests. ISPM 11 includes guidance on the three stages of a PRA (initiation, risk assessment, and risk management) and describes in detail the integrated processes to be used for risk assessment, as well as the selection of risk management options. ISPM 11 also addresses PRA documentation. (IPPC, ISPM 11 (Exhibit CRI-142), p. 5).

[164] Costa Rica's first written submission, paras. 864, 867, 870, and 1144 (quoting IPPC, ISPM 12 (Exhibit CRI-170)). ISPM 12 describes principles and guidelines for the preparation and issue of phytosanitary certificates and phytosanitary certificates for re-export. (IPPC, ISPM 12 (Exhibit CRI-170), p. 165; IPPC, ISPM 12 (2022), p. 6).

[165] Costa Rica's first written submission, para. 107 (referring to IPPC, ISPM 19 (Exhibit CRI-67)). ISPM 19 describes the procedures to prepare, maintain and make available lists of regulated pests. (IPPC, ISPM 19 (Exhibit CRI-67), p. 4).

i. Articles 5.1 and 5.2 of the SPS Agreement and, consequently, also Article 2.2 of the Agreement, considering that the measure is not covered by Article 5.7 of the SPS Agreement;

ii. Article 3.1 of the SPS Agreement;

iii. Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;

iv. Article 8 and Annex C(1)(a) of the SPS Agreement;

v. Article 7 and Annex B(5) or Annex B(6)(a) of the SPS Agreement;

vi. as a result of the foregoing, Articles 1.1 and 2.1 of the SPS Agreement;

vii. Article XI:1 of the GATT 1994; and

viii. Article 4.2 and footnote 1 of the Agreement on Agriculture.

b. With respect to the measure concerning the importation of dairy and meat products:

i. Articles 5.1, 5.2, and 5.3 of the SPS Agreement and, consequently, also Article 2.2 of the Agreement, considering that the measure is not covered by Article 5.7 of the SPS Agreement;

ii. Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;

iii. Article 2.3 of the SPS Agreement;

iv. Article 5.5 of the SPS Agreement;

v. Article 8 and Annex C(1)(a) of the SPS Agreement;

vi. Article 8 and Annex C(1)(c) of the SPS Agreement;

vii. Article 7 and Annex B(5) or Annex B(6)(a) of the SPS Agreement;

viii. as a result of the foregoing, Articles 1.1 and 2.1 of the SPS Agreement;

ix. Article I:1 of the GATT 1994;

x. Article XI:1 of the GATT 1994; and

xi. Article 4.2 and footnote 1 of the Agreement on Agriculture.

c. With respect to the measure concerning the importation of pineapples:

i. Articles 5.1, 5.2, and 5.3 of the SPS Agreement and, consequently, also Article 2.2 of the Agreement, considering that the measure is not covered by Article 5.7 of the SPS Agreement;

ii. Article 3.1 of the SPS Agreement;

iii. Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;

iv. Article 2.3 of the SPS Agreement;

v. Article 5.5 of the SPS Agreement;

vi. Article 8 and Annex C(1)(a) of the SPS Agreement;

vii. Article 7 and Annex B(5) or Annex B(6)(a) of the SPS Agreement;

viii. as a result of the foregoing, Articles 1.1 and 2.1 of the SPS Agreement;

ix. Article I:1 of the GATT 1994;

x. Article XI:1 of the GATT 1994; and

xi. Article 4.2 and footnote 1 of the Agreement on Agriculture.

d. With respect to the measure concerning the importation of plantains and bananas:

i. Articles 5.1, 5.2, and 5.3 of the SPS Agreement and, consequently, also Article 2.2 of the Agreement, considering that the measure is not covered by Article 5.7 of the SPS Agreement;

ii. Article 3.1 of the SPS Agreement;

iii. Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;

iv. Article 8 and Annex C(1)(a) of the SPS Agreement;

v. Article 7 and Annex B(5) or Annex B(6)(a) of the SPS Agreement;

vi. as a result of the foregoing, Articles 1.1 and 2.1 of the SPS Agreement;

vii. Article XI:1 of the GATT 1994; and

viii. Article 4.2 and footnote 1 of the Agreement on Agriculture.[166]

3.2. Costa Rica also requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Panama withdraw the challenged measures in order to restore trade in the Costa Rican products concerned.[167]

3.3. Panama requests that the Panel make the following findings:

a. With respect to the measure concerning the importation of dairy and meat products:

i. The measure challenged by Costa Rica in these proceedings constitutes an "approval procedure" within the meaning of Article 8 and Annex C(1) of the SPS Agreement. As such, it is not subject to the disciplines of Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, and 5.7 of the SPS Agreement.

ii. Costa Rica has not demonstrated that Panama has failed to undertake and complete the approval procedures "without undue delay" within the meaning of Article 8 and Annex C(1)(a) of the SPS Agreement with respect to 16 dairy and meat product establishments in Costa Rica.

[166] Costa Rica's panel request, pp. 6-8; first written submission, paras. 1247-1251; and second written submission, paras. 583-589. See also Costa Rica's responses to Panel question No. 67 (in which Costa Rica confirms that it has decided not to develop its claims under the following provisions: Articles 5.4, 5.8, and 6.1, and Annex B(1) and Annex C(1)(b) of the SPS Agreement, and Articles X:1 and X:3 of the GATT 1994 for all the measures at issue; Article 3.1 of the SPS Agreement for the measure concerning the importation of dairy and meat products; Article 5.3 of the SPS Agreement for the measure concerning the importation of strawberries; Articles 2.3 and 5.5 of the SPS Agreement, and Article I:1 of the GATT 1994 for the measures concerning the importation of strawberries, and plantains and bananas; and Annex C(1)(c) for the measures concerning the importation of strawberries, pineapples, and plantains and bananas), and No. 106 (in which Costa Rica confirms that, insofar as the Panel considers that Article 7 of the SPS Agreement can be invoked independently of Annex B, it maintains its independent claim under Article 7 of the SPS Agreement).

[167] Costa Rica's first written submission, para. 1252.

iii. Costa Rica failed to demonstrate that Panama has acted inconsistently with Article 8 and Annex C(1)(c) of the SPS Agreement by requesting more information than necessary for the approval procedures for dairy and meat product establishments in Costa Rica.

iv. Therefore, Costa Rica was unable to establish its claims under Articles 1.1 and 2.1 of the SPS Agreement, Articles I:1 and XI:1 of the GATT 1994, and Article 4.2 and footnote 1 of the Agreement on Agriculture.

b. With respect to the measures concerning the importation of strawberries, pineapples, and plantains and bananas:

i. These measures are provisional measures, and Costa Rica has failed to demonstrate that they do not satisfy the requirements of Article 5.7 of the SPS Agreement.

ii. Consequently, Costa Rica has been unable to demonstrate that these provisional measures are inconsistent with Articles 2.2, 3.1, 5.1, 5.2, 5.3, and 5.6 of the SPS Agreement.

iii. Costa Rica has also failed to demonstrate that the measure concerning the importation of pineapples is inconsistent with Articles 2.3 and 5.5 of the SPS Agreement.

iv. Costa Rica failed to establish the threshold applicability of Article 8 and Annex C(1)(a) of the SPS Agreement to the provisional measures at issue.

v. Therefore, Costa Rica was unable to establish its claims under Articles 1.1 and 2.1 of the SPS Agreement, Articles I:1 and XI:1 of the GATT 1994, and Article 4.2 and footnote 1 of the Agreement on Agriculture.[168]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 36 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, the European Union and the United States are reflected in their executive summaries, provided to the Panel in accordance with paragraph 39 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, and C-5). China, Guatemala, Honduras, India, Mexico, Nicaragua, the Russian Federation, Chinese Taipei and the United Kingdom did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 14 August 2024, the Panel issued its Interim Report to the parties. On 4 September 2024, Costa Rica and Panama each submitted written requests for the Panel to review aspects of the Interim Report. On 25 September 2024, Costa Rica submitted comments on Panama's requests for review, and Panama indicated that it had no comments on Costa Rica's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage.[169]

[168] Panama's first written submission, paras. 442-443.

[169] The numbering of the footnotes in the Final Report has changed due to the revisions made at the interim review stage. The footnote numbers indicated in this section pertain to those in the Final Report.

6.3. The Panel notes that the parties' requests for interim review consist of: (a) corrections of typographical errors; (b) specific drafting suggestions for certain paragraphs and footnotes; and (c) general suggestions that are not accompanied by specific drafting proposals. The latter are usually related to requests for the Panel to reassess or reconsider its position with respect to certain aspects of its reasoning.

6.4. This section will address some of the specific drafting suggestions that were rejected, as well as general suggestions linked to the reconsideration of a specific aspect of the Panel's reasoning. With respect to the rest of the requests, the Panel has corrected the typographical errors identified by the parties, as well as those identified by the Panel itself since the Interim Report was issued to the parties. Various paragraphs and footnotes have also been amended in response to specific drafting suggestions, which may or may not be aligned with the parties' proposals. These amendments seek to ensure drafting consistency, clarity, and precision.[170]

6.2 Measure 1

6.5. Panama requests that the Panel dismiss Exhibit CRI-405, referred to in **paragraph 7.173**, because: (a) it was not submitted in accordance with the Working Procedures of the Panel; and (b) Panama did not have "any meaningful opportunity" to comment on that exhibit, despite the fact that due process demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. Panama notes that this exhibit was submitted by Costa Rica together with its comments on Panama's response to Panel question No. 114, and relates to an issue that was not explored by the Panel.[171]

6.6. Costa Rica requests the Panel to reject Panama's suggestion for two reasons.[172] First, Costa Rica claims that paragraph 5.1 of the Working Procedures of the Panel expressly permits the submission of evidence during the procedural stage at which comments are made on the responses provided by the other party.[173] Second, Costa Rica considers that Panama is mistaken in its description of the context that led to the submission of Exhibit CRI-405 because the Panel was not required to rule, as Panama suggests, on whether the legal instruments contained in Exhibits CRI-392 and CRI-405 "could work together to monitor MRL compliance in Costa Rica when the measure at issue was adopted".[174] According to Costa Rica, this issue "goes beyond the Panel's analysis of the sufficiency of the scientific evidence".[175]

6.7. The Panel disagrees with Panama's assertion that Exhibit CRI-405, referred to in paragraph 7.173, was not submitted in accordance with the Working Procedures of the Panel, and that Panama's due process rights were violated. First, the Panel refers to paragraph 5.1 of the Working Procedures, which provides that parties may submit evidence after the first substantive meeting if that evidence is necessary "for purposes of rebuttal" or "for responding to questions or commenting on responses provided by the other party". As Costa Rica indicates, Exhibit CRI-405 was submitted in the context of Costa Rica's comments on Panama's response to Panel question No. 114. Accordingly, the Panel considers that this exhibit was submitted in accordance with the provisions of its Working Procedures.

6.8. Second, with respect to the alleged violation of Panama's due process rights, the Panel disagrees with Panama because: (a) Panama did not object to that exhibit when it was submitted, nor did it request the Panel to give it an opportunity to respond; and (b) that exhibit relates to an issue that was addressed in the round of questions following the second substantive meeting, namely, whether Panama had sufficient information on Costa Rica's good agricultural and production practices with regard to strawberries and compliance therewith. Therefore, this was not a new issue that had been raised for the first time in Costa Rica's comments on Panama's responses. As is clear from paragraph 7.173, the Panel concluded that Panama had sufficient information on the relevant issue, primarily on the basis of the *Manual on good agricultural and production practices for*

[170] See paras. 7.296, 7.774, and 7.1137, and fn 2217.
[171] Panama's request for interim review, paras. 6-8 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras.155 and 160).
[172] Costa Rica's comments on Panama's request for interim review, para. 2.8.
[173] Costa Rica's comments on Panama's request for interim review, paras. 2.4-2.5.
[174] Costa Rica's comments on Panama's request for interim review, paras. 2.6-2.7 (quoting Panama's request for interim review, para. 7).
[175] Costa Rica's comments on Panama's request for interim review, para. 2.7.

strawberry crops (Exhibit CRI-369), and supplemented its conclusion by referring to Exhibit CRI-405.

6.9. In the light of the foregoing, the Panel decides to reject Panama's request and to keep the wording of the Interim Report.

6.10. Panama requests the Panel to add a reference in **paragraphs 7.181 and 7.250** to its response to Panel question No. 132, in which Panama explains that on-site verification, and other risk management measures, were not reasonably available to Panama during the COVID-19 outbreak due to travel restrictions, and Panama's reduced capacity to maintain a fully functioning food safety programme (in the case of other risk management measures).[176]

6.11. Costa Rica considers that the addition proposed by Panama is not relevant because the Panel found that Panama did not express the need to perform those on-site verifications and, therefore, examining whether it was practicable to perform them during the COVID-19 pandemic is irrelevant.[177] Costa Rica adds that it does not consider it appropriate to add a reference to an argument by Panama that was rejected by the Panel.[178]

6.12. The Panel dismisses Panama's request as paragraphs 7.181 and 7.250 are framed in a different context, namely, in the Panel's assessment of the claim under Article 5.7 of the SPS Agreement. More specifically, these paragraphs address the relevance and sufficiency of the scientific evidence available at the time Measure 1 was adopted, and whether Panama adopted Measure 1 on the basis of available pertinent information. Conversely, Panel question No. 132, as well as the issue of whether the alternative measures to Measure 1 identified by Costa Rica (including verification at origin) were reasonably available, appear under the assessment of the claim under Article 5.6. This assessment is set out in detail in paragraphs 7.342-7.402 of the Panel Report.

6.13. Panama requests the Panel to delete the last sentence in **paragraph 7.295** because it considers that paragraphs 7.169-7.173, to which it refers, do not support the Panel's assertion that Panama has not argued that it has found Costa Rica's GAP, outlined in the Manual on good agricultural and production practices for strawberry crops, to be problematic. Panama adds that it is not clear what the phrase "found any of Costa Rica's GAP outlined []in [that Manual] to be … problematic" means or how this is relevant to the matter at issue.[179]

6.14. Costa Rica considers that Panama's request lacks merit because the Panel's observation is correct and supports its conclusion that Panama failed to substantiate its position that there was a systematic problem with strawberry production controls in Costa Rica at the time Measure 1 was adopted.[180]

6.15. The Panel observes that Panama's comments indicate that the position of the footnote in paragraph 7.295, together with the last sentence of that paragraph, may confuse the reader to a certain extent. At the same time, the Panel considers it necessary to keep the last sentence in order to provide a full picture of Panama's position with regard to its knowledge of the strawberry production system in Costa Rica and the controls applicable in that country. Therefore, the Panel has changed the position of the footnote and amended the last sentence of this paragraph in the interest of clarity.

6.16. Panama suggests amending the wording of **paragraph 7.297** so that it is consistent with the Panel's conclusions in paragraphs 7.192-7.200, and reflects its argument more accurately.[181] Costa Rica has not commented on this request by Panama.

[176] Panama's request for interim review, paras. 10-11.
[177] Costa Rica's comments on Panama's request for interim review, paras. 2.10-2.12.
[178] Costa Rica notes that the Panel found that: (a) on-site visits were a viable alternative to Measure 1 on the date the measure was adopted; and (b) Panama had failed to demonstrate that on-site visits remained unfeasible in September 2021. See Costa Rica's comments on Panama's request for interim review, paras. 2.13 and 2.15.
[179] Panama's request for interim review, para. 12.
[180] Costa Rica's comments on Panama's request for interim review, para. 2.20.
[181] Panama's request for interim review, para. 15.

6.17. The Panel rejects Panama's request as it does not correspond to the Panel's statement in paragraph 7.199 of its Report. However, this paragraph has been amended to reflect the change made in paragraph 7.269 and the Panel's conclusion in paragraph 7.199 regarding the systemic importance of the Costa Rica strawberry exporter Fresas Gego.

6.3 Measure 2

6.3.1 Content of Measure 2

6.18. Panama requests the Panel, in the interest of completeness, to replace the references to "dairy and meat products" in **paragraph 7.454**, and to "all the products at issue" in **paragraphs 7.497 and 7.500**, with a comprehensive list of the products at issue, as set out in Costa Rica's panel request.[182]

6.19. Costa Rica considers it unnecessary to amend these paragraphs as Panama requests because paragraph 2.2 of the Interim Report contains the full list of the dairy and meat products at issue.[183]

6.20. The Panel dismisses Panama's request because it considers that replacing the references to "dairy and meat products" in paragraph 7.454, and to "all the products at issue" in paragraphs 7.497 and 7.500, with a comprehensive list of the products at issue would make the paragraph unnecessarily long and would not provide additional clarity to the wording of the Interim Report. In order to avoid unnecessary repetition, the Panel has included footnotes 999, 1105, and 1109 in each of the three paragraphs identified by Panama, which refer to the full list of products at issue previously set out in paragraph 2.2 of the Report. The footnotes also indicate that, in the section of the Report concerning Measure 2, the phrase "the products at issue" is used to refer to those dairy and meat products.

6.3.2 Provisions of the SPS Agreement applicable to Measure 2 and the claim under Article 5.6 of the SPS Agreement

6.21. Panama requests the Panel to amend **paragraph 7.551** in order to conclude that Article 5.6 of the SPS Agreement applies only to substantive SPS measures, and to delete or amend **paragraphs 7.805-7.859** so that they are consistent with that conclusion. In Panama's view, the text of Article 5.6 expressly provides that it applies only to substantive SPS measures.

6.22. Costa Rica requests the Panel to reject the changes proposed by Panama because that request "goes beyond the scope of the review of a panel's interim report"[184], by introducing legal arguments that raise questions about the merits of the Panel's analysis, thereby challenging the very basis for the Panel's conclusions.[185] According to Costa Rica, Panama's request "clearly amounts to entering into a debate with the Panel on the merits of its analysis of the applicability of Articles 5.6 and 2.2 of the SPS Agreement to measures that constitute renewal procedures".[186] Costa Rica notes that, in previous disputes, panels have established that the purpose of the interim review stage is not to provide the parties with an opportunity "to enter into a debate with the Panel" and have rejected interim review requests that raise questions about the merits of the panel's analysis and findings.[187]

6.23. The Panel rejects Panama's request because the issue of applicability of the various provisions of the SPS Agreement, including Article 5.6, to Measure 2 has been addressed in paragraphs 7.546-7.553. In its submissions, Panama had already argued that, in its view, the obligations under Article 5.6 do not extend to approval, control or inspection procedures, but apply only to substantive SPS measures.[188] As indicated in paragraph 7.551, the Panel disagrees with that position, since it does not see any reason for the obligations set forth in Articles 5.6 and 2.2 not to be applicable to Measure 2. In addition, the Panel agrees with the approach taken in previous disputes that, pursuant

[182] Panama's request for interim review, paras.16-18.
[183] Costa Rica's comments on Panama's request for interim review, paras. 3.2-3.3.
[184] Costa Rica's comments on Panama's request for interim review, paras. 3.5-3.6.
[185] Costa Rica's comments on Panama's request for interim review, paras. 3.9-3.10.
[186] Costa Rica's comments on Panama's request for interim review, para. 3.7.
[187] Costa Rica's comments on Panama's request for interim review, para. 3.6 (quoting Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; and *Indonesia – Iron or Steel Products (Viet Nam)*, Annex A-3, para. 2.4).
[188] See e.g. Panama's second written submission, para. 45.

to Article 15.2 of the DSU, the interim review process is not an appropriate stage for the parties to re-argue their case on the basis of arguments that have already been debated.[189]

6.3.3 Claim under Article 2.3 of the SPS Agreement

6.24. Panama requests that the Panel include, in **paragraphs 7.728 and 7.731**, a reference to the fact that the objective of Measure 2 and AUPSA is to verify and ensure compliance with the sanitary requirements for importation, in line with what the Panel itself indicates in paragraphs 7.543 and 7.544.[190]

6.25. Costa Rica considers that the addition proposed by Panama "is not relevant to the Panel's findings in paragraphs 7.728 and 7.731".[191] According to Costa Rica, the language suggested by Panama refers to a characteristic of Measure 2 that is not relevant to the Panel's finding on the objective pursued in terms of Annex A(1) and the risks addressed by Measure 2.[192]

6.26. The Panel dismisses Panama's request because, although it is not incorrect, the proposed language is not relevant. These paragraphs refer to the Panel's assessment of whether Measure 2 constitutes an SPS measure within the meaning of Annex A(1) of the SPS Agreement and, more specifically, to the determination of the sanitary objective of Measure 2 pursuant to the Annex. In order to clarify this point, the Panel has amended the last sentence of paragraph 7.731.

6.4 Measures 3 and 4

6.27. Panama suggests amending the wording of **paragraphs 7.882 and 7.1195-7.1196** because, in its view, the drafting of the Interim Report suggests that the characterization of Measures 3 and 4 as an SPS measure was a matter of contention between the parties, or that Panama's position on this issue was ambiguous.[193] Panama also requests that paragraphs 7.1195 and 7.1196 be merged to create a single paragraph, because Measure 4 is an SPS measure "precisely *because* it was adopted to protect against a specific phytosanitary risk, namely, the introduction of Foc TR4 into Panamanian territory".[194]

6.28. Costa Rica considers that the change proposed by Panama should be rejected because the Panel's language reflects more precisely the fact that Panama did not address the issue of whether Measures 3 and 4 qualify as SPS measures within the meaning of Annex A(1)(a) and Article 1.1 of the SPS Agreement.[195] Furthermore, Costa Rica notes that, as the amendment to paragraph 7.1195 requested by Panama is not relevant, the request to merge that paragraph with paragraph 7.1196 should also not be accepted.[196]

6.29. The Panel disagrees with Panama that the drafting of the Interim Report, which indicates that Panama did not express a view on whether Measures 3 and 4 fall within the scope of the SPS Agreement, suggests that this was a matter of contention or that Panama's position in this respect was ambiguous. However, in the interest of clarity, the Panel has amended the wording to reflect that the absence of specific argumentation in this respect signifies that Panama does not contest the applicability of the SPS Agreement to the measures at issue in these proceedings.[197] With respect to the amendments to paragraph 7.1196 suggested by Panama, the Panel rejects these

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[189] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.43 (referring to Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259; and to Panel Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; *US – Zeroing (Japan)*, para. 6.106; *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *Brazil – Taxation*, para. 6.7; and *EU – Energy Package*, para. 6.3).

[190] Panama's request for interim review, para. 26.

[191] Costa Rica's comments on Panama's request for interim review, para. 3.14.

[192] Costa Rica's comments on Panama's request for interim review, para. 3.16.

[193] Panama's request for interim review, paras. 28 (with respect to Measure 3) and 36 (with respect to Measure 4).

[194] Panama's request for interim review, para. 36. (emphasis original)

[195] Costa Rica's comments on Panama's request for interim review, paras. 4.3-4.4 (with respect to Measure 3) and 5.3-5.4 (with respect to Measure 4).

[196] Costa Rica's comments on Panama's request for interim review, paras. 5.3-5.4.

[197] In the interest of consistency, similar amendments were made to paragraphs 7.59 and 7.512, where Panama's position on whether Measure 1 and Measure 2 are SPS measures within the meaning of Anexo A(1)(a) and Article 1.1 of the SPS Agreement.

because, although Panama did not express a view on whether Measure 4 is an SPS measures in accordance with the definition in Annex A(1) and Article 1.1 of the SPS Agreement, it did express a specific view on the purpose of that measure, an aspect on which the parties disagree.

6.5 Measure 3

6.30. Panama requests that the language regarding the burden of proof in **paragraphs 7.894 and 7.913** be amended to reflect the allocation of the burden of proof under Article 5.7 of the SPS Agreement described in paragraph 7.121 of the Report. According to Panama, this burden lies with Costa Rica and not with Panama.[198]

6.31. Costa Rica considers that the change proposed by Panama is not relevant because, while it is for Costa Rica to demonstrate that Measure 3 does not meet at least one of the requirements under Article 5.7, it is Panama who must demonstrate that the measures meet the four requirements set forth in that provision. In Costa Rica's view, the wording of the paragraphs in question in the Interim Report does precisely that. Costa Rica adds that the request to amend paragraph 7.894 includes deleting the Panel's comments on the relationship between Article 5.7 and Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement, without any reason being given for that deletion.[199]

6.32. The Panel dismisses the drafting suggestions made by Panama with regard to paragraphs 7.894 and 7.913 because they do not properly reflect the allocation of the burden of proof under Article 5.7 of the SPS Agreement as described in paragraph 7.121. However, in order to ensure consistency with other passages of this Report, and to faithfully reflect the Panel's understanding of the burden of proof under that provision, the wording of those two paragraphs has been revised.

6.33. Panama requests the Panel to delete **paragraphs 7.949-7.951** in the Final Report as it deems them to be unnecessary.[200] As a result, Panama also requests that the beginning of **paragraph 7.952** be amended.[201]

6.34. Costa Rica considers that Panama's request to delete the aforementioned paragraphs should be rejected because: (a) these paragraphs demonstrate that Costa Rica was the only one to continue to communicate with Panama, so the assertion regarding Panama's silence is factually correct; and (b) the Panel's description is precise and necessary for the assessment of the sufficiency of the scientific evidence.[202]

6.35. The Panel rejects Panama's request because, in its view, paragraphs 7.949 and 7.950 accurately describe the various requests for information that Panama sent to Costa Rica in relation to the adoption of Measure 3. The information in question was that which Panama considered necessary to carry out the assessment of the risk of entry, establishment or spread of the pink mealybug through imports of fresh Costa Rican pineapples, a key aspect of the examination of the first requirement of Article 5.7. Hence the importance of detailing the different wording used by Panama in its information requests over time. The Panel has edited paragraph 7.949 to ensure that it cannot, as Panama claims, be understood that the Panel is referring to all communications between the parties following the adoption of Measure 3. With respect to paragraphs 7.951 and 7.952, the Panel does not consider it necessary to make any changes to them, having not made substantial amendments to paragraphs 7.949 and 7.950.

6.6 Measure 4

6.36. Panama suggests amendments to **paragraphs 7.1199(b), 7.1200, and 7.1205** in order to more accurately reflect its arguments on the context in which Measure 4 was adopted.[203] Furthermore, Panama requests the Panel to reassess **paragraphs 7.1217-7.1219 and 7.1231**, as

[198] Panama's request for interim review, paras. 29-30.
[199] Costa Rica's comments on Panama's request for interim review, paras. 4.8-4.12.
[200] Panama's request for interim review, paras. 31-32.
[201] Panama's request for interim review, para. 33.
[202] Costa Rica's comments on Panama's request for interim review, paras. 4.14-4.18.
[203] Panama's request for interim review, paras. 39-41.

well as certain pieces of evidence that are in the record, to determine whether Measure 4 was adopted to protect against the entry of Foc TR4 into Panamanian territory.[204]

6.37. Costa Rica considers that the Panel should reject Panama's requests with regard to paragraphs 7.1199, 7.1200, 7.1205, 7.1217-7.1219, and 7.1231, except for the correction of the error in the date of the OIRSA regional alert in paragraph 7.1199.[205]

6.38. With regard to paragraph 7.1199, Costa Rica considers that the additions that Panama requests are unnecessary[206], as the language of the Interim Report reflects Panama's argument that a number of events related to Foc TR4 that pre-dated Measure 4 led to its adoption.[207] With regard to paragraph 7.1200, Costa Rica notes that, as it does not consider it necessary to amend paragraph 7.1199, the former should not be amended either.[208]

6.39. With regard to paragraph 7.1205, Costa Rica considers that the wording of the Interim Report objectively describes the factual elements that, according to Panama, "are inextricably part of the circumstances surrounding the application of Measure 4".[209]

6.40. With regard to paragraphs 7.1217-7.1219, Costa Rica argues that the Panel takes into account in those paragraphs the timeline identified by Panama and examines all of the events on that timeline, without focusing on one in isolation.[210] Moreover, Costa Rica submits that Panama's request in relation to these paragraphs goes beyond the scope of the review of a panel's interim report, because Panama requests the Panel to reconsider its objective assessment of a number of factual elements, as well as its conclusion that the objective of Measure 4 is not to prevent the entry of Foc TR4 into Panama.[211] Similarly, Costa Rica considers that Panama's request with respect to paragraph 7.1231 goes beyond the scope of the review of a panel's interim report, by requesting the Panel to reconsider its objective assessment of Exhibit CRI-109, as well as its conclusions in that regard.[212]

6.41. The Panel dismisses Panama's drafting suggestions with respect to paragraph 7.1199 as the language of the Interim Report accurately reflects Panama's arguments. For the same reason, the Panel also dismisses the changes requested by Panama with respect to paragraphs 7.1200 and 7.1205.

6.42. The Panel also rejects Panama's request that the Panel reassess paragraphs 7.1217-7.1219 and conclude that the objective of Measure 4 was to protect against the risk of entry and establishment of Foc TR4 in Panama. In paragraphs 7.1208-7.1227 of the Report, the Panel carefully reviews the evidence in the record to determine the objective of Measure 4. The conclusion of that analysis, which is supplemented by the analysis in paragraphs 7.1228-7.1232, is that the events which, in Panama's view, provide the "context" for Measure 4, as well as Panama's communications following the adoption of that measure do not demonstrate that the objective of Measure 4 is to protect against the risk of introduction of Foc TR4 into Panamanian territory. Panama's comments on paragraphs 7.1217-7.1219 call for the Panel to reassess this conclusion on the basis of an assessment of the evidence in the record that follows arguments Panama has already made in its submissions.[213] In addition, as noted above, the Panel agrees that the interim review process is not

[204] Panama's request for interim review, paras. 42-50. These elements are the chronological importance of the OIRSA phytosanitary alert, indicating the presence of Foc TR4 in the region, the declaration of the sanitary emergency in Colombia due to the presence of the pest on 5 August 2019, and Panama's communication to Costa Rica dated 22 February 2021, together with the other developments mentioned in Panama's response to Panel question No. 193(b).

[205] Costa Rica's comments on Panama's request for interim review, paras. 5.6, 5.14, 5.16, 5.25, 5.28, and 5.31.

[206] Costa Rica's comments on Panama's request for interim review, paras. 5.8-5.10.

[207] Costa Rica's comments on Panama's request for interim review, para. 5.7.

[208] Costa Rica's comments on Panama's request for interim review, para. 5.14.

[209] Costa Rica's comments on Panama's request for interim review, para. 5.17.

[210] Costa Rica's comments on Panama's request for interim review, para. 5.23.

[211] Costa Rica's comments on Panama's request for interim review, para. 5.24. (quoting Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; and *Indonesia – Iron or Steel Products (Viet Nam)*, Annex A-3, para. 2.4).

[212] Costa Rica's comments on Panama's request for interim review, para. 5.30.

[213] See e.g. Panama's second written submission, paras. 195-200; response to Panel question No. 193, paras. 231-234.

an appropriate stage for the parties to re-argue their case on the basis of arguments that have already been debated.[214]

6.43. Lastly, the Panel dismisses Panama's request to re-examine the contents of Exhibit CRI-109 and reassess its conclusion in paragraph 7.1231 on the objective of Measure 4. The Panel assessed that exhibit as part of the evidence in the record that formed the basis for its conclusions on the objective of Measure 4; that exhibit is not the only piece of evidence underpinning its conclusion. In order to reflect this idea more clearly, the Panel amended the wording of paragraph 7.1231.

7 FINDINGS

7.1 The Panel's terms of reference

7.1.1 Preliminary ruling

7.1. As mentioned in section 1.3.2 above, Panama raised two issues relating to the Panel's terms of reference, which the Panel addressed in a single preliminary ruling, namely:

a. whether Costa Rica's panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU; and

b. whether Costa Rica's claims under Annex B(5)(b) and Annex B(6)(b) to the SPS Agreement are outside the Panel's terms of reference.

7.2. On the first issue, the Panel concluded that Costa Rica's panel request clearly connected the challenged measures with the provisions of the covered agreements claimed to have been infringed. The Panel therefore found that the panel request was not inconsistent with the requirement under Article 6.2 of the DSU to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[215] Accordingly, the Panel also found that Panama's due process rights had not been violated as a result of the failure to comply with the above requirement of Article 6.2.[216]

7.3. On the second issue, with respect to Costa Rica's claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement, the Panel concluded that Costa Rica had not included such claims in its panel request. The Panel therefore found that such claims were outside its terms of reference.[217]

7.1.2 Whether the procedures challenged by Costa Rica in relation to Measures 1, 3, and 4 are within the Panel's terms of reference

7.4. Costa Rica claims that Panama acted inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement by unduly delaying the initiation and completion of procedures in order to check and ensure the fulfilment of the prohibitions on the importation of strawberries, pineapples, and plantains and bananas from Costa Rica (Measures 1, 3, and 4, respectively).[218]

7.5. Costa Rica describes the challenged procedures related to Measures 1, 3, and 4 as follows:

a. The procedure related to Measure 1 consists of "the procedure for Panama to consider Costa Rica's request to withdraw the prohibition on imports of strawberries imposed on 20 January 2020".[219]

[214] See fn 189 above.
[215] Panel's preliminary ruling, of 5 April 2023, para. 3.43. See Annex D-1 to this Report.
[216] Panel's preliminary ruling, of 5 April 2023, para. 3.46.
[217] Panel's preliminary ruling, of 5 April 2023, para. 4.21.
[218] Costa Rica's second written communication, paras. 423(e), 539, and 544 (Measure 1); 184(f) and 308 (Measure 3); and 335(d) and 390 (Measure 4).
[219] Costa Rica's second written submission, para. 541. In its first written submission, Costa Rica refers to the procedure related to Measure 1 differently. See Costa Rica's first written submission, paras. 471-472 and 497.

b. The procedure related to Measure 3 consists of "'Panama's review process of the phytosanitary requirements for the importation of pineapples from Costa Rica, which includes a risk assessment process'".[220]

c. The process related to Measure 4 consists of "the 'review process that includes a risk assessment, which, in turn, requires the approval of Costa Rican packing plants'".[221]

7.6. This description of the procedures, coupled with Costa Rica's description of the measures at issue in its panel request, led the Panel to deem that it was appropriate to examine whether these procedures had been duly identified in the panel request. In this connection, pursuant to Articles 6.2 and 7 of the DSU, the terms of reference of a panel are limited to the measures identified and to the claims presented in the complainant's panel request. Accordingly, panels must deal with all issues which go to the root of their jurisdiction, even on their own motion, in order to satisfy themselves that they have authority to proceed.[222] Thus, the Panel considers it necessary to satisfy itself, in this particular case, that the procedures related to Measures 1, 3, and 4 challenged by Costa Rica are within its terms of reference. The Panel will proceed to analyse this issue below.

7.1.2.1 Main arguments of the parties

7.1.2.1.1 Costa Rica

7.7. Costa Rica submits that the procedures related to Measures 1, 3, and 4 are within the Panel's terms of reference. In Costa Rica's view, its panel request described the acts and omissions that comprise the measures at issue, including these procedures.[223]

7.8. Costa Rica states that, according to WTO jurisprudence, any act or omission attributable to a Member can be identified as a measure at issue in a panel request. Costa Rica adds that it is important not to confuse this requirement with the requirement to set out the legal claims, and that Article 6.2 of the DSU does not require that the acts or omissions comprising the measure at issue be described in the panel request in a manner that includes the legal claims.[224] Furthermore, Costa Rica observes that Panama has not raised any jurisdictional objection related to the description of the measures in the panel request.[225]

7.9. Costa Rica considers that it did not simply describe the measures as import prohibitions in its panel request. Costa Rica states that its description of the measures includes an extensive account that reflects its exchanges with Panama aimed at resuming trade. According to Costa Rica, the events it describes indicate that these exchanges were part of a *process* to determine whether Panama would re-authorize imports of strawberries, pineapples, and plantains and bananas from Costa Rica.[226]

7.10. With respect to Measure 1, Costa Rica considers that its panel request contains a description of the communications through which Costa Rica requested Panama to "withdraw the prohibition on imports" of strawberries from Costa Rica. According to Costa Rica, the procedure related to Measure 1 is Panama's consideration of that request, as described in the panel request.[227]

7.11. With respect to Measure 3, Costa Rica considers that its panel request contains a description of different facts that identify acts and omissions attributable to Panama over a long period of

[220] Costa Rica's second written submission, para. 312.
[221] Costa Rica's second written submission, para. 394.
[222] Appellate Body Report, *Mexico – Corn Syrup* (*Article 21.5 – US*), para. 36 (quoting Appellate Body Report, *US – 1916 Act*, para. 54). In previous disputes is has been deemed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for a lawful panel proceeding" and that "[f]or this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters". (Ibid.)
[223] Costa Rica's response to question No. 102, paras. 1.6 and 1.15. See also Costa Rica's comments on Panama's response to Panel question No. 102, para. 1.6.
[224] Costa Rica's responses to Panel question No. 102, para. 1.5 (quoting Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 81; *Australia – Apples*, para. 417; and *EC – Certain Customs Matters*, para. 136), and No. 103, paras. 1.18 and 1.20.
[225] Costa Rica's responses to Panel question No. 102, para. 1.7, and No. 103, para. 1.19.
[226] Costa Rica's response to Panel question No. 103, para. 1.19. (original emphasis)
[227] Costa Rica's response to Panel question No. 102, paras. 1.9-1.10.

time.[228] According to Costa Rica, the procedure related to Measure 3 is the "review process" of phytosanitary import requirements (PIR) for pineapple from Costa Rica.[229] Costa Rica considers that the description of Measure 3 in its panel request reflects that "the prohibition" on imports of Costa Rican pineapples was related to obtaining information on Costa Rica's phytosanitary status. Costa Rica states that the "prohibition" would remain in place until Panama considered that it had the necessary information to review it. According to Costa Rica, this review process is reflected in the communications between the parties.[230]

7.12. With respect to Measure 4, Costa Rica considers that its panel request contains a description of different facts that identify acts and omissions attributable to Panama over a period of time.[231] According to Costa Rica, the procedure related to Measure 4 is the technical review process of the PIR for plantain and banana, including, in the case of plantains, approvals for packing plants.[232] Costa Rica considers that the description of Measure 4 in its panel request makes clear that the procedure at issue is within the Panel's terms of reference.[233]

7.1.2.1.2 Panama

7.13. Panama considers that the procedures challenged by Costa Rica in its submissions with respect to Measures 1, 3, and 4 are outside the Panel's terms of reference because they have not been sufficiently identified in Costa Rica's panel request.[234]

7.14. In Panama's view, from the description of Measures 1, 3, and 4 in Costa Rica's panel request, it follows that Costa Rica challenged substantive SPS measures, and not procedures designed to check and ensure the fulfilment of those substantive SPS measures.[235] Furthermore, Panama considers that a generic list of exchanges between the parties, without anything further, is not sufficient to identify the measures at issue with the degree of specificity required by Article 6.2 of the DSU.[236]

7.15. Panama considers that the communications to which Costa Rica refers in describing Measures 1, 3, and 4 in its panel request do not indicate that Costa Rica was challenging a procedure under Article 8 and Annex C of the SPS Agreement.[237] With respect to Measure 4, Panama adds that, despite including a brief reference to the suspension of imports of plantains and bananas until Panama approved Costa Rican packing plants, the narrative description of the measure refers to a substantive SPS measure.[238] Panama considers that Costa Rica's communications in this proceeding confirm the above.[239]

7.1.2.2 Assessment by the Panel

7.1.2.2.1 Relevant legal standard

7.16. Article 7.1 of the DSU establishes that the terms of reference of panels is "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". Accordingly, as indicated in paragraph 1.4 above, the Panel's terms of reference are defined by Costa Rica's panel request.

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[228] Costa Rica's response to Panel question No. 102, para. 1.11.
[229] Costa Rica's first written communication, para. 938.
[230] Costa Rica's response to Panel question No. 102, para. 1.12.
[231] Costa Rica's response to Panel question No. 102, paras. 1.13-1.14.
[232] Costa Rica's first written submission, para. 1166 (quoting Note AUPSA-AG-392-2019 (Exhibit CRI-95); and Note AUPSA-AG-424-2019 (Exhibit CRI-97)); and second written submission, para. 392. Costa Rica confirms this in its response to Panel question No. 98, para. 3.189.
[233] Costa Rica's response to Panel question No. 102, para. 1.14.
[234] Panama's response to Panel question No. 102, para. 1; and comments on Costa Rica's response to Panel question No. 102, para. 8.
[235] Panama's response to Panel question No. 102, paras. 2-5.
[236] Panama's comments on Costa Rica's response to Panel question No. 102, para. 1.
[237] Panama's comments on Costa Rica's response to Panel question No. 102, paras. 2-5.
[238] Panama's comments on Costa Rica's response to Panel question No. 102, para. 6.
[239] Panama's comments on Costa Rica's response to Panel question No. 102, para. 7.

7.17. Article 6.2 of the DSU defines the requirements that a panel request must meet. Pursuant to that provision, in addition to being made in writing and indicating whether consultations were held, the 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". It follows that measures not identified and claims not included or included in a defective manner in Costa Rica's panel request could not be examined by the Panel.[240]

7.18. As mentioned above, the Panel considers it necessary to satisfy itself that the procedures related to Measures 1, 3, and 4 are within its terms of reference. Thus, the relevant requirement for the Panel's analysis is the requirement to identify the specific measures at issue. Given that the panel request fulfils a due process objective, this requirement has been interpreted to include identifying the measures at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[241]

7.19. The Panel concurs with Costa Rica[242] that when examining whether a measure has been identified in a panel request, the measure should not have to be identified in terms of the obligation that is alleged to have been breached. In addition, it has been deemed that the sufficiency of a panel request in identifying a measure must be established by reading the request as a whole and on the basis of the language used therein.[243]

7.20. In the light of the foregoing, the Panel will next address whether the procedures challenged by Costa Rica related to Measures 1, 3, and 4 were identified with sufficient particularity in Costa Rica's panel request, and which are, therefore, within its terms of reference.

7.1.2.2.2 Whether Costa Rica identified the procedures it is challenging in relation to Measures 1, 3, and 4 in its panel request

7.1.2.2.2.1 Procedure related to Measure 1

7.21. Costa Rica notes that "in relation to the prohibition on imports of strawberries, Costa Rica challenges Panama's procedure for considering Costa Rica's request to withdraw the prohibition on imports of strawberries from Costa Rica".[244] The Panel will proceed to review the text of Costa Rica's panel request to determine whether Costa Rica identified with sufficient particularity the procedure it is challenging in relation to Measure 1.

7.22. Costa Rica describes the measure related to imports of strawberries (Measure 1) in section I.1 of its panel request, entitled "Measure restricting or prohibiting imports of strawberries originating in Costa Rica". This section comprises six paragraphs. The first paragraph describes the measure as Panama's decision "to prohibit strawberry imports from Costa Rica", about which Panama informed Costa Rica in Note AUPSA-AG-051-2020 of 20 February 2020, and explains the reasons why Panama imposed this prohibition. In the four paragraphs that follow, Costa Rica refers to an exchange of communications between Costa Rica and Panama in relation to Measure 1.[245] These paragraphs make no mention of a request by Costa Rica for Panama to withdraw the prohibition on imports of its strawberries, noting only that in the communications of 12 June 2020 and 19 February 2021, Costa Rica reiterated its readiness to "resolve this situation, with the fundamental aim being to resume exports of Costa Rican strawberries".[246] The last paragraph of this section concludes that "[d]espite the information and explanations provided by Costa Rica, Panama continues to maintain the ban on imports of Costa Rican strawberries …, which is baseless and lacks scientific evidence, a risk analysis or any other valid justification under WTO rules".[247]

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[240] See Panel Reports, *Colombia – Textiles (Article 21.5 – Colombia)/Colombia – Textiles (Article 21.5 – Panama)*, para. 7.368; and *Russia – Railway Equipment*, para. 7.822.

[241] Appellate Body Report, *US – Continued Zeroing*, para. 169.

[242] Costa Rica's responses to Panel question No. 102, para. 1.5, and No. 103, para. 1.20.

[243] Appellate Body Report, *Russia – Railway Equipment*, paras. 5.29 and 5.38.

[244] Costa Rica's responses to Panel question No. 96, para. 3.162, and No. 98, para. 3.174. See also Costa Rica's second written submission, para. 541.

[245] Costa Rica's panel request, pp. 1-2.

[246] Costa Rica's panel request, p. 2.

[247] Costa Rica's panel request, p. 2.

7.23. The Panel considers that Costa Rica's description of Measure 1 in section I.1 of its panel request and, in particular, paragraphs 2 to 6 thereof, does not make it clear that Costa Rica is challenging, in addition to a prohibition on imports of strawberries from Costa Rica that it alleges was imposed without scientific justification, a procedure consisting of the consideration of the request for the prohibition to be withdrawn. While the narrative in the panel request provides context for the reason for the prohibition and the subsequent attempts at dialogue and technical clarifications, at no point is reference made, directly or indirectly, to a procedure such as the one described by Costa Rica in its communications. In the Panel's view, this lack of particularity made it impossible for Panama to know, based on the terms of the panel request, that Costa Rica was challenging not only the prohibition on imports of strawberries from Costa Rica, but also a procedure related to that prohibition.

7.24. The lack of particularity in section I.1 of the panel request in identifying the procedure challenged by Costa Rica is not remedied by the manner in which Costa Rica asserted its claim under Article 8 and Annex C in section II of its panel request. In this section, which includes a brief summary of the legal basis of the complaint, Costa Rica states that "[e]ach and every one of the measures described in Section I of this request (collectively referred to as "measures at issue") are inconsistent with each and every one of the following obligations for Panama under the WTO covered agreements"[248] and claims that these measures are inconsistent with:

a. Annex C(1)(a) to the SPS Agreement, read in conjunction with Article 8, because Panama has incurred undue delays when undertaking and completing the necessary procedures to check and ensure the fulfilment of each of the measures at issue.

b. Annex C(1)(b) to the SPS Agreement, read in conjunction with Article 8, in relation to the processing by Panama of the procedures to check and ensure the fulfilment of each of the measures at issue.

c. Annex C(1)(c) to the SPS Agreement, read in conjunction with Article 8, because Panama requires more information than is necessary to carry out the control, inspection, and approval procedures related to each of the measures at issue.[249]

7.25. In this section, Costa Rica refers to "the necessary procedures to check and ensure the fulfilment of each of the measures at issue". This reference does not indicate the necessary procedures to check and ensure the fulfilment of the prohibition on strawberry imports to which Costa Rica is referring. It is not clear to the Panel how the challenged procedure (namely consideration of Costa Rica's request to Panama to withdraw this prohibition) could have been understood by Panama as a procedure related to the verification and fulfilment of that very prohibition. Thus, when describing the measure challenged under Article 8 and Annex C, the panel request does not provide any additional information that would indicate that Costa Rica was challenging the procedure as described in its communications. This conclusion is confirmed by the emphasis that Costa Rica places on the lack of scientific basis and justification for Measure 1, which indicates that it was challenging the prohibition on imports of Costa Rican strawberries, and not a procedure related to that prohibition.

7.26. In conclusion, reading the panel request as a whole, the Panel considers that Costa Rica failed to identify in that request, as a measure at issue, the procedure it is challenging with respect to Measure 1, namely Panama's consideration of Costa Rica's request to withdraw the prohibition on imports of strawberries from Costa Rica. Accordingly, the Panel finds that the procedure challenged by Costa Rica in relation to Measure 1 is outside its terms of reference.

7.1.2.2.2.2 Procedure related to Measure 3

7.27. Costa Rica describes the procedure related to Measure 3 as the "review process" of the PIR for pineapple from Costa Rica[250], "which includes a risk assessment, for which Panama must

[248] Costa Rica's panel request, p. 6.
[249] Costa Rica's panel request, p. 7.
[250] Costa Rica's first written communication, para. 938.

determine the phytosanitary status of pineapple-producing areas in Costa Rica".[251] The Panel will proceed to review the text of Costa Rica's panel request to determine whether Costa Rica identified with sufficient particularity the procedure challenged in relation to Measure 3.

7.28. Costa Rica describes the measure related to imports of pineapples (Measure 3) in section I.3 of its panel request, entitled "Measure restricting or prohibiting imports of fresh pineapples originating in Costa Rica". This section comprises five paragraphs. The first paragraph describes the measure as Panama's decision "to ban imports of fresh pineapples from Costa Rica", about which Panama informed Costa Rica through Note AUPSA-AG-032-2019 of 29 January 2019, and explains the reasons why Panama took this decision. In the three paragraphs that follow, Costa Rica refers to an exchange of communications between Costa Rica and Panama following the adoption of Measure 3.[252] The "review process" of the PIR for pineapple that Costa Rica is challenging is not mentioned in these paragraphs. The last of these paragraphs refers to various communications from Panama, noting that, in the first communication, Panama requested Costa Rica "to provide further information on the phytosanitary status of pineapple production areas with respect to the pink hibiscus mealybug and reiterating its concern regarding Fusarium in pineapple".[253] It is also points out that, in subsequent communications, in response to a request for clarification from Costa Rica, Panama indicated what additional information had been requested, which was subsequently sent by Costa Rica. Costa Rica asserts that Panama closed its market to fresh pineapples from Costa Rica "without any technical justification".[254] The last paragraph of this section concludes that "[t]o date, Panama has maintained the ban on imports of fresh Costa Rican pineapples".[255]

7.29. The Panel considers that Costa Rica's description of Measure 3 in section I.3 of its panel request, and in particular, paragraphs 2 to 5 thereof, does not make it clear that Costa Rica is challenging, in addition to the prohibition on pineapple imports that it alleges was imposed without scientific justification, a procedure consisting of the review of the PIR for pineapple. While the narrative in the panel request provides context for the reason for the prohibition and the subsequent attempts at dialogue and technical clarifications, it does not mention, directly or indirectly, a procedure such as that described by Costa Rica in its communications. In the Panel's view, this lack of particularity does not allow Panama to know, from the terms of the panel request, that Costa Rica was challenging not only the prohibition on pineapple imports from Costa Rica, but also a procedure related to that prohibition.

7.30. As noted above[256], section II of the panel request, when describing the claims under Article 8 and Annex C, refers to the "the necessary procedures to check and ensure the fulfilment of each of the measures at issue". This reference does not indicate the necessary procedures to check and ensure fulfilment of the prohibition on pineapple imports to which Costa Rica is referring. It is not clear to the Panel how, on the basis of the language used in the panel request, Panama could have understood the challenged procedure (i.e. the review procedure for the PIR for pineapple from Costa Rica) to be a procedure related to the verification and enforcement of the import prohibition on Costa Rican pineapples. Thus, the description of the subject of the claims under Article 8 and Annex C in the panel request fails to provide any additional information that would indicate that Costa Rica was challenging the process as described in its communications. This conclusion is confirmed by the emphasis that Costa Rica places on the lack of scientific basis or justification for the measure, which indicates that it was challenging the prohibition on imports of Costa Rican pineapples, and not a procedure related to that prohibition.

7.31. In conclusion, reading the panel request as a whole, the Panel considers that Costa Rica failed to identify in the panel request, as a measure at issue, the procedure that it is challenging in relation to Measure 3, namely the review of the PIR for pineapple from Costa Rica, including a risk

[251] Costa Rica's response to Panel question No. 98, para. 3.187; and second written submission, para. 310. See also Costa Rica's first written submission, paras. 937-938; and response to Panel question No. 98, para. 3.184.

[252] Costa Rica's panel request, pp. 4-5.

[253] The Panel observes that, in its argument related to Measure 3, Panama refers to the pest *Fusarium guttiforme*. However, Panama itself has confirmed in these proceedings that this pest is not related to the adoption and maintenance of Measure 3. (Panama's response to Panel question No. 53, para. 153).

[254] Costa Rica's panel request, pp. 4-5.

[255] Costa Rica's panel request, p. 5.

[256] See also paras. 7.24 and 7.25 above.

assessment. Accordingly, the Panel finds that the procedure challenged by Costa Rica in relation to Measure 3 is outside its terms of reference.

7.1.2.2.2.3 Procedure related to Measure 4

7.32. Costa Rica describes the procedure related to Measure 4 as the technical review process of the PIR for plantain and banana from Costa Rica, including, in the case of plantains, approvals for packing plants.[257] Costa Rica adds that this review process includes a risk assessment.[258] The Panel will proceed to review the text of Costa Rica's panel request to determine whether Costa Rica identified with sufficient particularity the challenged procedure in relation to Measure 4.

7.33. In section I.4 of its panel request, entitled "Measure restricting or prohibiting the importation of plantains and bananas originating in Costa Rica", Costa Rica describes the measure related to imports of plantains and bananas (Measure 4). This section comprises six paragraphs. The first paragraph describes the measure as a prohibition on imports of plantains and bananas from Costa Rica, about which Panama informed Costa Rica through Notes AUPSA-AG-392-2019 and AUPSA-AG-424-2019 of 10 and 25 October 2019, and which, in Costa Rica's view, was adopted without any scientific justification. In that paragraph of its request, Costa Rica adds that, when notifying the measures, "Panama stated that the importation of these products would remain suspended until Panama had completed a technical review of the existing phytosanitary requirements and had approved Costa Rican packing plants".[259] Costa Rica also describes the trade situation prior to the imposition of this measure. In the four paragraphs that follow, Costa Rica refers to the exchange of communications between Costa Rica and Panama following the adoption of Measure 4, which included statements by Panama on the reasons for adopting the measure. In these paragraphs, Costa Rica states that "there had been no change in Costa Rica's phytosanitary status to justify closing the market" and insists that Panama kept "the market closed to Costa Rican plantains and bananas without providing any [scientific or technical] justification".[260] The sixth and final paragraph of this section concludes that "Panama has maintained the ban on imports of Costa Rican plantains and bananas".[261]

7.34. The Panel considers that Costa Rica's description of Measure 4 in section I.4 of its panel request, and in particular, paragraphs 1 to 6 thereof, does not make it clear that Costa Rica is challenging, in addition to the prohibition on imports of plantains and bananas that it alleges was imposed without scientific justification, a procedure consisting of the review of the PIR for plantain and banana from Costa Rica and the approval of Costa Rican packing plants. While the narrative of the panel request provides context for the reason for the prohibition on imports of plantains and bananas and the subsequent attempts at dialogue and technical clarifications, it does not refer in a sufficiently precise manner to a procedure other than the prohibition itself as a measure at issue. In the Panel's view, Costa Rica's references to the review of the PIR and the approval of the packing plants seek to explain how the challenged prohibition works, while indicating that the suspension of imports of plantains and bananas would remain in place until that review and approval had been carried out. In this connection, the Panel considers that Costa Rica was not referring to a procedure independent from the prohibition. This lack of particularity does not allow Panama to know, from the terms of the panel request, that Costa Rica was challenging, in addition to the prohibition on imports of plantains and bananas, a procedure related to that prohibition.

7.35. As noted above[262], section II of the panel request, in describing the claims under Article 8 and Annex C, refers to the "the necessary procedures to check and ensure the fulfilment of each of the measures at issue". This reference does not indicate the necessary procedures to check and ensure the fulfilment of the prohibition on plantain and banana imports to which Costa Rica is referring. It is not clear to the Panel how, on the basis of the language used in the panel request, Panama could have understood that the challenged procedure (namely the technical review of the PIR for plantain and banana, including, in the case of plantains, packing plant approvals) to be a procedure related to verification and fulfilment of the prohibition on imports of plantains and bananas from Costa Rica.

[257] Costa Rica's first written submission, para. 1166 (quoting Note AUPSA-AG-392-2019 (Exhibit CRI-95); and Note AUPSA-AG-424-2019 (Exhibit CRI-97)); and second written submission, para. 392. Costa Rica confirms this in its response to Panel question No. 98, para. 3.189.

[258] Costa Rica's response to Panel question No. 98, para. 3.191.

[259] Costa Rica's panel request, p. 5.

[260] Costa Rica's panel request, pp. 5-6.

[261] Costa Rica's panel request, p. 6.

[262] See also paras. 7.24 and 7.25 above.

Thus, the description of the subject of the claims under Article 8 and Annex C in the panel request fails to provide any additional information that would indicate that Costa Rica was challenging the process as described in its communications. This conclusion is confirmed by the emphasis that Costa Rica places on the lack of scientific basis or justification for the measure, which indicates that it was challenging the prohibition on imports of Costa Rican plantains and bananas, and not a procedure related to that prohibition.

7.36. In conclusion, reading the panel request as a whole, the Panel considers that Costa Rica failed to identify in that request, as a measure at issue, the procedure it is challenging in relation to Measure 4, namely, the revision of the PIR for plantain and banana from Costa Rica and the approval of Costa Rican packing plants. Accordingly, the Panel finds that the procedure challenged by Costa Rica in relation to Measure 4 is outside its terms of reference.

7.1.2.3 Conclusion on whether Costa Rica identified the procedures it is challenging in relation to Measures 1, 3, and 4 in its panel request

7.37. In the light of the above, the Panel considers that Costa Rica failed to identify in its panel request the procedures in respect to Measures 1, 3, and 4 that Costa Rica is challenging. Accordingly, the Panel finds that these procedures are outside its terms of reference.

7.38. Having clarified the scope of its terms of reference, the Panel will now address the order in which it will examine Costa Rica's claims.

7.2 Order of analysis

7.39. In its panel request, Costa Rica has put forward claims with respect to the four measures at issue under the following provisions: Articles 1.1, 2.1, 2.2, 2.3, 3.1, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 6.1, 7, 8, Annex B(1), and Annex C(1)(a), (b) and (c) of the SPS Agreement, Articles I.1, X:1, X:3(a), and XI:1 of the GATT 1994, and Article 4.2 and footnote 1 of the Agreement on Agriculture.[263]

7.40. The Panel will organize its analysis by measure, since this approach will enable it to address the aspects particular to each measure at issue in a clearer and more structured manner.[264] The Panel also considers it necessary to decide for each of the measures which agreement it will examine first and the order in which it will examine the respective claims.[265] The Panel notes that, as a general principle, panels have discretion when determining the order in which they will analyse the different measures and claims.[266] The main limitation on this discretion is that imposed by the very "structure and logic" of the provisions in question.[267] In this regard, the Panel could be committing an error of law should it fail to follow a particular order arising from the relevant provisions, if any.[268]

7.41. Moreover, the obligation under Article 11 of the DSU, to make an objective assessment of the matter before it, does not require the Panel to rule on all the claims made by the complainant. The Panel may examine only those claims it considers necessary to secure a positive solution to the dispute.[269] In this regard, it has been considered that panels may consider the possibility of exercising judicial economy when deciding in what order to structure their analysis of the complaining party's claims.[270]

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[263] Costa Rica's panel request, pp. 6-8. In its written submissions, Costa Rica has not developed the claims under Articles 5.4, 5.6, 5.8, and 6.1 of the SPS Agreement, or Annex B(1) and Annex C(1)(b) thereto, or Articles X:1 and X:3(a) of the GATT 1994. (Costa Rica's response to Panel question No. 67).

[264] The Panel notes that the parties are in accordance with this approach. (Costa Rica's response to Panel question No. 63, para. 3.3; Panama's response to Panel question No. 63, para. 187).

[265] Appellate Body Reports, *US- Lead and Bismuth II*, paras. 71 and 73; and *Canada – Autos*, paras. 116-117.

[266] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[267] Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109.

[268] Panel Report, *India – Autos*, para. 7.154.

[269] Appellate Body Reports, *US- Lead and Bismuth II*, paras. 71 and 73; and *Canada – Autos*, paras. 116-117.

[270] See e.g. Panel Report, *EC – Seal Products*, paras. 7.61-7.69 (where the panel considers what the "most logical or economical" order of analysis would be under the circumstances of that dispute).

7.2.1 Order of analysis of the agreements cited by Costa Rica

7.42. Costa Rica has put forward claims under the three covered agreements, namely: the SPS Agreement, the GATT 1994, and the Agreement on Agriculture. Costa Rica considers that, if the Panel finds Panama has acted inconsistently with the obligations under the SPS Agreement, it may deem that it is not necessary to make findings under the GATT 1994 and the Agreement on Agriculture to resolve the matter.[271]

7.43. Panama also considers that, in the event that the Panel finds a violation of the SPS Agreement, it may exercise judicial economy with respect to the claims under the GATT 1994 and the Agreement on Agriculture, just as previous panels have done.[272]

7.44. The Panel notes that, in previous disputes where claims were made under these agreements, the decision was taken to begin the analysis with the SPS Agreement as it is the more specific agreement.[273] In particular, account was taken of the fact that the claims under the SPS Agreement should be examined even if the measure is determined to be consistent with the GATT 1994, while the reverse is not necessarily true.[274]

7.45. In this case, the Panel sees no reason that justifies adopting a different approach. As a result, the Panel will begin its analysis with Costa Rica's claims under the SPS Agreement. Depending on its findings, the Panel will decide whether it is necessary to make findings under the GATT 1994 and/or the Agreement on Agriculture to secure a positive solution to the dispute.

7.2.2 Order of analysis of the claims under the SPS Agreement

7.46. Costa Rica calls for the Panel to maintain the same order that Costa Rica used in its first written submission, namely: first, examine the applicability of the SPS Agreement to the measures at issue; second, Panama's defence under Article 5.7; and then the consistency with Articles 5.1, 5.2, 5.3, and 2.2; 3.1; 5.6 and 2.2; 2.3 and 5.5; Annex C read in conjunction with Article 8; and Article 7 and Annex B, to the extent relevant to each measure.[275]

7.47. Panama distinguishes between Measure 2 on the one hand, and the rest of the measures at issue on the other. In the case of Measure 2, Panama considers that the Panel should begin its analysis by examining the content of the measure in question and the applicability of the disciplines of the SPS Agreement to this measure.[276] Should the Panel determine that, as Panama claims, Measure 2 qualifies as an approval procedure under Article 8 and Annex C, Panama considers that the Panel should examine whether Costa Rica established the inconsistency of Measure 2 with Annex C(1)(a) and Annex C(1)(c). In Panama's view, the rest of the provisions of the SPS Agreement do not apply to Measure 2.[277] In relation to Measures 1, 3, and 4, Panama considers that the Panel should begin its analysis with Article 5.7 of the SPS Agreement, as it is "a qualified right that exempts them" from the provisions of Article 2.2 and, consequently, of Articles 2.3, 3.1, 5.1, 5.2, 5.3, 5.5, and 5.6.[278] According to Panama, if Measures 1, 3, and 4 are consistent with

[271] Costa Rica's response to Panel question No. 65, para. 3.20.

[272] Panama's response to Panel question No. 65, para. 202.(referring to Panel Reports, *Japan – Apples*, paras. 8.332-8.333; *US – Animals*, paras. 7.732 and 8.2; *Japan – Apples (Article 21.5 – US)*, para. 8.202; *EC – Approval and Marketing of Biotech Products*, paras. 7.2505, 7.3422 and 7.3429; *Costa Rica – Avocados (Mexico)*, paras. 7.2319-7.2320; and *India – Agricultural Products*, para. 7.803).

[273] See e.g. Panel Reports, *EC – Hormones (Canada)*, para. 8.45; *EC – Hormones (US)*, para. 8.42; *Australia – Salmon*, para. 8.39; and *India – Agricultural Products*, paras. 7.125-7.126.

[274] Pursuant to Article 2.4 of the SPS Agreement, a measure that is consistent with the SPS Agreement can be presumed to be consistent with the GATT 1994. However, a measure consistent with the GATT 1994 may still be inconsistent with one more provisions of the SPS Agreement, and should, therefore, be examined under that Agreement. See Panel Report, *US – Poultry (China)*, para. 7.67.

[275] Costa Rica's response to Panel question No. 63, para. 3.5.

[276] Panama also submits that Costa Rica has failed to demonstrate that Panama had revoked the country's sanitary eligibility for the products in question, which is one of the aspects of Measure 2.

[277] Panama's response to Panel question No. 63, para. 189.

[278] Panama's response to Panel question No. 63, para. 190.

Article 5.7 of the SPS Agreement, it will not be necessary to examine the rest of Costa Rica's claims.[279]

7.48. As Panama offers arguments specific to Measure 2, regarding which disciplines of the SPS Agreement are applicable to the measure in the light of its nature, the Panel must address this issue to determine which aspects of the measure Costa Rica has demonstrated and which provisions of the SPS Agreement are applicable to it. Therefore, the Panel will follow a different order of analysis for the claims under Measures 1, 3, and 4 on the one hand, and Measure 2 on the other.

7.49. With respect to Measures 1, 3, and 4, the Panel will begin its analysis by examining the applicability of the SPS Agreement to these measures.[280] The Panel will then, as suggested by the parties[281], assess whether Measures 1, 3, and 4 are covered by Article 5.7 of the SPS Agreement since this provision has been considered to be a qualified exemption from the obligation under Article 2.2 to not maintain an SPS measure without sufficient scientific evidence, an obligation expounded in Article 5.1 of the SPS Agreement.[282]

7.50. If the Panel finds that the measures at issue are provisional measures under Article 5.7, as Panama claims, it will determine whether this exemption applies only to Articles 2.2 and 5.1, as Costa Rica proposes, or to other obligations under the SPS Agreement, as Panama proposes. If, however, the Panel finds such measures are not covered by Article 5.7, as Costa Rica claims, it will examine whether these measures are inconsistent with Article 5.1 and, consequently, with Articles 5.2, 5.3[283], and 2.2 of the SPS Agreement.[284]

7.51. The Panel will then continue with its analysis of the rest of Costa Rica's claims, if necessary. These claims concern: (a) whether there is arbitrary, unjustifiable discrimination (Articles 2.3 and 5.5)[285]; (b) the necessity of the measure and its trade restrictiveness (Articles 2.2 and 5.6); (c) the harmonization with international standards, guidelines and recommendations (Article 3.1); (d) the transparency (Article 7 and Annex B(1); and (e) the inconsistency of the measures at issue with the SPS Agreement (Articles 1.1 and 2.1).

7.52. The Panel notes that the SPS Agreement does not establish an order of analysis among the provisions mentioned in the preceding paragraph. Moreover, the Panel observes that none of the considerations over the exercise of judicial economy guide the order of analysis with respect to these provisions. It should, however, be noted that in previous disputes, claims under Articles 1.1 and 2.1 were examined at the end of the panel's assessment under the SPS Agreement, given that any findings of inconsistency with one or more provisions of the SPS Agreement constitutes a violation of both these provisions.[286]

7.53. As a result, and bearing these observations in mind, the Panel will address Costa Rica's claims in the following order: (a) Articles 2.3 and 5.5; (b) Articles 2.2 and 5.6; (c) Article 3.1; (d) Article 7 and Annex B; and (e) Articles 1.1 and 2.1 of the SPS Agreement.

7.54. With respect to Measure 2, the Panel will begin its analysis by examining the content of this measure, a point on which the parties disagree.[287] Once the content of Measure 2 has been defined,

[279] Panama's response to Panel question No. 63, para. 190. See also Panama's first written submission, paras. 166 and 436.

[280] This approach was followed in previous disputes. See e.g. Panel Reports, *US – Animals*, para. 7.11; *India – Agricultural Products*, para. 7125; and *Russia – Pigs (EU)*, para. 7.31.

[281] Costa Rica's response to Panel question No. 63, para. 3.5; Panama's response to Panel question No. 63, para. 190.

[282] Appellate Body Report, *Japan – Agricultural Products II*, para. 80. See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2969, 7.2974, and 7.2976; *US – Animals*, paras. 7.292-7.293; and *Russia – Pigs* (EU), para. 7.643.

[283] Costa Rica has not advanced a claim under Article 5.3 with respect to Measure 1.

[284] Costa Rica's first written submission, paras. 314 (with respect to Measure 1), 542 (with respect to Measure 2), 760 (with respect to Measure 3) and 1033 (with respect to Measure 4).

[285] Costa Rica has not advanced a claim under Articles 2.3 and 5.5 with respect to Measures 1 and 4.

[286] See e.g. Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.28, regarding the order of analysis of Mexico's claims, which included Articles 1.1 and 2.1 of the SPS Agreement.

[287] Costa Rica claims that Measure 2 has two aspects, a substantive aspect and a procedural aspect, and that it is inconsistent with Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.3, 5.5, 5.6, 5.7, 7, 8, Annex B, and Annex C. Panama disagrees with Costa Rica and claims that Measure 2 is an approval procedure within the meaning of Article 8 of and Annex C to the SPS Agreement, which consists solely of a procedural aspect and is covered

the Panel will examine the applicability of the SPS Agreement to that measure, as it will with Measures 1, 3, and 4. The Panel will then assess whether Measure 2 is consistent with Article 8 of and Annex C to the SPS Agreement since the parties do not disagree on the existence of its procedural aspect (the procedure for the renewal of the sanitary approvals of the Costa Rican establishments in question). For the rest of Costa Rica's claims with respect to Measure 2, the Panel will follow the same order as for Measures 1, 3, and 4, namely: first, the claims under Articles 2.3 and 5.5; next, the claims under Articles 2.2 and 5.6; then, the claims with respect to Article 7 and Annex B; and, lastly, the claims under Articles 1.1 and 2.1 of the SPS Agreement.

7.55. As indicated at the beginning of the section, the Panel will now examine Costa Rica's claims with respect to Measure 1.

7.3 Measure concerning the importation of strawberries (Measure 1)

7.3.1 Claims under the SPS Agreement

7.3.1.1 Whether Measure 1 is a sanitary or phytosanitary measure that falls within the scope of the SPS Agreement

7.56. As noted above[288], Costa Rica has put forward claims under various provisions of the SPS Agreement with respect to Measure 1. While Panama does not question the fact that this measure falls within the scope of the SPS Agreement, the Panel recalls that Article 11 of the DSU requires panels to make an objective assessment of the applicability of the relevant covered agreements to the measures at issue. The Panel will therefore first determine whether Measure 1 is subject to the provisions of the SPS Agreement.

7.57. The arguments of the parties on the applicability of the SPS Agreement to Measure 1 are set out below, followed by the Panel's assessment.

7.3.1.1.1 Main arguments of the parties

7.3.1.1.1.1 Costa Rica

7.58. Costa Rica claims that Measure 1 falls within the scope of the SPS Agreement because it is an SPS measure within the meaning of Annex A(1)(b) to that Agreement and it directly affects international trade within the meaning of Article 1.1.[289] Costa Rica submits that Measure 1 was adopted to protect human life or health from risks arising from a contaminant within the meaning of Annex A(1)(b) because it was adopted due to the alleged detection of the pesticide oxamyl in shipments of strawberries from Costa Rica destined for human consumption.[290] Costa Rica also asserts that Measure 1 directly affects international trade because Panama's decision to "temporarily disallow imports of strawberries from Costa Rica" prevents the importation into Panama of strawberries originating in Costa Rica.[291]

7.3.1.1.1.2 Panama

7.59. Panama does not dispute that Measure 1 is an SPS measure in accordance with the definition in Annex A(1) and Article 1.1 of the SPS Agreement, to which the SPS Agreement applies.

exclusively by Article 8 and Annex C. Panama argues that these procedures fall outside the scope of Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, and 5.7 of the SPS Agreement. See Costa Rica's first written submission, para. 516; second written submission, paras. 15-16; and Panama's first written submission, para. 85.

[288] See para. 3.1(a) above. See also para. 7.39 above.

[289] Costa Rica's first written submission, paras. 293 and 296-297.

[290] Costa Rica's first written submission, para. 299 (referring to the Codex Alimentarius, Pesticide Index, "Oxamyl" (Exhibit CRI-125); and Note AUPSA-AG-051-2020 (Exhibit CRI-7), first para.).

[291] Costa Rica's first written submission, para. 300 (referring to Note AUPSA-AG-051-2020 (Exhibit CRI-7), final para.).

7.3.1.1.2 Assessment by the Panel

7.3.1.1.2.1 Relevant legal standard

7.60. Article 1 of the SPS Agreement provides in relevant part:

> 1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
>
> 2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

7.61. Therefore, the SPS Agreement applies to any measure that meets two requirements: (a) that it constitutes a SPS measure in accordance with the definition given in Annex A to the SPS Agreement; and (b) that it may, directly or indirectly, affect international trade.[292] The Panel will now examine whether Measure 1 meets both requirements.

7.62. With respect to the first requirement for the applicability of the SPS Agreement, the Panel refers first to the definition of "sanitary or phytosanitary measure" in Annex A to the SPS Agreement.

> 1. *Sanitary or phytosanitary measure* - Any measure applied:
>
> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

7.63. For the measure at issue to be considered an SPS measure within the meaning of Annex A(1), the measure must be applied to achieve at least one of the objectives listed therein.[293] The Panel

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[292] Panel Reports, *EC – Hormones (Canada)*, para. 8.39; and *EC – Hormones (US)*, para. 8.36. See also, e.g. Panel Reports, *Costa Rica – Avocados (Mexico)*, para. 7.69; *Korea – Radionuclides*, para. 7.22; *Russia – Pigs (EU)*, para. 7.191; *US – Animals*, para. 7.30; *India – Agricultural Products*, para. 7.136; and *US – Poultry (China)*, para. 7.62.

[293] The Panel is of the view that determining the objective of the measure, including the risk it claims to address, is important not only to establish the applicability of the SPS Agreement to the measure at issue, but also when examining various provisions of the SPS Agreement. For instance, the objective of a measure (and, in particular, the relevant risk) affect the determination of whether an SPS measure is maintained without sufficient scientific evidence, within the meaning of Article 2.2, given that the analysis of this issue requires examining the relationship between the SPS measure and the scientific evidence relating to the risk that the measure addresses. Additionally, when examining whether an SPS measure discriminates between Members where identical or similar conditions prevail, the objective of the SPS measure may inform which conditions must be identical or similar. (See Panel Report, *Japan – Apples*, para. 8.102; and Appellate Body Report, *Korea – Radionuclides*, para. 5.59).

recalls that, in previous SPS disputes, it was considered that "the relationship of the measure and one of the objectives listed in Annex A(1) must be manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure".[294] In this regard, it has been deemed that "the purpose of a measure is to be ascertained on the basis of objective considerations"[295], and that scrutiny of the circumstances must reveal "a clear and objective relationship between that measure and the specific purposes enumerated in Annex A(1)".[296] In this respect, it has been noted that the purpose may be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the measure, its surrounding regulatory context, and the way in which it is designed and applied.[297] It should be noted that panels have considered a wide range of factual elements, both before and after the adoption of the measure at issue, in order to determine its objective.[298] The Panel agrees with this approach.

7.64. The Panel also observes that neither the definition of "sanitary or phytosanitary measure" in Annex A(1), nor any other provision in the SPS Agreement, indicates a reference period with respect to which a panel should discern the purpose of a measure or how such an analysis should be undertaken.[299]

7.65. With respect to a reference period for determining the objective of an SPS measure, it should be noted that Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement, concerning the notification procedures for sanitary and phytosanitary regulations, require that a "brief indication of the objective and the rationale of the regulation" be given when notifying a regulation. In accordance with these provisions, notifications should take place at an early stage (in the case of draft regulations, as provided for in Annex B(5)(b)) or immediately (in the case of urgent problems of health protection, as provided for in Annex B(6)(a)). However, in the Panel's view, the content of these provisions on when to notify the "objective and rationale" of a regulation concern compliance with the transparency obligations contained therein, but does not define a reference period for determining the objective of an SPS measure.

7.66. Concerning the list of instruments that can be used to adopt an SPS measure, enumerated in the second sentence of Annex A(1), the Panel notes that this list is illustrative, as is reflected in the use of the use of the phrase "including, *inter alia*". As has been indicated in the past, this list "illustrate[s], through a set of concrete examples, the different types of measures that, when they exhibit the appropriate nexus to one of the specified purposes, will constitute SPS measures and, accordingly, be subject to the disciplines set out in the *SPS Agreement*".[300] Hence, the Panel does not rule out that measures adopted through instruments different to those mentioned in the second sentence of Annex A(1) may constitute an SPS measure.

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[294] Appellate Body Report, *Australia – Apples*, para. 172. See also Panel Reports, *Russia – Pigs (EU)*, para. 7.193; *Korea – Radionuclides*, para. 7.25; and *Costa Rica – Avocados (Mexico)*, para. 7.77.

[295] Appellate Body Report, *Australia – Apples*, para. 172.

[296] Appellate Body Report, *Australia – Apples*, para. 173.

[297] Appellate Body Report, *Australia – Apples*, paras. 172-173. See Panel Reports, *US – Animals*, para. 7.31; *India – Agricultural Products*, para. 7.139; *Russia – Pigs (EU)*, paras. 7.193-7.194; *Korea – Radionuclides*, para. 7.25; and *Costa Rica – Avocados (Mexico)*, paras. 7.77, 7.87, and 7.202.

[298] For example, when the measure took the form of a law or regulation, the text of the relevant legislation or legal instrument was considered first, including the purposes outlined in the preamble, and the requirements established. (See Panel Reports, *EC – Hormones (US)*, para. 8.22; *EC – Approval and Marketing of Biotech Products,* paras. 7.189-7.190 and 7.395; *US – Animals*, paras. 7.35 and 7.42; *India – Agricultural Products*, paras. 7.143-7.146; and *Costa Rica – Avocados (Mexico)*, paras. 7.89-7.90). In cases where the text of the measure did not contain a clear reference to a sanitary or phytosanitary objective, or the measure constituted conduct or a requirement that was not reflected in a specific legal instrument, other documents announcing the measures or clarifying their objectives were considered. These documents included the legislative history, the statements of a representative, a House Committee report, a risk analysis report, instructions issued by the relevant authority to the heads of territorial departments, a letter to the relevant authority of the complaining party, and press releases announcing the measures. (See Panel Reports, *US – Poultry (China)*, paras. 7.106-7.115; *Australia – Salmon*, paras. 8.34-8.35; *Australia – Apples*, paras. 7.124-7.128, 7.134, and 7.138; *Russia – Pigs (EU)*, paras. 7.199-7.206 and 7.222-7.224; and *Korea – Radionuclides*, para. 7.26).

[299] In particular, the Panel notes that the provisions of the SPS Agreement refer both to the adoption of the measure (e.g. Articles 2.1 and 5.7) and its application (e.g. Articles 1.1, 2.2, and 2.3). However, none of these provisions provide definitive guidance with respect to the appropriate period for the analysis of the measure's objective.

[300] Appellate Body Report, *Australia – Apples*, para. 176. (italics original)

7.67. Lastly, with respect to the second requirement for applicability of the SPS Agreement, namely that the measure may, directly or indirectly, affect international trade, the Panel notes that a broad interpretation has been given to the word "affect" in previous disputes.[301] The use of the words "may affect" and "directly or indirectly" in Article 1.1 of the SPS Agreement seems to suggest that the Agreement covers measures that may have a broad range of potential effects on international trade.[302] The Panel shares the assessments of previous panels, which found that an import ban, by its very nature, affects international trade.[303]

7.3.1.1.2.2 Whether Measure 1 constitutes an SPS measure within the meaning of Annex A(1) to the SPS Agreement

7.68. As mentioned in the descriptive part, Measure 1 disallows imports of strawberries from Costa Rica.[304] Taking into account the legal standard outlined above, the task of this Panel is to determine whether Measure 1 has been applied to achieve at least one of the objectives listed in Annex A(1)(a)-(d) to the SPS Agreement, which are set out in paragraph 7.62 above. In this respect, the Panel notes that in Note AUPSA-AG-051-2020, whereby Panama informed Costa Rica of Measure 1, Panama stated that this measure was adopted due to the "health situation" arising from the detection of the pesticide oxamyl in shipments of Costa Rican strawberries. In particular, this note states that "imports of strawberries from Costa Rica … [have] be[en] temporarily disallowed" until the Costa Rican health authorities indicate the corrective measures taken to remedy the nonconformity detected by Panama, given that nonconformities could "affect the health of [its] consumers."[305]

7.69. Note AUPSA-AG-051-2020 contains information on the nonconformity detected by Panama, including the exporter involved (Fresas Gego), the product (strawberries for human consumption), the pesticide (oxamyl), and the legal basis for the finding of nonconformity (Executive Decree No. 467 adopting the MRL Regulation).[306] In this regard, the Panel is of the view that the note announces a measure the application of which seeks to address Panama's concerns regarding the risk to human health. This risk arises from the presence of a pesticide at levels exceeding Panama's MRL in a product destined for human consumption.

7.70. The Panel notes that the word "contaminants" within the meaning of the SPS Agreement covers "pesticide and veterinary drug residues and extraneous matter".[307] Therefore, the pesticide oxamyl may be considered a contaminant for the purpose of the definition of an SPS measure under Annex A to the SPS Agreement. The Panel also notes that, in addition to the reference to the risks to human health set out in Note AUPSA-AG-051-2020, the record contains information on the harmful effects of this pesticide on human health.[308]

7.71. Therefore, the Panel considers the objective of Measure 1 to correspond with the objective of "protect[ing] human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuff", set out in Annex A(1)(b) to the SPS Agreement.

7.72. As for the type of measure, the Panel recalls that Measure 1 is the decision to "disallow ... imports of strawberries from Costa Rica".[309] Therefore, in the Panel's view, Measure 1 could qualify as a requirement for the purposes of Annex A(1).[310] In any event, as the Panel stated above, a

[301] Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.175-7.176 (quoting Appellate Body Reports, *EC – Bananas III*, para. 220; and *US – FSC (Article 21.5 – EC)*, paras. 209-210).

[302] Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.177-7.179.

[303] See Panel Reports, *India – Agricultural Products*, para. 7.157 (referring to Panel Reports, *EC – Hormones (Canada)*, para. 8.26; and *EC – Hormones (US)*, para. 8.23). See also Panel Reports, *US – Animals*, para. 7.44-7.47; and *Russia – Pigs (EU)*, para. 7.234-7.236.

[304] See section 2.1.2.1 above.

[305] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[306] Note AUPSA-AG-051-2020 (Exhibit CRI-7); and the Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulation (2007) (Exhibit CRI-8).

[307] Annex A to the SPS Agreement, fn 4.

[308] See e.g. EPA, Oxamyl Facts (2000) (Exhibit PAN-39); and New Jersey Department of Health and Senior Services, Hazardous Substance Fact Sheet – Oxamyl (1999) (Exhibit PAN-43).

[309] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[310] The Panel notes that *"prescripción"* ("requirement") is defined as the *"acción y efecto de prescribir"* ("action and effect of requiring"), where *"prescripción"* means *"[p]receptuar, ordenar, determinar algo"* ("to

measure that is not expressly listed among the measures in Annex A(1) may be considered an SPS measure if it is applied to achieve one of the objectives listed in that provision.[311] Measure 1 meets this requirement and, as a result, may be considered an SPS measure within the meaning of Annex A(1) to the SPS Agreement.

7.3.1.1.2.3 Whether Measure 1 may, directly or indirectly, affect international trade

7.73. As stated above, the Panel shares the assessments of previous panels, which found that an import ban, by its very nature, affects international trade.[312] The Panel considers that Measure 1, to the extent that it makes it impossible to import Costa Rican strawberries into Panama as a result of Panama's decision to "temporarily disallow"[313] such imports, directly affects international trade. The Panel therefore finds that Measure 1 affects international trade.

7.3.1.1.3 Conclusion on the applicability of the SPS Agreement to Measure 1

7.74. Having determined that Measure 1 constitutes an SPS measure within the meaning of Annex A(1)(b) to the SPS Agreement and that it directly affects international trade within the meaning of Article 1.1 of the Agreement, the Panel finds that the SPS Agreement does apply to this measure.

7.75. The Panel will therefore examine Costa Rica's claims under the SPS Agreement with respect to Measure 1. As indicated in the section relating to the order of analysis, the Panel will first examine the claims under Articles 5.1, 5.2, 2.2, and 5.7 of this Agreement.

7.3.1.2 Claims under Articles 5.1, 5.2, 2.2, and 5.7 of the SPS Agreement

7.3.1.2.1 Order of analysis

7.76. Costa Rica claims that Measure 1 is inconsistent with Articles 5.1 and 5.2 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to human life or health. Costa Rica also claims that, as a result, Measure 1 is not based on scientific principles and is maintained without sufficient scientific evidence, in a manner inconsistent with Article 2.2 of the SPS Agreement. Costa Rica also submits that Measure 1 is not covered by Article 5.7 of the SPS Agreement and, therefore, if Panama cites this provision to justify the lack of risk analysis, this justification is not applicable.[314]

7.77. For its part, Panama asserts that Costa Rica has failed to establish a *prima facie* case that Panama does not meet the four requirements under Article 5.7 of the SPS Agreement. Panama requests the Panel to conclude that Measure 1 is a provisional measure covered by Article 5.7 and that, consequently, Panama has not acted inconsistently with Articles 5.1, 5.2, and 2.2 of the SPS Agreement.[315]

7.78. In the light of the arguments of the parties, the Panel considers it necessary to examine the relationship between Articles 5.1, 5.2, 2.2, and Article 5.7 to determine the order in which it will analyse the relevant claims.

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prescribe, order, determine something"). (RAE, definition of *"prescripción"* ("requirement") https://dle.rae.es/prescripci%C3%B3n?m=form; and *"prescribir"* ("require") https://dle.rae.es/prescribir (accessed 13 August 2024)). Additionally, in *EC – Approval and Marketing of Biotech Products,* having observed that the reference to "requirements" in Annex A(1) to the SPS Agreement is broad and unqualified, the panel considered that both an authorization to market and a ban on the marketing of a product are "requirements". In its view, the second example would constitute a negative requirement. (Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2597.) See also Panel Report, *Russia – Pigs (EU)*, para. 7.217.

[311] Appellate Body Report, *Australia – Apples*, paras 175-176.

[312] See Panel Reports, *India – Agricultural Products*, para. 7.157 (referring to Panel Reports, *EC – Hormones (Canada)*, para. 8.26; and *EC – Hormones (US)*, para. 8.23). See also Panel Reports, *US – Animals*, para. 7.44-7.47; and *Russia – Pigs (EU)*, para. 7.234-7.236.

[313] Note AUPSA-AG-051-2020 (Exhibit CRI-7), final para.

[314] Costa Rica's panel request, p. 6; first written submission, paras. 294 and 1248.

[315] Panama's first written submission, paras. 166, 247, and 435-436.

7.79. Costa Rica notes that the Panel could begin its analysis with Panama's defence under Article 5.7 and then address the consistency of Measure 1 with Articles 5.1, 5.2, and 2.2.[316] Panama also considers that the Panel should begin its analysis with Article 5.7 since, in its view, this provision exempts Measure 1 from Articles 3.1, 5.1, 5.2, and 5.6.[317]

7.80. The Panel notes that the obligations under Article 5 of the SPS Agreement on the Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection (ALOP) elaborate on the basic rights and obligations set out in Article 2 of the Agreement.[318] Article 2.2 of the SPS Agreement requires Members to ensure that their SPS measures are based on scientific principles and are not maintained without sufficient scientific evidence. These obligations are expounded in Article 5.1[319], which establishes the obligation to base SPS measures on a risk assessment. This assessment should take into account the elements listed in Article 5.2. Moreover, Article 5.7 provides an exemption to Article 2.2, which extends to Article 5.1.[320]

7.81. In accordance with the foregoing, in previous disputes it has been considered that the preferred means of complying with the basic obligations under Article 2 is through the "particular routes" or "specific obligations" set out in Article 5.[321] Accordingly, when complainants put forward claims under Articles 2 and 5 of the SPS Agreement, the panels began their analysis with Article 5.[322] In cases where the complainants put forward claims under Articles 2.2 and 5.1, and the respondent asserted that the measure was covered by Article 5.7, the panels addressed Article 5.7 first.[323]

7.82. Given that Costa Rica has brought claims under Articles 5.1, 5.2, and 2.2, and Panama has invoked Article 5.7, this Panel also considers it appropriate to begin its analysis by examining whether Measure 1 is a provisional SPS measure covered by Article 5.7. If necessary, the Panel will then examine the claims under Article 5.1, 5.2, and 2.2.

7.3.1.2.2 Whether Measure 1 is an SPS measure covered by Article 5.7 of the SPS Agreement

7.3.1.2.2.1 Main arguments of the parties

Costa Rica

7.83. Costa Rica claims that Measure 1 cannot be considered a provisional SPS measure under Article 5.7 of the SPS Agreement.[324] Costa Rica submits that Panama has failed to demonstrate that each of the four cumulative requirements under Article 5.7 have been met, according to the corresponding burden of proof.[325]

7.84. With respect to the *first requirement* under Article 5.7, Costa Rica submits that Panama has failed to demonstrate that there was a situation of insufficient scientific evidence that prevented it from performing a risk assessment that would provide the basis for applying a measure that ensures compliance with the oxamyl MRL in future shipments of Costa Rican strawberries by the producer concerned.[326]

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[316] Costa Rica's response to Panel question No. 63, para. 3.5(2).
[317] Panama's response to Panel question No. 63, para. 190.
[318] Appellate Body Reports, *EC – Hormones*, para. 180 (referring to Panel Report, *EC – Hormones (US)*, para. 8.93); *US/Canada – Continued Suspension*, para. 674; and *Australia – Apples*, paras. 339 and 341.
[319] Appellate Body Report, *EC – Hormones*, para. 180.
[320] Article 5.7 has been considered a "qualified exemption" to the obligation in Article 2.2 to not maintain an SPS measure without sufficient scientific evidence. (See Panel Report, *US – Animals*, para. 7.264). Article 5.7 has also been considered a qualified exemption to the obligation arising from Article 5.1, given that Article 5.1 is a specific application of the obligations contained in Article 2.2, and is not applicable in situations where Article 2.2 is not applicable. (Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2996.)
[321] Appellate Body Report, *India – Agricultural Products*, para. 5.25.
[322] See e.g. Panel Reports, *US – Poultry (China)*, para. 7.157; *Costa Rica – Avocados (Mexico)*, para. 7.24.
[323] See e.g. Panel Reports, *US – Animals*, paras. 7.264-7.265; *Russia – Pigs (EU)*, paras. 7.629-7.630.
[324] Costa Rica's first written submission, paras. 326-398.
[325] Costa Rica's second written submission, paras. 507-512.
[326] Costa Rica's second written submission, paras. 436-437.

7.85. According to Costa Rica, the detection of a pesticide in quantities exceeding the relevant MRL, whether these quantities are "alarming" or not, is not a factor that, under the circumstances of Measure 1, renders previously sufficient scientific evidence insufficient. In Costa Rica's view, the detection of non-compliance with the oxamyl MRL in strawberries is precisely the type of information that would have been relevant to consider in the risk assessment that Panama failed to conduct.[327]

7.86. Costa Rica considers that, given the adoption of Measure 1 was prompted by the detection of oxamyl residues in two shipments of Costa Rican strawberries, Panama did have before it all the pertinent information on the circumstances that, in its view, posed a risk to the health of its consumers. Costa Rica asserts that there is no indication that the scientific evidence was insufficient for the performance of a risk assessment, given that Panama possessed information about the two shipments of strawberries in question, the pesticide in question, the exact quantities of residue, the name of the Costa Rican producer in question and its compliance history, as well as information about the prohibition on the use of oxamyl in strawberry crops in Costa Rica.[328]

7.87. Regarding the *second requirement* under Article 5.7, Costa Rica submits that Panama did not adopt Measure 1 on the basis of pertinent information available at the time that measure was adopted.[329] According to Costa Rica, there was no evidentiary basis indicating the existence of a risk with respect to the importation of strawberries from Costa Rica.[330] Costa Rica argues that Panama had the following pertinent information:

a. Codex Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (Guidelines CAC/GL 26-1997); and Codex Guidelines for Food Import Control Systems (Guidelines CAC/GL 47-2003)[331];

b. Measures adopted by the European Union, the United States, and Australia in cases of non-compliance with imported food safety requirements[332];

c. The fact that the use of oxamyl in the production of strawberries is not authorized in Costa Rican territory[333]; and

d. The fact the producer responsible for the non-compliance, Fresas Gego, is not the only Costa Rican producer of strawberries.[334, 335]

7.88. Costa Rica asserts that there is no rational and objective relationship between the information available and Measure 1.[336] According to Costa Rica, the Codex Guidelines and the measures of the European Union, the United States, and Australia indicate that, in the event of non-compliance with an MRL, the appropriate response is to change how the risk is managed, not to impose a "total import prohibition on the product".[337] Costa Rica argues that the suspension of imports is the last

[327] Costa Rica's response to Panel question No. 77, paras. 3.80 and 3.83.

[328] Costa Rica's first written submission, paras. 331-332. See also Costa Rica's response to Panel question No. 77, para. 3.79; second written submission, para. 442. Costa Rica asserts that Panama is contradicting itself by, on the one hand, stating it did not have sufficient information to assess the risk associated with the oxamyl residues in two shipments of Costa Rican strawberries, and, on the other hand, demanding that Costa Rica take corrective action to "sufficiently address the risk of adverse health effects arising from the presence of oxamyl". See Costa Rica's comments on Panama's response to Panel question No. 128, para. 3.93 (referring to Panama's first written submission, para. 229).

[329] Costa Rica's first written submission, paras. 336 and 366; second written submission, para. 448.

[330] Costa Rica's first written submission, para. 336.

[331] Costa Rica's first written submission, paras. 339-340 (referring to Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126); and Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127)); second written submission, paras. 449-453.

[332] Costa Rica's first written submission, para. 352; second written submission, para. 480.

[333] Costa Rica's first written submission, para. 363. According to Costa Rica, Panama should have concluded that, given the prohibition on the use of oxamyl in strawberry production in Costa Rica, it was unlikely that there was a systemic problem affecting all strawberry producers relating to the use of oxamyl in that produce. (Costa Rica's second written submission, para. 483).

[334] Costa Rica's second written submission, paras. 484-485.

[335] Costa Rica's response to Panel question No. 120, para. 3.32 (where the information elements identified in subparagraphs (a)-(d) of this paragraph are mentioned).

[336] Costa Rica's first written submission, paras. 338 and 366.

[337] Costa Rica's second written submission, para. 449. See also ibid. para. 466.

resort, justifiable only "in the most serious or persistent cases" of non-compliance.[338] According to Costa Rica, Panama's submissions confirm that the non-conformities detected do not fall under this category[339], and Panama has acknowledged that Measure 1 was prompted solely by two instances of non-compliance in February 2020.[340]

7.89. Costa Rica also considers that Measure 1 – which prevents the importation of strawberries from all Costa Rican producers, including those in relation to which Panama has not detected any infringement of Panamanian MRL – bears no rational and objective relationship to the available pertinent information on the non-conformities in two shipments from a specific Costa Rican producer.[341] According to Costa Rica, the information available did not indicate a "generalized or systematic problem" affecting all Costa Rican strawberry producers, but, at worst, a risk limited to the producer concerned.[342] Costa Rica considers it relevant that the use of oxamyl in strawberry production is not authorized in its territory[343], both for strawberries produced for exportation and for domestic consumption.[344] Costa Rica adds that its *Manual on good agricultural and production practices for strawberry crops*, which Panama failed to take into account, confirms that Costa Rica maintains a mandatory system of good agricultural practices (GAP) for strawberry producers, which suggests that it is unlikely there is a systemic problem with the use of oxamyl in Costa Rican strawberry production.[345]

7.90. With regard to the *third* requirement under Article 5.7, Costa Rica claims that Panama did not meet this requirement because it did not seek to obtain the additional information necessary for a more objective assessment of risk.[346] Costa Rica asserts that, when it was notified by Panama about the adoption of Measure 1, Panama did not request any information pertinent to performing a risk assessment and only announced that the measure would be maintained until Costa Rica communicated the corrective action taken.[347] Costa Rica states that, even though it was Panama's responsibility to seek additional information[348], Costa Rica initiated the process of gathering this information, and made an effort to provide documentation that would allow Panama to review the measure.[349] Costa Rica claims that, after asking Panama repeatedly to indicate whether this information was sufficient and to clarify the information it required[350], Panama did the latter on

[338] Costa Rica's first written submission, para. 347; second written submission, para. 453.

[339] Costa Rica's first written submission, para. 350 (quoting Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), para. 35; Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), para. 20 of the Schedule; and Note AUPSA-AG-051-2020 (Exhibit CRI-7), final para.).

[340] Costa Rica's second written submission, paras. 472-473. Costa Rica adds that Panama confirms that the non-conformities detected in subsequent shipments of strawberries from Costa Rica concern "different shipments to those cited in Note AUPSA-AG-051-2020", the laboratory results for which "were issued after" the adoption of Measure 1. (Ibid. (quoting Panama's response to the Panel question No. 19, para. 83)).

[341] Costa Rica's first written submission, paras. 361 and 365. As mentioned, Costa Rica states that Fresas Gego, the Costa Rican producer responsible for the non-compliance, is not the only Costa Rican producer of strawberries. (Costa Rica's second written submission, para. 484).

[342] Costa Rica's first written submission, para. 362. For Costa Rica, Measure 1 is not proportionate to the facts, given that non-compliance with any MRL by a specific producer indicates that this producer probably did not abide by the applicable good agricultural practices (GAP), and there is no reason to draw the same conclusion about other producers unconnected to this non-compliance. (Costa Rica's second written submission, paras. 409 and 419-420).

[343] Costa Rica's first written submission, para. 363.

[344] Costa Rica's second written submission, para. 483.

[345] Costa Rica's response to Panel question No. 116, paras. 3.10 and 3.16.

[346] Costa Rica's first written submission, paras. 369 and 379; second written submission, para. 501.

[347] According to Costa Rica, this does not equate to identifying an insufficiency of scientific evidence that Panama needs to address to be able to conduct a risk assessment; it also does not mean that Panama has made "best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research". (Costa Rica's first written submission, para. 370 (quoting Note AUPSA-AG-051-2020 (Exhibit CRI-7); Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679).

[348] Costa Rica's first written submission, paras. 368 and 377 (referring to Panel Report, *US – Animals*, para. 7.294).

[349] Costa Rica's first written submission, paras. 371-372 (referring to Memorandum DSFE 0343-2020 (Exhibit CRI-9)); second written submission, paras. 488 and 490.

[350] Costa Rica's first written submission, paras. 373 (referring to Memorandum DSFE 0525-2020 (Exhibit CRI-11); Memorandum DSFE-0108-2021 (Exhibit CRI-12), p. 2) and 375 (referring to Memorandum DSFE-0128-2021 (Exhibit CRI-17)); second written submission, paras. 491-492 and 494. Costa Rica claims that, on 22 February 2021, Panama stated that the explanations and measures communicated by Costa Rica on 5 May 2020 showed highly ineffective controls and traceability, without

17 March 2021, one year after Measure 1 was adopted.[351] Costa Rica notes that it provided the information requested by Panama two months later, on 18 May 2021.[352] According to Costa Rica, Panama has not responded to its communication or commented on the information provided.[353]

7.91. With respect to the *fourth requirement* under Article 5.7, Costa Rica submits that Panama has not reviewed Measure 1 since it was adopted on 20 February 2020.[354] According to Costa Rica, Panama's inactivity is evident in two periods: (a) an initial delay of more than a year between the adoption of Measure 1 on 20 February 2020 and Panama re-establishing contact with Costa Rica regarding Measure 1 on 22 February 2021[355]; and (b) a second delay, partly coinciding with the first, and which corresponds with Panama's failure to review Measure 1 since its adoption on 20 February 2020.[356]

7.92. In Costa Rica's view, there is no reason that justifies Panama's silence for more than a year given that Costa Rica followed up on the situation.[357] Costa Rica asserts that the failure to review the measure is closely linked to the fact that Panama did not seek to obtain additional information.[358] For Costa Rica, Panama's failure to review cannot be explained by the difficulty of obtaining the information necessary for a more objective assessment of risk, as Costa Rica provided Panama with pertinent, exhaustive and detailed information related to Measure 1.[359] Costa Rica adds that the COVID-19 pandemic does not justify Panama's periods of inactivity and silence either.[360]

Panama

7.93. Panama, for its part, submits that this measure constitutes a provisional measure adopted and maintained pursuant to Article 5.7.[361] According to Panama, Costa Rica has failed to demonstrate that Article 5.7 does not apply to Measure 1.[362]

7.94. Regarding the *first requirement* under Article 5.7, Panama asserts that Costa Rica has failed to demonstrate that the scientific evidence was sufficient for the performance of a risk assessment of the potential for adverse effects on human health arising from the presence of oxamyl in strawberries.[363]

clarifying what information it required from Costa Rica. (Costa Rica's first written submission, para. 374 (quoting Note DNSV-0111-2021-OIAR (Exhibit CRI-13)); second written submission, para. 493).

[351] Costa Rica's first written submission, para. 376 (quoting Note AUPSA-AG-151-2021 (Exhibit CRI-19)); second written submission, paras. 495-496.

[352] Costa Rica's first written submission, para. 376 (referring to Memorandum DSFE 0393-2021 (Exhibit CRI-21)); second written submission, paras. 497-499.

[353] Costa Rica's second written submission, para. 500.

[354] Costa Rica's first written submission, para. 383.

[355] Costa Rica's first written submission, paras. 385-387 (referring to Note DNSV-0111-2021-OIAR (Exhibit CRI-13)).

[356] Costa Rica's first written submission, para. 389. According to Costa Rica, for the purposes of Article 5.7, Panama has not conducted "a formal assessment of [the measure] with the intention of instituting change if necessary". (Ibid. (quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3257)). See also Costa Rica's second written submission, para. 511.

[357] Costa Rica's first written submission, para. 386. Costa Rica notes that Panama's response came after repeated steps taken by Costa Rica and bilateral discussions within the context of the Bilateral Technical Working Commission on SPS matters. (Ibid. paras. 386-388 (referring to Memorandum DSFE-0343-2020 (Exhibit CRI-9); Memorandum DSFE-0525-2020 (Exhibit CRI-11); Memorandum DSFE-0108-2021 (Exhibit CRI-12); Bilateral Technical Working Commission, Aide-Mémoire, Session No. 1 (18 February 2021) (Exhibit CRI-15); and the Bilateral Technical Working Commission, Aide-Mémoire, Session No. 2 (25 February 2021) (Exhibit CRI-16)).

[358] Costa Rica's first written submission, para. 390.

[359] Costa Rica's first written submission, paras. 391-392.

[360] Costa Rica's first written submission, para. 393.

[361] Panama's first written submission, para. 19; second written submission, para. 186.

[362] Panama's opening statement at the first meeting of the Panel, para. 39; second written submission, para. 185.

[363] Panama's first written submission, paras. 206-207.

7.95. Panama asserts that instances of non-compliance with the MRL would lead to a situation of insufficient relevant scientific evidence within the meaning of Article 5.7 "whenever subsequent information 'call[s] into question' the conclusions of a Member in relation to risk".[364]

7.96. Panama asserts that the information on the specific shipments, the pesticide and the producer in question is not sufficient for an appropriate assessment of the risk because it says nothing about the effectiveness of Costa Rica's sanitary control systems. Panama considers that, without any information on the effectiveness of Costa Rica's sanitary controls, it is not possible to assess appropriately the risks to human health posed by the presence of oxamyl residues in strawberries from Costa Rica.[365]

7.97. Panama submits that scientific evidence showing repeated non-compliance with the MRL in shipments of strawberries from Costa Rica called "into question" Panama's conclusions with respect to the risk in question due to the "alarming quantities" of residues detected and the fact that the non-compliant shipments "potentially account for the total volume of imports".[366] Panama notes that it had previously concluded that its MRL of 0.01mg/kg for oxamyl in strawberries[367] was sufficient to achieve its ALOP of "lowest possible risk of contamination"[368] because it operated "in synergy" with Costa Rica's prohibition on that pesticide.[369] According to Panama, following the detections in question, the risks to human health posed by the presence of oxamyl in strawberries from Costa Rica appeared to be far greater than expected owing to potential problems with Costa Rica's sanitary controls. Panama asserts that it, therefore, acted cautiously and temporarily suspended imports while it obtained additional information from the Costa Rican authorities to assess the relevant risks objectively.[370]

7.98. With respect to the *second requirement* under Article 5.7, Panama submits that Costa Rica has failed to demonstrate that Measure 1 was not based on available pertinent information.[371] According to Panama, the temporary suspension of imports of strawberries from Costa Rica is based on the following information:

a. the measures of the Codex and the United States, "which were unable to establish MRLs for oxamyl in strawberries"[372];

b. the scientific evidence indicating the presence of oxamyl residues in shipments of strawberries from Costa Rica[373]; and

[364] Panama's response to Panel question No. 77, para. 221 (quoting Appellate Body Report, *Canada – Continued Suspension*, para. 667).

[365] Panama's second written submission, para. 111.

[366] Panama's first written submission, para. 206; second written submission, paras. 92 and 110.

[367] Panama's first written submission, paras. 200 and 202. Panama asserts that its MRL for oxamyl in strawberries was based on the European Union's MRL, which corresponded to the lower limit of analytical quantification. According to Panama, "neither the Codex nor the United States considered that the scientific evidence was sufficient to establish an MRL for oxamyl in strawberries that was safe for human consumption". (Ibid. para. 202).

[368] Panama's first written submission, paras. 203 (where Panama explains that "the detection of any quantity of oxamyl in strawberries, however small, would prevent marketing and trigger the relevant sanitary measures") and 217. See also Panama's response to Panel question No. 77, para. 221.

[369] Panama's first written submission, para. 203; response to Panel question No. 77, paras. 221 and 224-225. See also Panama's second written submission, para. 92.

[370] Panama's second written submission, para. 110. Panama asserts that the detection suggested, at the very least, a potential risk that oxamyl was, in effect, being used in the production of strawberries in Costa Rica, and the "alarming quantities detected" gave rise to serious concerns over the adverse effects on the health of Panamanian consumers. (Panama's first written submission, paras. 204 and 206. See also Panama's second written submission, para. 111).

[371] Panama's first written submission, para. 219.

[372] Panama's first written submission, para. 218 (referring to FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41); EPA, Pesticide Database, Oxamyl MRL Search (Exhibit PAN-42)).

[373] Panama's first written submission, para. 218.

c. the body of scientific evidence relating to the adverse effects on human health arising from the presence of oxamyl in strawberries.[374]

7.99. Panama adds that, when making the relevant risk management decisions, its authorities took into account, *inter alia*: (a) repeated violations; (b) the systemic importance of the offending supplier, including the quantity of its exports in relation to Panama's total imports from Costa Rica; (c) the harmfulness of the pesticide oxamyl; (d) the degree to which Panama's MRL for oxamyl was exceeded; and (e) its knowledge of Costa Rica's production and control system. Panama submits that these elements, taken together, point to a greater risk of exposure to and ingestion of this pesticide for Panamanian consumers.[375]

7.100. Panama submits that the Codex Guidelines and the measures of the European Union, the United States, and Australia to which Costa Rica refers are not pertinent because they are generic and do not say anything about the specific risk Panama is assessing.[376] Panama argues that, even assuming the Guidelines are pertinent, the temporary suspension of imports from the respective producer or country is one of the measures prescribed by the Codex for the most serious or persistent cases[377], as is the case with Measure 1, according to Panama.[378] Panama also asserts that other Members' measures do not rule out the possibility of introducing an import prohibition for the entire exporting country[379], and it is not uncommon for countries to adopt such a measure in cases where MRLs are persistently violated.[380]

7.101. Panama adds that the information available indicated the existence of a "generalized or systematic problem" of non-compliance with MRLs, given that the quantities of oxamyl detected were 2.2 and 8.6 times greater than the respective MRL in the shipments from the sole exporter of Costa Rican strawberries. In Panama's view, this would suggest that a prohibition on the use of oxamyl was not being implemented effectively by Costa Rica.[381]

7.102. Regarding the *third requirement* under Article 5.7, Panama submits that it sought to obtain the additional information necessary for a more objective assessment of the "potential for adverse effects on human health arising from the presence of oxamyl in Costa Rican strawberries".[382] Panama asserts that it clearly identified the insufficiencies in the relevant evidence once it notified Measure 1, and that it requested information from Costa Rica on the corrective action taken.[383] According to Panama, the information that Costa Rica provided on 5 May 2020 was "clearly insufficient to demonstrate the 'corrective action' necessary for a more objective assessment" of the

[374] Panama's first written submission, para. 218 (referring to EPA, Oxamyl Facts (2000) (Exhibit PAN-39); EFSA, Reasoned Opinion (2010) (Exhibit PAN-40); FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41); New Jersey Department of Health and Senior Services*, Hazardous Substance Fact Sheet – Oxamyl* (1999) (Exhibit PAN-43); and Extoxnet, Pesticide Information Profiles – Oxamyl (1996) (Exhibit PAN-44)). See also Panama's second written submission, para. 121.

[375] Panama's responses to Panel question No. 123, para. 61, and No. 124, para. 64.

[376] Panama's first written submission, paras. 211-212 and 214-215. Panama asserts that these Guidelines are generic guidelines on the operation of inspection, certification and control systems and do not equate to an "international food security standard that assesses the risk to human health from the presence of oxamyl residues in strawberries". (Ibid. para. 212).

[377] Panama's second written submission, para. 119.

[378] Panama's response to Panel question No. 73, para. 208 (in the context of a question relating to Article 3.1 of the SPS Agreement). See also Panama's opening statement at the second meeting of the Panel, para. 96 (where Panama states that "[Fresas Gego's] repeated non-compliance with the MRLs invariably raises a systemic concern").

[379] Panama's opening statement at the second meeting of the Panel, paras. 94-95.

[380] Panama's response to Panel question No. 117, paras. 53-54.

[381] Panama's first written submission, para. 217; second written submission, paras. 116-117.

[382] Panama's first written submission, paras. 223 and 233. The Panel notes that Panama states that Article 10.1 of the SPS Agreement provides that the special needs of developing countries shall be taken into account. (Ibid. para. 222).

[383] Panama's first written submission, paras. 224 (quoting Note AUPSA-AG-051-2020 (Exhibit CRI-7) and 233; second written submission, para. 125.

risk in question.[384] Panama adds that, from that moment, Costa Rica systematically refused to provide the necessary information.[385]

7.103. Panama maintains that, on 17 March 2021, it explained that it needed information on Costa Rica's GAP control programmes, sampling at export production sites, laboratory results, analysis method, and analytical techniques.[386] Panama states that two months later, on 18 May 2021, Costa Rica finally sought to submit the information originally requested by Panama.[387] Panama notes that it was still assessing this information when Costa Rica submitted its panel request on 19 August 2021.[388]

7.104. Regarding the *fourth requirement* under Article 5.7, Panama submits that when the detections of oxamyl called into question its conclusions with respect to the risk in question, it considered it necessary to obtain the available pertinent information with respect to the soundness and robustness of Costa Rica's sanitary controls. According to Panama, an exhaustive assessment of Costa Rica's sanitary control system requires, by definition, a lot of time and cannot be completed in a matter of days, as Costa Rica suggests.[389]

7.105. Panama submits that the additional information it needed was in the hands of Costa Rica. Panama asserts that it identified this information once the measure was notified, but Costa Rica only sought to provide it a year and two months later, on 18 May 2021.[390] Panama asserts that the three months that elapsed between this response from Costa Rica and its panel request was still a reasonable period of time for Panama to analyse the information and potentially review Measure 1.[391]

7.106. Panama is also of the view that, when assessing what constitutes a "reasonable period of time" within the scope of Article 5.7, the Panel should take into account the fact that from 16 March 2020 until 2021, the COVID-19 pandemic caused major delays in Panama's administrative procedures and impacted its ability to review the available pertinent information and to perform a more objective assessment of the risk.[392]

7.3.1.2.2.2 Assessment by the Panel

7.107. The Panel will now assess whether Measure 1 constitutes a provisional SPS measure covered by Article 5.7 of the SPS Agreement. This assessment will be preceded by the relevant legal standard and observations by the Panel with respect to the burden of proof under this provision.

Relevant legal standard

7.108. Article 5.7 of the SPS Agreement provides as follows:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from

[384] Panama's first written submission, paras. 225 (quoting Memorandum DSFE-0343-2020 (Exhibit CRI-9) and 234; second written submission, para. 125. Panama describes the information provided by Costa Rica on 5 May 2020 as "superficial and baseless". (Panama's first written submission, para. 234.)

[385] Panama's first written submission, paras. 226 (referring to Memorandum DSFE-0525-2020 (Exhibit CRI-11)), 229 (referring to Memorandum DSFE-0128-2021 (Exhibit CRI-17)) and 234.

[386] Panama's first written submission, para. 230 (quoting Note AUPSA-AG-151-2021 (Exhibit CRI-19)); second written submission, para. 126.

[387] Panama's first written submission, para. 231.

[388] Panama's first written submission, paras. 232 and 234.

[389] Panama's first written submission, para. 240.

[390] Panama's first written submission, paras. 241-242. See also Panama's response to Panel question No. 11, paras. 39-44; second written submission, para. 130.

[391] Panama's first written submission, para. 242. Panama asserts that, without prejudging the outcome of the risk assessment, the information provided by Costa Rica seemed to support rather than refute a risk of adverse health effects arising from the presence of pesticides in strawberries from Costa Rica, given the relatively high number of failures to comply with the MRLs. (Ibid. para. 232 (referring to Memorandum DSFE-0393-2021 (Exhibit CRI-21)). Panama adds that the information it received was insufficient and lacked information on the GAP control programmes. (See the table in Panama's response to Panel question No. 5).

[392] Panama's first written submission, paras. 243-244; second written submission, para. 131.

> sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

7.109. Article 5.7 of the SPS Agreement, therefore, allows Members to adopt and maintain a *provisional* measure provided that the Member adopting this measure complies with each and every one of the following requirements:

a. the Member must adopt the measure in a situation where "relevant scientific evidence is insufficient";

b. the Member must adopt the measure "on the basis of available pertinent information";

c. the Member adopting the measure must "seek to obtain the additional information necessary for a more objective assessment of risk"; and

d. the Member adopting the measure must "review the ... measure accordingly within a reasonable period of time".[393]

7.110. The Panel notes that the first two requirements refer to the *adoption* of a provisional SPS measure, whereas the last two address its *maintenance*.[394] These four requirements under Article 5.7 are cumulative.[395] Therefore, if one of these requirements is not met, the measure at issue will not be covered by Article 5.7.[396]

7.111. The first requirement relates to the adoption of the measure in situations where there is insufficient relevant scientific evidence. This requirement has been interpreted as covering situations where deficiencies in the body of available scientific evidence do not allow a Member, in quantitative or qualitative terms, to perform an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement.[397] In such circumstances, the Member in question will be unable to arrive at a sufficiently objective conclusion in relation to risk.[398]

7.112. Under the second requirement the Member must adopt the provisional measure on the basis of available pertinent information.[399] According to the text of Article 5.7, this information may include "that from the relevant international organizations as well as from [SPS] measures applied by other Members".[400] Bearing in mind the context of Article 5.7, pertinent information refers to evidentiary

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[393] Appellate Body Report, *Japan – Agricultural Products II*, para. 89. See also Appellate Body Reports, *US/Canada – Continued Suspension*, para. 676; *Japan – Apples*, para. 176; and *Korea – Radionuclides*, para. 5.107; and Panel Reports, *Japan – Apples*, para. 8.213; *Russia – Pigs (EU)*, para. 7.632.

[394] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 676.

[395] Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

[396] Appellate Body Report, *Japan – Apples*, para. 176 (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 89).

[397] Appellate Body Reports, *Japan – Apples*, para. 179; *US/Canada – Continued Suspension*, paras. 674 and 677. The Appellate Body made these observations taking into account the text and context of Article 5.7. Article 5.7 is part of Article 5, entitled "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection", is preceded by the requirement to base SPS measures on a risk assessment, and refers to a "more objective assessment of risk".

[398] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 677.

[399] The Panel notes that the expression "on the basis of" is similar to the expressions "as the basis for" and "based on". The latter two expressions have been interpreted in previous disputes, in the context of Article 2.4 of the TBT Agreement and Article 3 of the SPS Agreement, to mean that "there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other". In this regard, something cannot be considered a "basis" for something else if the two are contradictory. (Appellate Body Reports, *EC – Sardines*, para. 245; *India – Agricultural Products*, para. 5.77).

[400] The Panel notes that both the English and French versions of the SPS Agreement refer to *"Members"* and *"Membres"*, respectively, rather than *"partes contratantes"* (contracting parties), which is the term used in the Spanish version of the Agreement. Additionally, in accordance with Explanatory Note 2(a) to the GATT 1994, the references to a "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The Panel notes that, in this respect, the preamble to the SPS Agreement states that the SPS Agreement elaborates rules for the application of the relevant provisions of GATT 1994. Therefore, any reference to *"partes contratantes"* under Article 5.7 in the Spanish version of the SPS Agreement should be understood as referring to "Members".

bases indicating the possible existence of a risk. Therefore, there must be a rational and objective relationship between information concerning the risk and the provisional measure.[401] With regard to the existence of a rational and objective relationship between the information concerning the risk and the provisional measure, the Panel considers the interpretation of this sentence in the context of Article 2.2 to be relevant. In particular, no "rational and objective relationship" has been found to exist between the measure and the pertinent scientific evidence when the measure was "clearly disproportionate" to the risk identified on the basis of scientific evidence available.[402]

7.113. The third requirement mandates that the Member adopting the provisional measure shall seek to obtain the additional information necessary for a more objective assessment of risk. This has been interpreted to mean that, once the provisional measure has been adopted, the Member must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources.[403] Bearing in mind that the objective of seeking to obtain additional information is to perform "a more objective assessment of risk", this information should be germane to conducting such an assessment.[404] The "more objective assessment of risk" referred to in Article 5.7 corresponds to the risk assessment as required under Article 5.1 and as defined in Annex A(4).[405]

7.114. The fourth requirement concerns the review of the provisional measure within a reasonable period of time. The term *"razonable"* ("reasonable") is defined as *"adecuado, conforme a razón"* ("adequate, within reason") or *"proporcionado o no exagerado"* ("proportionate, not exaggerated").[406] What constitutes a "reasonable period of time" should be established according to the specific circumstances, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional measure.[407] Previous disputes have taken into account whether the delay in concluding the review of the provisional measure is legitimate and justifiable, as opposed to unwarranted or excessive, in determining whether the review was conducted within a "reasonable period of time".[408]

7.115. The Panel agrees with these assessments of the legal standard applicable under Article 5.7 made in the above-mentioned disputes and will proceed with its assessment on this basis. Before that, the Panel considers it appropriate to clarify which party bears the burden of proving that the measure at issue is covered by Article 5.7 of the SPS Agreement.

Burden of proof

7.116. With respect to the allocation of the burden of proof under Article 5.7 of the SPS Agreement, Costa Rica points out that this provision is a "qualified exemption" from the obligation not to maintain SPS measures without sufficient scientific evidence. In Costa Rica's view, while the initial burden lies with the complainant to raise the inapplicability of Article 5.7, it is the respondent who ultimately decides if it wishes to invoke the article as a defence, in which case it bears the burden of proof.[409] Costa Rica asserts that it discharged its initial burden by raising the inapplicability of Article 5.7, and

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[401] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.
[402] Panel Report, *Japan – Apples*, para. 8.198.
[403] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.
[404] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679 (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 92). Article 5.7 does not set out explicitly what type of additional information should be collected, how it should be collected, or the results of the efforts to collect it. (Ibid.).
[405] See Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2988-7.2990.
[406] *Diccionario de la Real Academia Española*, definition of *"razonable"* (reasonable) https://dle.rae.es/razonable (accessed 13 August 2024). The United States as a third party points out that the Oxford English Dictionary defines "reasonable" as "[p]roportionate" and "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate". (United States' response to Panel question No. 12, para. 34).
[407] Appellate Body Report, *Japan – Agricultural Products II*, para. 93.
[408] Panel Reports, *Russia – Pigs (EU)*, para. 7.701 (quoting Appellate Body Report, *Australia – Apples*, para. 437); *US – Animals*, para. 7.301. In this respect, to determine whether an SPS measure was reviewed within a reasonable period of time, previous panels have considered the interpretation of the term "undue delay" given in Annex C(1) to the SPS Agreement to be relevant. (Panel Reports, *Russia – Pigs (EU)*, para. 7.701 (quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495-7.1497 (with respect to Article C(1)(a)) and 7.3245 (with respect to Article 5.7)); *US – Animals*, para 7.301).
[409] Costa Rica's opening statement at the first meeting of the Panel, paras. 14-16 (quoting Panel Report, *US – Animals*, para. 7.293).

did so in its panel request and its first written submission.[410] Costa Rica adds that, given that Panama has asserted that Measure 1 falls within the scope of Article 5.7, Panama bears the burden of proving that each of the four cumulative requirements has been met. Costa Rica submits that Panama has failed to discharge its burden of demonstrating that it has fulfilled these requirements.[411]

7.117. Panama responds that, given the provisional nature of Measure 1, the issue that the Panel needs to address is whether Costa Rica discharged its burden of establishing that Panama acted inconsistently with Article 5.7. Panama asserts that Costa Rica has failed to discharge its burden of proof with respect to Measure 1.[412]

7.118. Among the third parties, the European Union considers that Costa Rica bears the burden of proof[413], and Canada's view is that Costa Rica bears the "initial burden" in this respect.[414] For the United States, Panama bears the burden of proof.[415] Brazil, for its part, notes that, as a general rule, the party asserting something bears the burden of proving it.[416]

7.119. The Panel recalls that Article 5.7 has been considered to be a qualified exemption from the obligation under Article 2.2 that Members ensure their SPS measures are not maintained without sufficient scientific evidence.[417] In this regard, and considering that this obligation under Article 2.2 applies "except as provided for in [Article 5.7]", the issue of whether a measure is covered by Article 5.7 determines the scope of the applicable obligations. It should be added that, for a Member to be entitled to adopt provisional measures pursuant to Article 5.7, the Member must comply with the requirements set out therein.[418]

7.120. The Panel notes that in previous disputes where the complaining parties claimed that the measure at issue was inconsistent with Articles 2.2 and 5.1 of the SPS Agreement and not covered by Article 5.7, the initial burden of demonstrating that the respondent had failed to comply with at least one of the requirements under Article 5.7 lay with the complaining party.[419] Additionally, if the respondent asserted it had adopted and maintained an SPS measure in accordance with the requirements under Article 5.7, they bore the burden of proving their assertion.[420]

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[410] Costa Rica submits that it has demonstrated the inapplicability of this provision to the measures at issue. (Costa Rica's first written submission, paras. 327 and 395).

[411] Costa Rica's second written submission, paras. 191-192, 256, 340, 370, 423(b), and 431 (quoting Panel Reports, *Russia – Pigs (EU)*, para. 7.643; *US – Animals*, para. 7.293).

[412] Panama's opening statement at the first meeting of the Panel, paras. 38-39. See also Panama's second written submission, para. 132.

[413] European Union's third-party submission, para. 24; third-party response to Panel question No. 11, paras. 34-35.

[414] Canada's third-party response to Panel question No. 11, para. 43.

[415] United States' third-party response to Panel question No. 11, para. 33.

[416] Brazil's third-party submission, para. 3; third-party response to Panel question No. 11, paras. 12-13.

[417] See para. 7.80 above.

[418] See Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2973-7.2974; and Appellate Body Reports, *US/Canada – Continued Suspension,* para. 674 (which notes that the applicability of Articles 2.2 and 5.1, on the one hand, and of Article 5.7, on the other, will depend on the sufficiency of the scientific evidence).

[419] This approach has also been followed in previous disputes where the burden of proof was considered under provisions that limit the scope of application of other provisions –referred to as excluding provisions, exemptions or autonomous rights– and it was concluded that the onus was on the complainant because these provisions relate to the issue of whether the complainant had established a valid claim. (Panel Report, *India – Export Related Measures*, paras. 7.7-7.9). See also Panel Report, *US – Upland Cotton*, paras. 7.270-7.285 (where the panel determined that the complaining party bore the initial burden of demonstrating that the measures at issue fell within the scope of the obligations with which it claimed they were inconsistent, which included the burden of demonstrating that the conditions provided for in Article 13 of the Agreement on Agriculture, which partially defined the scope of these obligations, were not met). Similarly, in *India – Additional Import Duties*, the Appellate Body considered that if, in the circumstances of that case, it could be understood that the measure might not result in a violation of Article II:1(b) of the GATT 1994 because it satisfied the requirements of Article II:2(a) of the Agreement, then the complaining party bore some burden in establishing that the conditions of Article II:2(a) of the GATT 1994 were not met. (Appellate Body Report, *India – Additional Import Duties*, paras. 190 and 192). See also Appellate Body Report, *EC – Hormones*, para. 104 (with respect to Articles 3.1 and 3.3 of the SPS Agreement).

[420] Panel Reports, *US – Animals*, paras. 7.292-7.293; *Russia – Pigs (EU)*, para. 7.643. See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2963-7.3000. In *Japan – Apples* and *Korea – Radionuclides*, the panels considered that the respondent bore the burden of proving that Article 5.7 was applicable to its measures. However, the Appellate Body in *Korea – Radionuclides* declared the panel's

7.121. The Panel agrees with the allocation of the burden of proof in these disputes and considers that Costa Rica, in raising the inapplicability of Article 5.7 in its panel request, must discharge its initial burden of demonstrating that Measure 1 is not covered by Article 5.7. Therefore, Costa Rica must demonstrate that Measure 1 fails to meet at least one of the cumulative requirements listed in Article 5.7. Likewise, given that Panama asserts that Measure 1 is covered by Article 5.7, it bears the burden of proving its assertion that the four requirements set out in this provision have been met.

7.122. Having clarified the matter of the allocation of the burden of proof, the Panel will continue its analysis by examining the first requirement under Article 5.7 concerning whether Panama adopted Measure 1 in a situation of insufficient relevant scientific evidence.

Whether Panama adopted Measure 1 in a situation where relevant scientific evidence was insufficient

7.123. In accordance with the legal standard set out above[421], the Panel will now examine whether Measure 1 was adopted in a situation where relevant scientific evidence was insufficient, within the meaning of the first requirement under Article 5.7 of the SPS Agreement. The Panel recalls that Article 5.7 covers situations where deficiencies in the body of scientific evidence do not allow a Member, in quantitative or qualitative terms, to perform an adequate assessment of risks, as required under Article 5.1 and as defined in Annex A to the SPS Agreement.[422]

7.124. Costa Rica submits that Panama has failed to demonstrate that there was a situation of insufficient scientific evidence that prevented it from performing a risk assessment that would provide the basis for applying a measure that ensures compliance with the oxamyl MRL in future shipments of strawberries by the producer concerned.[423] Panama, for its part, asserts that Costa Rica has failed to demonstrate that the scientific evidence was sufficient for the performance of a risk assessment of the potential for adverse effects on human health arising from the presence of oxamyl in strawberries.[424]

7.125. Given that the parties disagree on what constitutes a situation of insufficient scientific evidence for the purposes of Article 5.7, the Panel will examine this matter before addressing other aspects relevant to its analysis.

Considerations about what constitutes a situation of insufficient relevant scientific evidence

7.126. Costa Rica claims that the approach proposed by Panama as to what constitutes a situation of insufficient scientific evidence for the purposes of Article 5.7 is misguided.[425] According to Costa Rica, Panama failed to meet its burden of identifying the insufficiencies in the relevant scientific evidence.[426]

7.127. Moreover, Costa Rica submits that Panama uses the phrase *"poner en tela de juicio"* ("call into question") incorrectly by making a flawed analogy with *US/Canada – Continued Suspension*. Costa Rica states that, in that dispute, the Appellate Body explained that scientific evidence that was previously sufficient for a risk assessment may become insufficient due to a qualified scientific view. Costa Rica adds that the Appellate Body found that insufficiency of scientific evidence may arise

findings under that article moot and of no legal effect. (Panel Reports, *Japan – Apples*, para. 8.212; *Korea – Radionuclides*, paras. 7.70 and 7.74-7.75; and Appellate Body Report, *Korea – Radionuclides*, para. 5.118).

[421] See para. 7.111 above.

[422] See para. 7.111 above (referring to Appellate Body Reports, *Japan – Apples*, para. 179; *US/Canada – Continued Suspension*, paras. 674 and 677).

[423] Costa Rica's second written submission, paras. 436-437.

[424] Panama's first written submission, paras. 206-207.

[425] Costa Rica's second written submission, paras. 438-440 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 677 and 703).

[426] Costa Rica's first written submission, para. 333; second written submission, para. 442 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679).

where new scientific evidence "casts doubts as to whether the previously existing body of scientific evidence *still permits a sufficiently objective assessment of risk*".[427]

7.128. According to Costa Rica, Panama cites this dispute to claim that the non-compliance with the oxamyl MRL called into question its conclusions with regard to its decision to allow imports of Costa Rican strawberries subject to an MRL of 0.01mg/kg for oxamyl. Costa Rica submits that Panama has not explained why these circumstances have rendered previous scientific evidence insufficient to the extent that it was not possible for Panama to conduct a new risk assessment.[428]

7.129. For Costa Rica, it cannot be claimed that the scientific evidence is insufficient for a risk assessment simply because there was a change in circumstances. Costa Rica points out that, unlike in *US/Canada – Continued Suspension*, cited by Panama, there was no "qualified and respected scientific view" in this case that led to a lack of scientific evidence for a risk assessment. Costa Rica understands that, in the context of the first requirement under Article 5.7, the relevant assessment concerns not only the existence or lack of new scientific evidence, but also whether that evidence revises previous evidence in such a way that it becomes impossible to perform a new risk assessment.[429]

7.130. Panama claims that the evidence would be insufficient within the meaning of Article 5.7 if it is demonstrated that it does not allow an appropriate assessment to be performed of the potential for adverse effects on human health arising from the presence of oxamyl in Costa Rican strawberries.[430] To that end, Panama is of the view that the Panel should determine whether the non-conformities call "into question" Panama's conclusions with respect to the risk, to the extent that they do not permit the performance of a sufficiently objective assessment of risk.[431] Panama submits that the instances of non-conformity with the MRLs will lead the scientific evidence to move from a state of sufficiency to a state of insufficiency "whenever subsequent information calls 'into question' the conclusions of a Member in relation to risk".[432] Panama notes that it had previously concluded that its MRL for oxamyl in strawberries was sufficient to achieve its ALOP of lowest possible risk because it operated "in synergy" with Costa Rica's prohibition on that pesticide.[433] Panama asserts that the detection of high levels of oxamyl residues in strawberries from Costa Rica is the scientific evidence that called into question its previous conclusions in relation to the relevant risk.[434]

7.131. The United States, as a third party, remarks that scientific evidence that is sufficient to conduct a proper risk assessment at one point in time, may later become insufficient for such an assessment. The United States refers to a situation where a Member may be presented with some data relating to risk (e.g. a detection) without having sufficient evidence to fully assess that risk (e.g. information on the exporting country conditions, etc.). In this scenario, the United States considers it would be less that the scientific evidence previously relied upon became "insufficient", but rather that circumstances changed, requiring the collection and evaluation of sufficient

[427] Costa Rica's second written submission, paras. 439-440 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 677 and 703). (italics original)

[428] Costa Rica's second written submission, para. 441. See also Costa Rica's response to Panel question No. 77, para. 3.76.

[429] Costa Rica's response to Panel question No. 77, para. 3.76; second written submission, paras. 438-440 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 677 and 703). Costa Rica asserts that Panama has not submitted any scientific evidence that calls into question or "casts doubt" as to whether the existing scientific evidence "still permits a sufficiently objective assessment of risk". (Costa Rica's response to Panel question 86, para. 3.147 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 703)). Costa Rica adds that an explanation must be provided of why the available information, whether existing or new, is insufficient for the performance of a risk assessment. (Costa Rica's second written submission, para. 443).

[430] Panama's first written submission, para. 197; second written submission, para. 106 (where Panama refers to the assessment "of the potential for adverse effects on human health *from the presence of a particular [oxamyl] residue level in food* [strawberries]" and quotes Australia's third-party submission, para. 11). (emphasis original)

[431] Panama's response to Panel question No. 77, para. 224; second written submission, paras. 95 and 97 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 667).

[432] See also Panama's response to Panel question No. 77, unnumbered para. and para. 221.

[433] Panama's response to Panel question No. 77, para. 225.

[434] Panama's first written submission, para. 206. Panama also points out that the detection called into question "the relationship between Panama's risk assessment and its conclusions with respect to the potential for adverse effects on human health arising from the importation of Costa Rican strawberries". (Ibid. para. 204).

evidence.[435] Australia, as a third party, notes that the level of non-compliance detected, on its own, does not have a bearing on whether the scientific evidence that was deemed sufficient prior to detection can be subsequently deemed insufficient. In its view, the detection of any residue level, whatever it might be, would not be relevant to the risk assessment, absent some link to the effect on human health of a particular residue level.[436]

7.132. The Panel observes that both parties refer to the assertions of the Appellate Body in *US/Canada – Continued Suspension*. As Costa Rica asserts, the Appellate Body noted in that dispute that the Member adopting a provisional SPS measure should be able to identify the insufficiencies in the relevant scientific evidence.[437] Article 5.7 establishes a qualified right to adopt an SPS measure temporarily[438] while the additional information necessary for a more objective risk assessment is obtained. The Panel considers that a logical consequence of the foregoing is that the Member adopting the measure should be able to identify the insufficiencies in the scientific evidence that justify its adoption in order to address those insufficiencies. The Panel notes that, in the case of Measure 1, Panama has identified what it considers to be an insufficiency of scientific evidence, namely the lack of up-to-date information on the suitability of Costa Rica's production and control system for strawberries.[439]

7.133. With respect to situations where scientific evidence previously considered sufficient becomes insufficient, the parties agree that new scientific evidence may make it necessary to obtain additional information, without which it would be impossible to perform a risk assessment. Both parties also acknowledge that new scientific evidence may come to light that calls "into question" the previous conclusions of a Member with respect to the relevant risk. However, the parties disagree over whether, in this case, the detections at issue called "into question" Panama's previous conclusions relating to the risk to such an extent that it was impossible to conduct a new risk assessment.

7.134. The Panel concurs that there may be situations where new scientific evidence about a certain aspect of the risk associated with the imported product calls into question the risk assessor's conclusions, which formed the basis for the SPS measure adopted to manage that risk. In the Panel's view, this scientific evidence may be a qualified and respected scientific opinion, as Costa Rica asserts[440], or another type of scientific evidence, such as the results of detecting a contaminant in food, as referred to by Panama in this case.[441]

7.135. However, the Panel considers that the emergence of new relevant scientific evidence does not automatically make the body of previously relevant scientific evidence insufficient for the purposes of Article 5.7, even if the new evidence calls into question previous conclusions about the risk. The Panel recalls that the threshold for insufficiency of scientific evidence within the meaning of Article 5.7 is determined by the obligation to base the SPS measure on an assessment of risk, as required under Article 5.1 and Annex A.[442] The Panel therefore considers that its examination should focus on whether, at the time Measure 1 was adopted, following the detections in question, the body of relevant scientific evidence, including both new and available evidence, permitted Panama to conduct a risk assessment.[443]

7.136. In this respect, the Panel agrees with the Appellate Body's observation in *US/Canada – Continued Suspension* that, in some cases, new scientific developments would not permit a Member to perform a sufficiently objective assessment of risk, whereas in others, it would.[444] In this context,

[435] United States' third-party response to Panel question No. 10, para. 32.
[436] Australia's third-party response to Panel question No. 10, paras. 9-10.
[437] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.
[438] Article 5.7 covers provisional measures, and the *Diccionario de la Real Academia Española* defines *"provisional"* ("provisional") as *"[q]ue se hace, se halla o se tiene temporalmente*" (something done, found or held temporarily). (*Diccionario de la Real Academia Española*, definition of *"provisional"* https://dle.rae.es/razonable (accessed 13 August 2024).
[439] Panama's response to Panel question No. 124, para. 64.
[440] Costa Rica's second written submission, para. 440.
[441] Panama's second written submission, para. 96.
[442] See para. 7.111 above.
[443] See Appellate Body Reports, *Japan – Apples*, para. 179; *US/Canada – Continued Suspension*, paras. 674, 677, and 702-703.
[444] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 701. It should be noted that in that dispute, the Appellate Body pointed out that the "insufficiency" requirement in Article 5.7 does not imply that new scientific evidence must entirely displace the previous scientific evidence (thereby causing a

the possibility of conducting further research or of analysing additional information, by itself, should not mean that the relevant scientific evidence is or becomes insufficient.[445] The Panel also considers that if the scientific evidence evolves, this may be an indication that the risk assessment should be reviewed or a new assessment undertaken.[446]

7.137. With respect to compliance with the first requirement under Article 5.7, Panama further submits that the existence of the international standards on which Costa Rica bases its position does not mean that the scientific evidence is sufficient.[447] The Panel considers that Costa Rica cites the Codex Guidelines to argue that the risk in question was not managed on the basis of the recommendations contained therein, but it does not argue these Guidelines, by themselves, demonstrate the sufficiency of the scientific evidence to assess the relevant risk. Pursuant to this reading, the Panel does not consider it necessary to address these Guidelines in the context of the first requirement under Article 5.7.

7.138. In view of the foregoing, the Panel will now examine whether Panama has demonstrated that, as a consequence of oxamyl being detected in two shipments of Costa Rican strawberries, a situation of insufficient relevant scientific evidence developed that prevented it from assessing the risk in question. To that end, the Panel will address two questions: the relevant risk and the information necessary to assess that risk. An examination of these two issues will enable the Panel to continue its assessment of the relevance and sufficiency of the scientific evidence available at the time Measure 1 was adopted.

The relevant risk

7.139. Costa Rica asserts that Panama should have evaluated the risk of the "potential for adverse effects on human health *related to possible future non-compliance* with the oxamyl MRL in strawberries imported from Costa Rica".[448] For its part, Panama claims that the risk lies in the "the potential for adverse effects on human health arising from the presence of oxamyl in strawberries" or "the possible harmful effects on people's health due to the presence of oxamyl in Costa Rican strawberries".[449]

7.140. For Costa Rica, the risk identified by Panama would be relevant if Panama wished to review its oxamyl MRL. However, Costa Rica points out that it is not challenging Panama's MRL or its decision to reject the entry into its territory of the two shipments of strawberries that did not comply with the oxamyl MRL for strawberries in February 2020[450], but rather Panama's decision to prohibit all imports of strawberries from Costa Rica in response to this non-compliance.[451]

7.141. For its part, Panama asserts that Costa Rica's argument is a baseless attempt to render Article 5.7 inapplicable in circumstances where Members decide to achieve their ALOP by establishing MRLs. According to Panama, MRLs are not a substitute for the specific risk they address, but simply a tool Members can use to mitigate this risk.[452] For Panama, Costa Rica is conflating risk management with risk assessment in its arguments.[453] Panama adds that scientific evidence is not in a perennial state of sufficiency once a Member establishes an MRL to mitigate the potential risks

"paradigm shift"). The Appellate Body emphasized that the relevant issue was whether the body of scientific evidence still permitted a sufficiently objective assessment of risk. (Ibid. para. 725).

[445] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 702.

[446] Panel Report, *Japan – Apples*, para. 7.12.

[447] Panama's second written submission, paras. 98-103.

[448] Costa Rica's response to Panel question No. 78, paras. 3.94 and 3.95. (italics added) According to Costa Rica, Panama incorrectly characterizes the risk in question as a general risk relating to the presence of oxamyl in strawberries from Costa Rica. Costa Rica asserts that Panama should assess the possibility of this risk materializing as a result of future non-compliance with the oxamyl MRL in strawberries imported from Costa Rica. (Costa Rica's response to Panel question No. 13, para. 2.88).

[449] Panama's first written submission, para. 197; second written submission, paras. 108-110. According to Panama, Costa Rica seeks to redefine the relevant risk. (Panama's second written submission, para. 104).

[450] The Panel understands that Costa Rica is not questioning the validity of the evidence used to detect oxamyl in two shipments of Costa Rican strawberries, despite stating that there were "several deficiencies and irregularities in the results" submitted by Panama. (Costa Rica's response to Panel question No. 12, paras. 2.45-2.78.)

[451] Costa Rica's response to Panel question Nos. 13, para. 2.86; 77, paras. 3.79-78; and 78, para. 3.94.

[452] Panama's second written submission, paras. 107-108 (quoting Costa Rica's response to Panel question No. 77, para. 3.78).

[453] Panama's second written submission, paras. 107-109.

to human health arising from the presence of additives in food. Panama submits that the MRL it had established was considered sufficient to achieve its ALOP, but the detections of oxamyl in question called "into question" its conclusions with respect to the risks posed to human health by the presence of this pesticide in strawberries from Costa Rica.[454]

7.142. The Panel notes that the parties agree that the risk that must be assessed in order to impose an SPS measure on the importation of Costa Rican strawberries is the potential for adverse effects on human health arising from the presence of oxamyl in Costa Rican strawberries. This reading is based on how Panama defines the relevant risk[455] and on Costa Rica's assertion that the assessment of the relevant risk is that defined in the second sentence of Annex A(4), namely "the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs".[456] The Panel agrees that, given that Measure 1 falls within the scope of Annex A(1)(b)[457], the risk assessment in question is that described in the second sentence of Annex A(4).

7.143. The disagreement between the parties arises from the fact that Costa Rica considers that Panama should link the risk to the likelihood of instances of non-compliance with its MRL in the future. In Costa Rica's view, Panama could assess this risk on the basis of information derived from the detections in question.[458] Panama also refers to future non-compliance by asserting that it sought to address the risk arising from the importation of strawberries that do not comply with its MRL.[459] However, Panama argues that the detections called into question its conclusions about the risk, on the basis of which it had imposed its MRL, to such an extent that made it impossible to perform a risk assessment due to the lack of additional information on the effectiveness of Costa Rica's sanitary controls.[460]

7.144. The Panel considers that the difference in the parties' arguments does not revolve around the definition of the relevant risk, but rather whether the detection of oxamyl in Costa Rican strawberries in February 2020 resulted in a situation of insufficient scientific evidence. In this respect, the parties disagree on the information necessary for a risk assessment of the potential for adverse effects on human health arising from the presence of oxamyl in shipments of strawberries from Costa Rica. The Panel will now address this disagreement.

Information necessary for the risk assessment in question

7.145. The Panel notes that the parties disagree on whether Panama had before it all the information it needed to perform a risk assessment. As mentioned above[461], Costa Rica considers that Panama had all the relevant information to conduct an assessment of the risk in question, namely, information on: (a) the two non-compliant shipments of strawberries, specifically the pesticide in question, the exact amounts of residue of that pesticide, the name of the Costa Rican producer in question and its compliance history; and (b) the prohibition on the use of oxamyl in strawberry crops in Costa Rica.[462] Although Costa Rica considers that Panama did not need information about its regulations[463], Costa Rica is of the view that the information contained in its

[454] Panama's second written submission, para. 110.
[455] See para. 7.139 above.
[456] Costa Rica's first written submission, para. 306. Annex A(4) of the SPS Agreement, which defines "risk assessment" for the purposes of that Agreement, refers to two types of risk assessment: (a) the evaluation of the likelihood of entry, establishment or spread of a pest or disease, and the associated potential biological and economic consequences; and (b) the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.
[457] See para. 7.71 above. Annex A(1)(b) covers measures applied "to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs". See para. 7.62 above.
[458] Costa Rica's response to Panel questions Nos. 77, para. 3.80; 78, para. 3.95 (where Costa Rica notes that the detection of non-compliance with the oxamyl MRL in strawberries is precisely the type of information that would have been relevant to consider in the risk assessment that Panama failed to undertake).
[459] See Panama's response to Panel question No. 122, para. 60.
[460] Panama's second written submission, para. 110.
[461] See para. 7.86 above.
[462] Costa Rica's first written submission, paras. 331-332; response to Panel question No. 77, para. 3.79; and second written submission, paras. 442 and 444.
[463] Costa Rica's opening statement at the second meeting of the Panel, para. 65.

Manual on good agricultural and production practices for strawberry crops, which it submitted during the Panel proceedings, is relevant.[464]

7.146. For its part, Panama contends that the risk in question cannot be assessed appropriately without up-to-date information on the suitability of Costa Rica's production and control system for strawberries.[465] Panama claims that the information on specific shipments, the pesticide and the producer in question is not sufficient for an appropriate assessment of the risk because it says nothing about the effectiveness of Costa Rica's sanitary control systems.[466] When it comes to risks arising from a specific type of product from specific countries, Panama argues that the authority of an importing country must necessarily consider the management of the pesticide in question in the exporting country; in this case, how Costa Rica manages the use of oxamyl on a national level. With respect to the importation of strawberries from Costa Rica, Panama asserts that the PIR contained in Resolution AUPSA-DINAN-006-2008 took into account Costa Rica's national SPS controls, including its pesticide control measures, and the fact that these operated together with the MRLs established for specific pesticides.[467]

7.147. The Panel recalls that Article 5.7 covers situations where all the necessary information is not available for an appropriate assessment of the risks as required by Article 5.1 and defined in Annex A to the SPS Agreement, given that Article 5.7 refers to the need to "obtain the additional information necessary for a more objective assessment of risk". In this regard, the insufficiency of relevant scientific evidence referred to in Article 5.7 is determined by the information that would be necessary for the performance of an appropriate assessment of the risks. The Panel therefore considers it necessary to identify the information that Panama needed to assess the risk in question in order to determine whether, on the date Measure 1 was adopted, the available scientific evidence was relevant and sufficient for the assessment of that risk.

7.148. The Panel recalls that the risk assessment Panama has to perform relates to the potential for adverse effects on human health arising from the presence of oxamyl in Costa Rican strawberries. It has been considered that this type of risk assessment, as provided for in the second sentence of Annex A(4) to the SPS Agreement, requires a Member to: (a) identify the additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs at issue; (b) identify any possible adverse effect on human or animal health; and (c) evaluate the potential for that adverse effect to arise from the presence of the identified additives, contaminants, toxins or disease-causing organisms in food, beverages, or feedstuffs.[468]

7.149. The record does not contain any risk assessment technique developed by a relevant international organization that could guide the Panel with respect to the information necessary to assess the risk in relation to the adverse effects on human health arising from the presence of pesticide residues in food. However, three main components of risk analysis are described in Costa Rica's "Procedure for the analysis of risks related to the chemical safety of unprocessed vegetables", as defined by the Codex: (a) risk assessment; (b) risk management; and (c) risk communication. In this procedure, it is noted that a risk assessment is a scientifically-based process consisting of the four following steps: (a) hazard identification; (b) hazard characterization; (c) exposure assessment; and (d) risk characterization.[469]

7.150. No further details are contained in the record about what these four steps entail. Nevertheless, the Panel finds that the Codex food safety guidelines in the record (Guidelines CAC/GL 47-2003 and CAC/GL 26-1997), which address inspection based on risk and risk management according to the degree of risk, may shed light on the information relevant to the assessment of the

[464] Costa Rica's response to Panel question No. 116, paras. 3.9-3.16.

[465] Panama's response to Panel question No. 124, para. 64. In the context of the third requirement relating to obtaining the additional information necessary for a risk assessment, Panama refers to the "soundness and robustness of Costa Rica's sanitary controls". (Panama's first written submission, para. 240.)

[466] Panama's second written submission, para. 111.

[467] Panama's response to Panel question No. 115, paras. 39-40 (referring to Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34)).

[468] Panel Report, *Canada – Continued Suspension*, para. 7.479.

[469] "Procedure for the analysis of risks related to the chemical safety of unprocessed vegetable products" (Exhibit CRI-297), section 6.1. See also the definition of "[r]isk assessment" in Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 2.

risk in question.[470] The Panel considers that the guidance contained in these Codex Guidelines may be relevant, as it addresses the information to be borne in mind when determining food safety risks, as described below.

7.151. The appendix to Guidelines CAC/GL 47-2003 is entitled "Principles and Guidelines for Imported Food Inspection Based on Risk", that being food safety risks and the probability and severity of an adverse health effect, consequential to hazards in food.[471] Section 4 of the appendix provides guidance on relevant information when assessing the level of risk associated with the imported food. According to that section, relevant information could include:

> The scientific determination of the food safety risk to the extent possible.
>
> The adequacy of processing controls in place in the exporting country as evidenced by its laws, regulations, and other policies; its infrastructure; and its ability to enforce food safety requirements, as may be verified by audits and on-site visits by the competent authority of the importing country.
>
> The compliance history of the food generally, irrespective of the source of the food.
>
> The compliance history of the food with respect to the source of the food, including, where available, the compliance history of:
>
> - the exporting country or region/area within an exporting country;
> - the producer and manufacturer;
> - the exporter;
> - the shipper; and
> - the importer.
>
> Reports from officially recognized inspection bodies and/or certification bodies.[472]

7.152. The Panel also notes that Guidelines CAC/GL 26-1997 indicate that, in the event of non-compliance with safety requirements, to ensure that any measure is proportional to the degree of risk, the following criteria should be considered: (a) repeated non-conformity in the same product or in the same category of products; (b) history of non-conformity of those responsible for handling the products; and (c) reliability of checks made by the country of origin.[473]

7.153. The Panel considers that the foregoing guidance from the Codex supports Panama's position that the product processing regulations and relevant controls in the country of origin are elements relevant to a food safety risk assessment. Additionally, on the basis of this guidance, the scientific determination of the food safety risk and the compliance history of the food in question can also be considered relevant.

7.154. Moreover, the Panel finds support in the text of the SPS Agreement for the interpretation that commodity production regulations and controls may be necessary to the assessment of the risk in question. In this respect, the Panel notes that Article 5.2 of the SPS Agreement stipulates that, in the assessment of risks, Member shall take into account "available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods". In the

[470] The Panel notes that these Guidelines provide guidance for import inspection systems, and not directly on the evaluation of the potential for adverse effects arising from the presence of pesticides in food. However, the Panel notes that Panama refers to these Guidelines to support its assertion that the information on Costa Rica's controls is relevant. (Panama's closing statement at the second meeting of the Panel, paras. 89-90; and responses to Panel question No. 119, para. 58, and No. 124, para. 65).

[471] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, fn 11.

[472] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 4. (fns omitted)

[473] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6. para. 34.

Panel's view, these elements may include regulations on the use of a pesticide in the production of the commodity concerned and controls related to the use of said pesticide.[474]

7.155. The Panel will now address the information available as of February 2020, when Measure 1 was adopted, and possible deficiencies in the body of relevant scientific evidence, in the light of the information Panama needed to assess the risk at issue.

Relevance and sufficiency of the scientific evidence available at the time of the adoption of Measure 1

7.156. Based on the arguments of the parties and the evidence in the record, the Panel identifies the following categories of information that were available at the time of the adoption of Measure 1 in February 2020:

a. general information on the use of oxamyl and its effects on human health;

b. information on the existence or absence of MRLs for oxamyl in the United States, the European Union (previously, the European Communities) and the Codex;

c. information on the control of the use of oxamyl in Costa Rica;

d. information on the detections in question; and

e. information on the compliance history of Fresas Gego and other potential Costa Rican exporters.

General information on the use of oxamyl and its effects on human health

7.157. The Panel notes that the record contains a number of documents that describe the chemical characteristics, toxicity and potential for adverse effects on human health of oxamyl and its residues in food. In particular, these aspects of oxamyl have been assessed by the Joint FAO/WHO Meeting on Pesticide Residues in 2002, as well as by the EPA in 2000, and by the European authorities in 2006.[475] The Panel considers that these documents contain relevant scientific evidence for the purposes of Article 5.7, given that they precede the adoption of Measure 1 and are related to the adverse effects on human health associated with the presence of oxamyl residues resulting from the use of oxamyl in agricultural production.

7.158. Costa Rica submits that, given that it does not challenge Panama's MRL, the risk analysis that Panama should have performed in this case should not have focused on the adverse effects of oxamyl residues in strawberries in the abstract.[476] In this regard, the Panel considers that, irrespective of the fact that Costa Rica does not challenge Panama's MRL and that the parties do not disagree on the sufficiency of the scientific evidence regarding the adverse effects of oxamyl in general, this scientific evidence forms part of the body of relevant scientific evidence.

7.159. In any case, it should be noted that Panama is not arguing that there is insufficient information on the toxicity of oxamyl for human health resulting from a certain quantity of residues of this pesticide in strawberries. The Panel understands that Panama is expressing concerns about the alleged higher risk of oxamyl residues being present in harmful quantities in strawberries from Costa Rica as a result of non-compliance with Panama's MRLs. In this regard, Panama's concern and

[474] Similarly, in *EC – Hormones*, which looked at the carcinogenic effects of hormone residues in meat, it was considered that it may be relevant to a risk assessment that the risk assessor examine and evaluate the risks arising from potential abuse in the administration of controlled substances and from control problems. (Appellate Body Report, *EC – Hormones*, para. 206.) See also Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 535 and 545.

[475] US Code of Federal Regulations, The List of Extremely Hazardous Substances and Their Threshold Planning Quantities (2008) (Exhibit PAN-38); EPA, Oxamyl Facts (2000) (Exhibit PAN-39); EFSA, Reasoned Opinion (2010) (Exhibit PAN-40); FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41); New Jersey Department of Health and Senior Services, *Hazardous Substance Fact Sheet – Oxamyl* (1999) (Exhibit PAN-43); and Extoxnet, Pesticide Information Profiles – Oxamyl (1996) (Exhibit PAN-44). See also section 2.2.2.2 of this Report.

[476] Costa Rica's response to Panel question No. 78, paras. 3.94-3.95.

its allegations of insufficient relevant scientific evidence focus on Costa Rica's control system for complying with Panama's MRLs.[477] Before proceeding with the analysis of the alleged insufficiency of scientific evidence concerning Costa Rica's control system, the Panel will address the information on the imposition or absence of MRLs in the United States, the European Union, and the Codex, referred to by Panama in its arguments with respect to the first requirement of Article 5.7.

Information on the imposition or absence of MRLs in the United States, the European Union, and the Codex

7.160. Panama asserts that its MRL for oxamyl in strawberries was based on the European Union's MRL, which corresponded to the lower limit of analytical quantification. Panama adds that "neither the Codex nor the United States considered that the scientific evidence was sufficient to establish an MRL for oxamyl in strawberries that was safe for human consumption."[478]

7.161. The record contains information about the imposition or absence of MRLs for oxamyl in strawberries in the United States, the European Union, and the Codex.[479] The Panel notes that, as Panama indicates, MRLs "are not a substitute for risk" but an "instrument" through which Members can address a specific risk.[480] MRLs represent a reference value for the highest acceptable level of a pesticide residue in a product from a crop to which that pesticide can be applied, which is why they are an import requirement for that product. The Panel understands that MRLs result from risk assessments and that MRLs already established for a pesticide may inform a Member's decision on what MRL to impose in relation to that pesticide. In particular, the Codex MRLs, as international recommendations, may serve as a guide.[481]

7.162. In this regard, information on the existence or values of MRLs for oxamyl in strawberries from the relevant international organizations or other Members could be relevant to the risk management phase, in particular, to the adoption of an MRL for this pesticide. The Panel does not rule out that an MRL value and the considerations that led to its establishment may be relevant to a risk assessment, especially when such considerations are reflected in a risk assessment. However, the record contains no information on why there is no MRL for oxamyl in the United States or the Codex.[482] It also contains no explanation of the MRL for oxamyl in strawberries in the European Union, although it is understood that 0.01 mg/kg corresponds to the lower limit of analytical quantification achieved with the detection techniques available at that time.[483] Thus, in this case, the Panel does not consider that the existence of an MRL for oxamyl in strawberries in the European Union and the absence of such an MRL in the United States and the Codex is, in itself, proof of a situation of insufficient relevant scientific evidence for the assessment of the risk in question.

[477] See Panama's response to Panel question No. 122, para. 60. Panama asserts that the risk that the suspension of imports was intended to manage is the risk of importing strawberries from Costa Rica containing oxamyl at a level well above the established MRL, from producers responsible for repeated breaches during the COVID-19 pandemic. Panama does not explain its reference to the COVID-19 pandemic in the context of the risk associated with oxamyl detections in Costa Rican strawberry shipments in February 2020.

[478] Panama's first written submission, para. 202. See also ibid. para. 200.

[479] Codex Alimentarius, Pesticide Index, "Oxamyl" (Exhibit CRI-125); EPA, Pesticide Database, oxamyl MRL search (Exhibit PAN-42). See also EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), Appendix C, pp. 27-29, on existing MRLs for oxamyl under the relevant European Communities Regulation of 2005. See also the European Union's third-party response to Panel question No. 13, para. 40 (in which the European Union notes that its MRL for oxamyl in strawberries is set at 0.01 mg/kg, as provided for in the Annex to Regulation (EU) 2019/552, in force since 25 April 2019).

[480] Panama's second written submission, para. 108.

[481] EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 15 (noting that Codex MRLs result from assessments and are international recommendations that need to be considered by European risk managers when establishing MRLs).

[482] The Panel notes that the US EPA considers that, with the risk mitigation measures required, the individual, aggregate risks of oxamyl are within acceptable levels. (EPA, Oxamyl Facts (2000) (Exhibit PAN-39), pp. 1 and 3).

[483] EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 8. The European Union Reasoned Opinion is a review of the existing MRLs for oxamyl in the European Union, but the MRL for strawberries is only specified in Appendix C.

Information on the control of the use of oxamyl in Costa Rica

7.163. With respect to the sufficiency of the scientific evidence, the main point of contention between the parties is the relevance and availability of information on the control of the use of oxamyl in Costa Rica.

7.164. Panama asserts that its MRL operated in conjunction with the fact that oxamyl is not generally approved for use in strawberries by Panama's trading partners. Panama claims that the insufficiency of scientific evidence stems from the fact that the detection of oxamyl residues in the two shipments of Costa Rican strawberries caused it to question whether oxamyl was actually being used in strawberry production in Costa Rica, despite such usage supposedly being prohibited. For Panama, it was as a consequence of having detected oxamyl in two shipments of strawberries that the lack of information on the effectiveness of Costa Rican health controls emerged.[484]

7.165. Costa Rica considers that, when establishing an MRL, the importing country has no reason to consider the legislation of exporting countries on the use of the pesticide. Costa Rica adds that, even assuming that Panama had considered Costa Rica's prohibition on the use of oxamyl in strawberries as scientific evidence for the management of the risk, Panama has not demonstrated that the detected instances of non-compliance at issue have called this scientific evidence "into question".[485]

7.166. As mentioned in paragraph 7.153 above, in the Panel's view, the product processing regulations and relevant controls in the country of origin are elements relevant to a food safety risk assessment. The Panel bases this understanding on, *inter alia*, the appendix to Guidelines CAC/GL 47-2003 on the relevant information for assessing the level of risk associated with an imported food. These Guidelines state that the adequacy of processing controls in place in the exporting country is determined on the "evidence[] [of] its laws, regulations and other policies"; and that the ability to effectively enforce food safety requirements is established according to what "may be verified by audits and on-site visits by the competent authority of the importing country".[486] The Panel therefore understands that the relevant risk assessment would take into account (a) the laws, regulations and other policies of the exporting Member; and (b) the verification at origin carried out by the authorities of the importing Member.

7.167. The Panel addresses below the information in the record regarding the regulation of the use of oxamyl in strawberry production in Costa Rica and the relevant pre-export controls of that country, in order to determine whether the information in question was sufficient for the purposes of Article 5.7 at the time Measure 1 was adopted.

7.168. Regarding its legislation, Costa Rica refers to the national prohibition on the use of oxamyl in strawberry crops. Costa Rica submits a "list of formulated pesticides and related substances authorized in strawberry crops" in Costa Rica, certified in 2022 by the Head of the Pesticide and Application Equipment Registration Unit of the SFE of Costa Rica.[487] The fact that this list does not include oxamyl confirms that this pesticide was not registered for use in strawberry crops in Costa Rica at the time the certification was issued in 2022. Although this certification post-dates the adoption of Measure 1, Panama has confirmed that it "was aware that Costa Rica did not authorize the use of oxamyl in strawberry production" at that time.[488]

7.169. Moreover, Costa Rica asserts that Panama had available pertinent information from its *Manual on good agricultural and production practices for strawberry crops*, which expressly regulates the use of pesticides such as oxamyl, and confirms that the Government of Costa Rica maintains a

[484] Panama's first written submission, paras. 203-204; second written submission, para. 111.
[485] Costa Rica's opening statement at the second meeting of the Panel, paras. 67-68.
[486] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 4.
[487] SFE, Certification of pesticides for use in strawberries, AE-REG-C-0035-2022 (Exhibit CRI-5).
[488] Panama's second written submission, para. 117. The Panel observes that Costa Rica refers to a "prohibition on the use of oxamyl", while the exhibit in question does not refer to a "prohibition" but rather presents a certification of the pesticides registered for use in such crops. The Panel further notes that the *Manual on good agricultural and production practices for strawberry crops* indicates that "[o]nly pesticides currently registered in the country for use in the cultivation of strawberries may be used", which indicates that the use of unregistered pesticides is not permitted. (*Manual on good agricultural and production practices for strawberry crops* (Exhibit CRI-369), section 6.8.2, p. 32).

system of good practices that is mandatory for strawberry producers.[489] Costa Rica confirms that the Manual was published in 2017 on both the SFE website and the website of the Inter-American Institute for Cooperation on Agriculture (IICA), which collaborated in the development of the Manual.[490] In this regard, Costa Rica notes that, in order to comply with a country's MRLs, producers must apply the GAP, which aim to reduce the risk of pesticide residues remaining in the relevant products.[491] Costa Rica asserts that the Manual in question is mandatory for all producers, field personnel, transporters, and technicians involved in strawberry production in Costa Rica.[492] Costa Rica adds that, while the SFE monitors and verifies that Costa Rican producers comply with the provisions of the Manual, ultimate responsibility rests with each individual producer.[493]

7.170. Panama states that, when Measure 1 was communicated to Costa Rica in February 2020, Panama did not have information about Costa Rica's implementation of the Manual.[494] Panama notes that the Manual does not refer to the ability of producers to implement it, nor to the existence of a surveillance system or penalties for non-compliance.[495]

7.171. The Panel observes that the *Manual on good agricultural and production practices for strawberry crops*, published in 2017 by MAG and the SFE of Costa Rica, "brings together a set of technical recommendations and standards, with a preventive approach, focused on the control of microbial, chemical and physical hazards at the various stages of strawberry production".[496] These technical recommendations and standards cover the activities that are undertaken, ranging from the selection of the land to the transportation to the packing plant, as well as aspects related to the handling, packaging and protection of the cargo.[497]

7.172. The Manual contains a number of provisions on the use of pesticides which state, *inter alia*, that: (a) only pesticides currently registered in the country for use strawberry crops may be used, in accordance with the recommendations on the label and in the accompanying leaflet concerning dosage, expiry date, etc., in order to comply with the MRLs; (b) in the case of products for export, pesticides that are officially prohibited for use in the country of destination must not be applied; (c) it is recommended to carry out pesticide residue analysis on fruits at least once a year; (d) documented records of pesticide residue analysis results must be kept; (e) pesticide residue analysis results must be issued by a competent laboratory; (f) pesticide residues must not exceed the MRLs established by national legislation or stipulated by the country of destination; and (g) in the case of harvested fruit that does not comply with pesticide MRLs, the legislation in force will apply. With regard to producers' ability to apply the GAP on pesticide use, the Manual specifies that producers may make recommendations on pesticide applications, provided they demonstrate their technical competence; and that the workers who apply pesticides must be trained in the appropriate procedures and demonstrate competence in, and knowledge of, the matter.[498] The Manual also states that the SFE will carry out surveillance and verify the implementation of the various provisions of the Manual that correspond directly to its competences.[499]

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[489] Costa Rica's response to Panel question No. 116, para. 3.10; comments on Panama's response to Panel question No. 116, para. 3.37 (referring to the *Manual on good agricultural and production practices for strawberry crops* (Exhibit CRI-369)).

[490] Costa Rica's response to Panel question No. 110, para. 3.1 (referring to SFE, "Publications and materials for download", https://www.sfe.go.cr/Publicaciones/Manual%20BPA%20para%20el%20cultivo%20de%20fresa.pdf; IICA, https://repositorio.iica.int/bitstream/handle/11324/2932/BVE17058869e.pdf;jsessionid=7C4F2736F934E3BDA%2025C41AB2BC61C7D?sequence=1).

[491] Costa Rica's second written submission, para. 411.

[492] Costa Rica's second written submission, para. 414.

[493] Costa Rica's second written submission, para. 415.

[494] Panama's response to Panel question No. 125, para. 73.

[495] Panama's response to Panel question No. 110, para. 32. See also Panama's response to Panel question No. 116, para. 45.

[496] *Manual on good agricultural and production practices for strawberry crops* (Exhibit CRI-369), section 1, p. 11.

[497] *Manual on good agricultural and production practices for strawberry crops* (Exhibit CRI-369), section 2, p. 12; section 4, p. 14. See also ibid. pp. 16-40.

[498] *Manual on good agricultural and production practices for strawberry crops* (Exhibit CRI-369), sections 6.8.2-6.8.7, pp. 32-35.

[499] *Manual on good agricultural and production practices for strawberry crops* (Exhibit CRI-369), section 7, p. 42.

7.173. Given that the Manual was published in 2017 and was therefore available to Panama in February 2020[500], the Panel considers that, when adopting Measure 1, Panama had detailed information on the good agricultural and production practices that the Costa Rican authorities recommend for the strawberry production chain. This information covers the management of the production, packaging, and transportation of strawberries, and includes instructions on the use of pesticides in strawberry crops. The Manual refers to the ability of producers to apply pesticides in accordance with GAP and the SFE's surveillance obligation. In addition, with regard to surveillance and penalties in the event of non-compliance with MRLs, the Panel notes that Costa Rican Decree No. 27683-MAG-MEIC-S of 1998, applicable to the entire agricultural sector, establishes penalties and obligations relating to the observation status of producers or companies that infringe MRLs, including the corrective actions to be taken. The Decree also includes provisions on the surveillance of non-compliant products.[501] The Decree was published in *La Gaceta*, the Official Journal of the Government of Costa Rica, in 1999[502], meaning that it was also available to Panama in February 2020.

7.174. The Panel underscores that, in February 2020, Panama had prior knowledge of Costa Rica's controls, given that Panama had imposed requirements for the importation of Costa Rican strawberries in 2008 and had imported strawberries from Costa Rica since at least 2015.[503] Indeed, the Panel considers that the above-mentioned requirements – contained in Resolution AUPSA-DINAN-006-2008[504]- are indicative of the information on the Costa Rican sanitary control systems that Panama needed in order to have sufficient confidence in the food safety of Costa Rican strawberries and, as a result, permit their importation.

7.175. Panama explains that it imposed such requirements following a verification of the pests of quarantine concern notified by the country of origin of the product, which it characterized as a "risk analysis ... [which] was not documented as such".[505] Resolution AUPSA-DINAN-006-2008 includes among its requirements that strawberries imported from Costa Rica should be covered by a phytosanitary certificate which attests, among other things, that "[t]he goods come from areas and places of production subject to inspection by the [NPPO] of the country of origin during the active growth period, harvesting and packaging of the food".[506] Another requirement of the same Resolution is that the production, harvesting, and packaging of strawberries should take place in line with the GAP and good manufacturing practices (GMP).[507]

7.176. In the Panel's view, the foregoing shows that, when it adopted Resolution AUPSA-DINAN-006-2008, Panama knew that the NPPO of Costa Rica was inspecting areas and places of production, since it required certification of that fact. In addition, it should be noted that Panama required Costa Rica to ensure GAP compliance, but did not request it to provide evidence of such compliance in order to import Costa Rican strawberries. This implies that Panama considered that the information it had in 2008 regarding Costa Rica's GAP was sufficient to assess the risk in question.

7.177. Panama argues that the regulatory environment in which strawberry producers were operating in Costa Rica in 2020 is "allegedly different" to that of 2008. In this regard, Panama cites the 2017 introduction to Costa Rica's *Manual on good agricultural and production practices for strawberry crops*. However, Panama asserts that it does not have enough information to assess the exact difference in the regulatory environment.[508] Costa Rica, in turn, maintains that pre-export

[500] Panama confirms this in its response to Panel question No. 110, para. 32.

[501] Decree No. 27683-MAG-MEIC-S adopting laboratory regulations for the analysis of residues of chemical and biological substances for use in agriculture for human and animal consumption (1998) (Exhibit CRI-405), Articles 1, 5.1, and 5.3. This Decree was referred to by Costa Rica in its comments on Panama's response to Panel question No. 114, para. 3.18.

[502] Decree No. 27683-MAG-MEIC-S adopting laboratory regulations for the analysis of residues of chemical and biological substances for use in agriculture for human and animal consumption (1998) (Exhibit CRI-405).

[503] See ITC, Trade Map – List of supplying markets for fresh strawberries imported by Panama (2015-2022) (Exhibit PAN-121), which shows imports of strawberries from Costa Rica to Panama for the years 2015-2017 and 2019-2020.

[504] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34).

[505] Panama's response to Panel question No. 9, paras. 30-31.

[506] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Article 3.2.

[507] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Articles 3-4.

[508] Panama's response to Panel question No. 125, para. 73.

controls on strawberries, or any other non-processed plant product, are carried out in the field as it is necessary to verify the producer's GAP implementation.[509] Costa Rica submits the procedure to be followed by the Agrochemical Residue Control Unit in the development and implementation of its 2022 annual plan for monitoring pesticide residues in fresh plant products, which was not in force when Measure 1 was adopted.[510] The procedures in force when the relevant PIR were adopted in 2008 and when Measure 1 was applied in February 2020 are not in the record. However, Panama has not demonstrated that changes were made to the Costa Rican regulations in force in 2008 that resulted in a situation where relevant scientific evidence was insufficient to assess the relevant risk. Therefore, the Panel considers that, in February 2020, Panama had sufficient information on the regulations concerning controls on strawberry production in Costa Rica, in particular with respect to the use of oxamyl, to assess the risk in question.

7.178. Furthermore, Panama has continued to import other fruits and vegetables from Costa Rica following the imposition of Measure 1[511], and Costa Rica points out that its procedure for monitoring pesticide residues covers all types of fresh plant products.[512] That being the case, it would indicate that Panama had general information on pesticide residue monitoring in Costa Rica in order to import other plant products from that country.

7.179. After having concluded that Panama had sufficient information on Costa Rica's relevant regulations, including the information available on its GAP, the Panel will now address Panama's argument that the detections in question caused a situation of insufficient scientific evidence by calling into doubt the effective implementation of controls on the use of oxamyl in the production of Costa Rican strawberries for export. For this reason, Panama considered it necessary to obtain additional information on GAP control programmes, sampling at export production sites, laboratory results, and analysis methods.[513]

7.180. In the light of this argument, the Panel will analyse whether Panama had sufficient scientific evidence on the implementation of pesticide use controls in Costa Rica.

7.181. The Panel considers that the information referred to by Panama pertains to the exporting country's ability to effectively enforce the food safety requirements of the importing country. The Panel recalls that, according to the Codex Guidelines, verification at origin provides information on the exporting country's ability to do this.[514] In this regard, if the detections in question made Panama doubt Costa Rica's ability to enforce its safety requirements, Panama could have obtained relevant information through verifications at origin. However, in the context of Costa Rican strawberry imports, Panama has not referred to the necessity of carrying out verifications at origin, which suggests that, when Measure 1 was adopted, Panama did not consider it necessary to obtain information from these verifications in order to assess the risk.

[509] Costa Rica's response to Panel question No. 121, paras. 3.36-3.37.

[510] Procedure for the planning and development of the annual plan for monitoring pesticide residues in unprocessed fresh plant products (Exhibit CRI-392). The Panel notes that the record contains explanations and documents relating to the monitoring of pesticide residues in Costa Rica. In these documents, the only evidence of sanitary controls being carried out by Costa Rica in places of strawberry production in Costa Rica prior to the adoption of Measure 1 is a sampling record from September 2019. (SFE, Sampling record, test report and notification of pesticide residue analysis results AE-RES-CUMPL-1080-2019 (Exhibit CRI-404)). Costa Rica provides various records from 2020, and reports that it was unable to recover two missing records from 2019. (See Costa Rica's comments on Panama's response to Panel question No. 111, paras. 3.6-3.13; fn 66; as well as Exhibits CRI-374 to CRI-390). The record also contains explanations of pesticide residue monitoring in Costa Rica, as well as several documents related to Costa Rican sanitary controls, which Costa Rica provided to Panama on 18 May 2021 in response to its information request of 17 March 2021. (Costa Rica's response to Panel question No. 100, para. 4.1 (setting out Exhibits CRI-292 to CRI-324); Memorandum DSFE-0393-2021 (Exhibit CRI-21), pp. 3-5). These documents include a document from 2019 which contains the "Procedure for the analysis of risks related to the chemical safety of unprocessed vegetable products" (Exhibit CRI-297), and an undated form used in the handling and transportation of samples (Exhibit CRI-300).

[511] Panama's response to Panel question No. 8, para. 29.

[512] Costa Rica's response to Panel question No. 111, para. 3.2 (in which Costa Rica asserts that the annual monitoring plan applies to all domestic producers of fresh, non-processed plant products, irrespective of whether the product is for sale in the domestic market or for export).

[513] See the table in Panama's response to Panel question No. 5, regarding the information Panama needed to carry out a risk assessment.

[514] See para. 7.166 above.

7.182. More than a year after Measure 1 was adopted, on 17 March 2021, Panama requested information from Costa Rica on GAP control programmes, sampling at export production sites, laboratory results and methods of analysis.[515] When Panama notified Measure 1 to Costa Rica on 20 February 2020, after detailing the cases in question where oxamyl had been detected, Panama stated that "[i]n view of this health situation, imports of strawberries from Costa Rica to the Republic of Panama will be temporarily disallowed until the health authority of our sister country indicates the corrective actions taken".[516] The Codex Guidelines for the Exchange of Information between Countries on Rejections of Imported Food, which apply where a consignment is found not to comply with a country's safety requirements, state the following[517]:

> Where appropriate, the competent authority of the exporting country should have reasonable access to the evidence found by the importing country, so as to be able to investigate the cause of the non-compliance and implement and manage any corrective actions as required.
>
> If requested, the competent authority in the exporting country should provide the competent authority in the importing country with information on the outcome of the necessary investigations and corrective actions taken.[518]

7.183. In this regard, the Panel understands that detection of non-compliance with an MRL may justify the importing country requesting information from the exporting country about its investigation into the cause of the non-compliance, and that this information may include information on sampling, laboratory results, and methods of analysis employed in that investigation. The Panel considers that Panama's request for information from Costa Rica in its communication of 20 February 2020 referred precisely to this exchange of information between the competent authorities of the exporting and importing countries. In this respect, the Panel considers that the fact that the competent authority of the importing Member needs to collect information does not necessarily imply that the importing Member is in a situation where it is impossible for it to conduct a risk assessment.[519] In addition, the Panel notes that Panama's request for additional information in the context of the adoption of Measure 1 was limited to the corrective actions taken by Costa Rica in response to the non-compliance of two shipments of a Costa Rican producer, notified on 20 February 2020.[520] Panama's request for information does not refer to a lack of information on the relevant risk and does not indicate that there was insufficient information to conduct an assessment of that risk. In the Panel's view, Panama has failed to demonstrate that, in the case of the detections at issue, while waiting for Costa Rica's responses to its request for information on corrective actions, it was in a situation of insufficient relevant scientific evidence which prevented it from conducting the relevant risk assessment.

Information on the detections in question

7.184. The Panel considers that the information on the detections in question[521] is relevant, given that Panama adopted Measure 1 in response to these detections. This information could serve as an

[515] Note AUPSA-AG-151-2021 (Exhibit CRI-19), p. 1.
[516] Note AUPSA-AG-051-2020 (Exhibit CRI-7).
[517] Codex, Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (2016) (Exhibit CRI-135).
[518] Codex, Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (2016) (Exhibit CRI-135), section 2, p. 2.
[519] The Panel considers relevant the United States' third-party assertion that a Member may be presented with some data relating to risk (e.g. a detection) that requires the collection and evaluation of sufficient evidence, without necessarily being a situation in which the scientific evidence previously relied upon became "insufficient". (United States' third-party response to Panel question No. 10, para. 32).
[520] Note AUPSA-AG-051-2020, in which Panama informed Costa Rica of the adoption of Measure 1, says that Measure 1 is adopted "[i]n view of" the situation described in the Note, which concerns the non-compliance with Panama's MRL of two Fresas Gego shipments of fresh strawberries. See Note AUPSA-AG-051-2020 (Exhibit CRI-7).
[521] Note AUPSA-AG-051-2020 (Exhibit CRI-7); DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Reception of Samples and Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-003-2020 (Exhibit PAN-36); DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-009-2020 (Exhibit PAN-37); DNSV, Internal communication of 19 August 2021, "Report and annexes setting out the analysis carried out on strawberries from Costa Rica" (Exhibit PAN-45); and DNSV, Internal communication of 19 August 2021, "Subject STRAWBERRIES Costa Rica – Missing annexes" (Exhibit PAN-46).

input for assessing and deciding how to manage the risk. In this regard, while Costa Rica considers that Panama had before it all the relevant information on the circumstances which, in its view, implied a risk to the health of its consumers as a result of the instances in question where oxamyl was detected[522], Panama submits that the information regarding those detections was not sufficient to conduct a risk assessment. For Panama, the "alarming" level of oxamyl detected in the two shipments of Costa Rican strawberries called into question its conclusions on the relevant risk, raising as it did "substantial concerns" about adverse effects on the health of its consumers.[523] Costa Rica, in turn, considers that the detected level is irrelevant for the purpose of determining the sufficiency of the scientific evidence.[524]

7.185. The Panel observes that, although Panama asserts that the detections called into question its conclusions on the risk, its arguments confirm that the detection details constitute relevant information for the assessment of the risk. The Panel refers to Panama's arguments that cases of non-compliance with MRLs "constitute, by definition, evidence of a risk that is higher than a Member's ALOP", and that the levels detected, together with other pieces of information, point to a higher risk of exposure and ingestion for Panamanian consumers.[525]

7.186. The Panel recalls that Article 5.7 of the SPS Agreement covers situations where the importing Member could not arrive at a sufficiently objective conclusion in relation to risk.[526] Such situations are different from those where, due to changes in circumstances, the Member needs to revise its risk assessment. In the latter case, the Member could reach objective conclusions about the risk, even though these conclusions differ from those arrived at previously. In the Panel's view, in this case, the detected level does not affect Panama's ability to perform a risk assessment on the basis of the available pertinent information, which includes the information on oxamyl and its effects on human health, the information on Costa Rica's controls, and the details of the detection in question.

7.187. Given that the MRL is defined as the highest level of a pesticide residue that is legally tolerated in food when pesticides are applied correctly in accordance with GAP[527], the Panel understands that non-compliance with an MRL may indicate that GAP have not been followed in the exporting country with respect to the MRL-infringing shipment. Instances of non-compliance could therefore inform the health risk assessment. In this regard, border controls could allow data on the prevalence of non-compliance to be collected, and an infringement would not necessarily create a situation of insufficiency for the purposes of Article 5.7.

Information on the compliance history of Costa Rican strawberries with Panama's MRLs

7.188. With respect to information from border controls, another relevant piece of information may be the compliance history of Costa Rican strawberries with Panama's MRLs.[528]

7.189. The Panel agrees with Costa Rica's observation that the compliance history of imports of Costa Rican strawberries to Panama must be in the hands of the Panamanian authorities, since this information is obtained through controls carried out by these authorities on products intended to be imported into Panama.[529] Regarding its import controls, Panama argues that, prior to 20 February 2020, inspection controls, sampling, and laboratory analysis were carried out in accordance with the procedure manual on "sampling for the control of pesticide residues in products of plant origin".[530] This manual, dated 8 October 2013, indicates that the initial stages of the

[522] Costa Rica's first written submission, paras. 331-332 and 335. See also Costa Rica's response to Panel question No. 77, para. 3.79; second written submission, para. 442.

[523] Panama's first written submission, paras. 171 and 206; response to Panel question No. 77, paras. 221 and 223; and second written submission, paras. 110-111.

[524] Costa Rica's response to Panel question No. 77, paras. 3.81-3.83.

[525] Panama's first written submission, para. 206; response to Panel question No. 124, para. 64.

[526] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 677.

[527] Codex, Maximum residue limits (MRLs) (2021) (Exhibit CRI-370). See also Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulations (2007) (Exhibit CRI-8), Chapter I, Article I of the MRL Regulations.

[528] See para. 7.153 above.

[529] Costa Rica's response to Panel question No. 111, para. 3.2.

[530] Panama's response to Panel question No. 125, para. 71 (referring to AUPSA, *Procedure manual: Sampling for the control of pesticide residues in products of plant origin* (2013) (Exhibit PAN-128)). Panama also asserts that, after February 2020, the COVID-19 pandemic limited the operation of the chemical contaminant surveillance system for imports. (Ibid. para. 72).

procedure consist of: (a) the "review of [the] notification requiring sampling"; (b) the "verification of supporting documents", (c) the visual inspection of the lot or lots in order to detect products that are damaged or show signs of disease; and (d) sampling.[531] Regarding the selection of samples, the following methods are used:

a. Random samples of products contained in a given type of packaging (boxes, bags, etc.): these samples are used whenever possible, in order to avoid any dispute about the representativeness of the sample.[532]

b. Selective or targeted samples: these samples are used when there is reason to suspect (i) "another possible instance of non-compliance [with] MRLs", based on a complaint or because the products are not GAP-compliant; or (ii) a population group has been identified as being exposed to the maximum risk (because the conditions and practices in the country of origin are conducive to the use of synthetic fungicides and insecticides).[533]

7.190. The Panel also observes that Resolution AUPSA-DINAN-006-2008 stipulates that, upon the entry of a food into Panama, AUPSA shall carry out sampling for entomological analysis, and that it reserves the right to take other samples, at that time or at any stage in the food chain, in order to perform other analyses, including toxic residue analysis.[534] Accordingly, the Panel understands that Panama reserves the right to carry out further controls as it sees fit, at any point in the food chain. In the Panel's view, it would be reasonable to consider that Panama's controls would allow it to detect potential instances of non-compliance with its regulations, including those stemming from failures in the surveillance of compliance with GAP and GMP, which, under the aforementioned Resolution, must be applied in the production, harvesting, and packaging of Costa Rican strawberries. By means of these controls, Panama was able to obtain data that allowed it to keep a compliance history in order to re-assess the risk posed by the importation of Costa Rican strawberries.

7.191. Panama has presented no evidence of implementation of the above-mentioned controls, particularly the random sampling of specific shipments. However, in the Panel's view, the evidence above shows that Panama conducted sampling for pesticide residue analysis and, therefore, possessed a compliance history of Costa Rican strawberries with its MRLs. As mentioned above[535], this record constitutes information relevant to the assessment of the risk in question. Nevertheless, the Panel does not consider it necessary to address the details of the compliance history in question for the purpose of determining compliance with the first requirement of Article 5.7, since the details of the compliance history do not determine its relevance and sufficiency for the purpose of assessing the risk in question; rather the details are an input for establishing whether Measure 1 is based on that history.

7.192. Another matter that the Panel considers appropriate to address is the disagreement between the parties regarding the number of exporters of Costa Rican strawberries, given that in its argument that the detections called into question its previous conclusions, Panama insists that the breach accounted for the "total" volume of imports.[536] Panama asserts that the offending producer (Fresas Gego) was the only exporter of Costa Rican strawberries on the date Measure 1 was adopted

[531] AUPSA, *Procedure manual: Sampling for the control of pesticide residues in products of plant origin* (2013) (Exhibit PAN-128), pp. 5-6. The procedure applies to imported products of plant origin, and seeks to guarantee that samples obtained in accordance with the procedure "are considered representative of the consignment or lot of imported food". (Ibid. p. 1).

[532] AUPSA, *Procedure manual: Sampling for the control of pesticide residues in products of plant origin* (2013) (Exhibit PAN-128), p. 7. The procedure manual also explains that the elements or units that form the sample must be selected on the basis of the random sampling method. Furthermore, it states that, where it is not possible to select the samples *a priori*, the systematic random sampling method may be used, which entails dividing the number of units in the lot or consignment by the number of primary samples to be selected (as set out in a table).

[533] AUPSA, *Procedure manual: Sampling for the control of pesticide residues in products of plant origin* (2013) (Exhibit PAN-128), p. 7.

[534] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Article 11.

[535] See para. 7.153 above.

[536] Panama's second written submission, para. 92.

in February 2020.[537] Panama argues that Costa Rica's exports of strawberries to Panama in the two years prior to 2020 were sporadic – none in 2018 and 2 tonnes in 2019.[538]

7.193. Costa Rica, for its part, asserts that the fact that Fresas Gego was the only Costa Rican producer that exported strawberries to Panama in 2020 does not make it the only exporter of strawberries in Costa Rica. Costa Rica submits that there are four other exporters of Costa Rican strawberries to Panama. In support of this assertion, Costa Rica provided, in its second written submission and in Exhibit CRI-403, submitted subsequently, information on strawberry exports to Panama in 2019 and 2020 which, according to Costa Rica, comes from the Single Window for Foreign Trade of Costa Rica (SIVUCE).[539]

7.194. Panama requests the Panel to dismiss the probative value of Exhibit CRI-403 because (a) it is impossible for Panama to verify its veracity and relevance, since the Exhibit gives no source for the data provided therein; and (b) the information in this Exhibit does not correspond to that provided by Costa Rica in its second written submission (which mentions one exporter less).[540]

7.195. The Panel observes that Exhibit CRI-403 contains two tables indicating that five companies exported strawberries from Costa Rica to Panama in the period 2019–2020.[541] The data presented in Exhibit CRI-403 and in Costa Rica's second written submission correspond, except for the fact that Costa Rica does not mention the exporter Plantas y Flores Ornamentales CABH S.A. in its second written submission. The Panel considers that the information in the tables comes from a reliable source, namely, the SIVUCE database. In addition, the information is relevant, given that the filters applied to the search indicate that the information collected was from the period preceding the imposition of Measure 1 (2019-2020), for the product in question (strawberries with Panama as the country of destination).

7.196. Regarding the data on exporters, the Panel finds in the record evidence of the existence of Plantas y Flores Ornamentales CABH S.A. In particular, the Panel finds a letter in which Costa Rica mentions sampling the strawberries of Fresas Gego and of another exporter located in the Eastern Central region[542], and sampling records from 2019 and 2021 from visits made to the Plantas y Flores Ornamentales farm in Llano Grande, Cartago.[543] In the Panel's view, this evidence confirms the existence of Plantas y Flores Ornamentales CABH S.A. and its connection with strawberry production.

7.197. The Panel also notes that the import data provided by Panama show that Costa Rican strawberries were imported into Panama before 2020 (17 tonnes in 2015, 18 tonnes in 2016, 1 tonne in 2017, and 2 tonnes in 2019).[544] Given that Fresas Gego was registered as an exporter in

[537] Panama's responses to Panel question No. 19, para. 84, and No. 124, para. 66.

[538] Panama's comments on Costa Rica's response to Panel question No. 111, paras. 32 and 34 (referring to ITC, Trade Map – List of supplying markets for fresh strawberries imported by Panama (2015-2022) (Exhibit PAN-121)).

[539] Costa Rica's second written submission, paras. 484-485; and responses to Panel question No. 113, para. 3.8, and No. 231, para. 4.2 (referring to SIVUCE, Exporters of strawberries to Panama (2019-2020) (Exhibit CRI-403)).

[540] Panama's comments on Costa Rica's response to Panel question No. 113, paras. 36-38.

[541] Exhibit CRI-403 indicates that, in 2019, a total of 1,975.74 kg of Costa Rican strawberries were exported to Panama by four exporting companies: Central de Flores R G J, S.Am (730 kg), Fresas Frescas del Llano JOMA, S.A. (463.5 kg), Fruta Internacional S.A. (282.24 kg) and Gregory Herrera Siles (Fresas Gego) (500 kg). The same exhibit indicates that, in 2020, two exporting companies exported a total of 3,012 kg of Costa Rican strawberries to Panama (Gregory Herrera Siles (Fresas Gego) (2,850 kg) and Plantas y Flores Ornamentales CABH S.A. (162 kg)). It can be discerned, on the basis of the tariff code (081010000000) and the species of the exported product (*Fragaria sp*), that all the exported products are fresh strawberries. (SIVUCE, Exporters of strawberries to Panama (2019-2020) (Exhibit CRI-403)). Although Costa Rica's tariff code is not in the record, Panama's tariff code 08.10.10.00 for fresh strawberries is found in Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34).

[542] Memorandum DSFE-0393-2021 (Exhibit CRI-21), p. 6.

[543] SFE, Sampling record, test report and notification of pesticide residue analysis results AE-RES-CUMPL-1080-2019 (Exhibit CRI-404); SFE, Sampling record and notification of pesticide residue analysis results AE-RES-CUMPL-0262-2021 (sampling of 19 April 2021, results of 27 April 2021) (Exhibit CRI-324). The record contains various sampling records for Fresas Gego (Gregory Herrera Siles), located in Vara Blanca, Heredia. (See e.g. SFE, Sampling record for pesticide residue analysis No. 0028772 (12 April 2021) (Exhibit CRI-312); SFE, Sampling record for pesticide residue analysis No. 0025715 (20 April 2021) (Exhibit CRI-315)).

[544] ITC, Trade Map – List of supplying markets for fresh strawberries imported by Panama (2015-2022) (Exhibit PAN-121). This Exhibit gives the source of the data from 2010 onwards as Panama's National Institute

Costa Rica in November 2019[545], imports of Costa Rican strawberries to Panama from earlier periods are not attributable to it. The Panel therefore concludes that, contrary to Panama's assertion, the evidence in the record demonstrates that Fresas Gego was not the only exporter of Costa Rican strawberries to Panama, as there were other exporters in the period 2015-2020.

7.198. Panama asserts that, in any case, Fresas Gego was an exporter "of systemic importance", as its exports in the first two months of 2020 had far exceeded Costa Rica's total exports in 2019.[546]

7.199. The quantity exported by Fresas Gego in 2019 is significant (25.30% of Costa Rica's total exports of strawberries to Panama that year[547]), especially in the light of the fact that Fresas Gego was registered as an exporter in Costa Rica on 27 November 2019. Between 1 January and 20 February 2020, Fresas Gego exported 94.62% of the total exports of strawberries from Costa Rica to Panama.[548] This suggests that Fresas Gego was a major exporter in the period during which it exported strawberries to Panama, i.e. between 27 November 2019 and 20 February 2020. However, the data on Costa Rican strawberry exports to Panama is of limited relevance, given that Measure 1 was adopted in February 2020 and, from that date on, Panama has not permitted imports of strawberries from any Costa Rican exporter.

7.200. After having concluded that Fresas Gego was not the only exporter of Costa Rican strawberries in the years preceding the adoption of Measure 1, the Panel concludes that Panama has not demonstrated that the MRL-infringing shipments represented "all" imports in such a way that the detections gave rise to an insufficiency of scientific evidence that prevented Panama from assessing the risk in question at the time Measure 1 was adopted. As mentioned in paragraph 7.190 above, the Panel considers that Panama had a compliance history of strawberries from Costa Rica that could serve as an input for its assessment of the risk.

Conclusion on whether Panama adopted Measure 1 in a situation in which the relevant scientific evidence was insufficient

7.201. In the light of the foregoing, the Panel considers that, at the time Measure 1 was adopted in February 2020, the body of relevant scientific evidence was sufficient for Panama to perform an assessment of the risk. In particular, the Panel considers the information on the following to be relevant and sufficient: (a) oxamyl and its effects on human health; (b) Costa Rican regulations relating to the use of oxamyl in strawberry production; (c) the non-compliance by Fresas Gego to which Measure 1 was the response; and (d) the compliance history of Costa Rican strawberries. Although the detections in question could have justified Panama requesting certain information from Costa Rica, the Panel considers that Panama has failed to demonstrate that the detections affected its ability to perform a risk assessment in accordance with Article 5.1 and the second clause of Annex A(4) of the SPS Agreement.

7.202. Accordingly, the Panel finds that Panama has not demonstrated that it adopted Measure 1 in a situation of insufficient relevant scientific evidence within the meaning of Article 5.7 of the SPS Agreement.

7.203. In the Panel's view, this finding would be sufficient to conclude that Measure 1 is not covered by Article 5.7, given that the requirements of Article 5.7 are cumulative.[549] However, the Panel considers it appropriate to also address the second requirement of Article 5.7, which, like the first, concerns the adoption of the measure. The Panel will therefore proceed to examine whether Panama has demonstrated that it adopted Measure 1 on the basis of available pertinent information, within the meaning of Article 5.7 of the SPS Agreement.

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of Statistics and Censuses (INEC). Exhibit PAN-121 does not specify the measurement of weight of the figures indicated, but Panama refers to tonnes. (Panama's comments on Costa Rica's response to Panel question No. 111, paras. 32 and 34).

[545] Fresas Gego registration decision (Exhibit CRI-373).

[546] Panama's comments on Costa Rica's response to Panel question No. 113, para. 39. See also Panama's opening statement at the second meeting of the Panel, para. 96 (in which it states that the volume of Fresas Gego imports for 2020 was "almost equivalent" to the total trade in strawberries between Costa Rica and Panama during the previous three years).

[547] Costa Rica's response to Panel question No. 113, para. 3.8. See also the data in fn 541 above.

[548] See the data in fn 541 above.

[549] See para. 7.110 above.

Whether Panama adopted Measure 1 on the basis of available pertinent information

7.204. In accordance with the legal standard described above[550], the Panel will examine below whether Panama adopted Measure 1 on the basis of available pertinent information within the meaning of Article 5.7 of the SPS Agreement. The Panel recalls that, as the parties have indicated[551], in order to satisfy this requirement there must be a "rational and objective relationship" between the information concerning a certain risk and a Member's provisional SPS measure.[552]

7.205. Taking into account these considerations, the Panel will now proceed to analyse whether Panama's decision to "temporarily disallow imports of strawberries from Costa Rica" in response to the detection of non-compliance in two shipments of strawberries from the Costa Rican producer Fresas Gego was based on pertinent information available to Panama on 20 February 2020.[553] To this end, the Panel will examine whether there is a rational and objective relationship between Measure 1 and pertinent available information regarding the risk in question, namely the risk of the potential for adverse effects on human health arising from the presence of oxamyl in shipments of strawberries from Costa Rica.[554] The Panel will address the information that each party identifies as pertinent for the purposes of the second requirement of Article 5.7, which is summarized in the table below.

Table 4 – Available pertinent information according to Costa Rica and Panama

Costa Rica	Panama
Codex Guidelines CAC/GL 26-1977 and CAC/GL 47-2003[555]	The body of scientific evidence relating to the adverse effects on human health arising from the presence of oxamyl in strawberries (the harmfulness of oxamyl)[556]
The measures applied by the European Union, the United States, and Australia in cases of non-compliance with MRLs[557]	The measures of the Codex and the United States, which were unable to establish MRLs for oxamyl in strawberries[558]
The fact that Measure 1 was prompted by only two instances of non-compliance with an MRL in February 2020[559]	The scientific evidence indicating the presence of oxamyl residues in the shipments of strawberries from Costa Rica (considering (a) the "repeated infringements"; and (b) the degree to which the MRL was exceeded: detection in quantities 2.2 and 8.6 times higher than the MRL[560])

[550] See para. 7.112 above.
[551] Costa Rica's first written submission, paras. 336-337; Panama's first written submission, para. 209.
[552] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678. In addition, the expression "*sobre la base de*" ("on the basis of") is similar to the expressions "*como base de*" ("as a basis for") and "*basada en*" ("based on"), which have been interpreted, in the context of Article 2.4 of the TBT Agreement and Article 3 of the SPS Agreement, to mean that there must be a very strong and very close relationship between two things. Therefore, the measure must not contradict the information in question. (See also Appellate Body Reports, *EC – Sardines*, para. 245; *India – Agricultural Products*, para. 5.77). The Panel also recalls that it has been found that, in order for there to be a "rational and objective relationship" between the measure and the information concerning the risk, the measure must not be disproportionate to the risk identified by that information. (Panel Report, *Japan – Apples*, para. 8.198.)
[553] The Panel recalls that Measure 1 was notified to Costa Rica by means of Note AUPSA-AG-051-2020 of 20 February 2020, which states that "imports of strawberries from Costa Rica … [have] be[en] temporarily disallowed". (Note AUPSA-AG-051-2020 (Exhibit CRI-7)).
[554] See para. 7.142 above.
[555] Costa Rica's first written submission, paras. 339-340 (referring to Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126); Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127)).
[556] Panama's first written submission, para. 218. See also Panama's second written submission, para. 121; responses to Panel question No. 123, para. 61, and No. 124, para. 64.
[557] Costa Rica's first written submission, paras. 353-355 (European Union); 356 (United States) and 357 (Australia); second written submission, paras. 455-462 (European Union); 464 (United States) and 465 (Australia).
[558] Panama's first written submission, para. 218 (referring to FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41); EPA, Pesticide Database, oxamyl MRL search (Exhibit PAN-42)).
[559] Costa Rica's second written submission, paras. 472-473.
[560] Panama's first written submission, para. 217; responses to Panel question No. 123, para. 61, and No. 124, para. 64.

Costa Rica	Panama
The fact that Costa Rica does not authorize the use of oxamyl in the production of strawberries[561]	Panama's knowledge of Costa Rica's production and control system[562]
The fact the producer responsible for non-compliance, Fresas Gego, is not the only Costa Rican producer of strawberries[563]	The systemic importance of the offending supplier, including the volume of its exports in relation to the total volume of imports of Costa Rican strawberries into Panama[564]

7.206. The Panel will address this information by grouping it into the following categories:

a. general information on oxamyl and the establishment of MRLs for this pesticide;

b. the measures recommended in cases of non-compliance with MRLs in the light of the Codex Guidelines and the measures of other Members; and

c. the information on Costa Rica's sanitary control system derived from the non-compliance with Panama's MRL for oxamyl in strawberries by a Costa Rican exporter of strawberries (considering the detection level, the lack of authorization to use oxamyl in the production of strawberries in Costa Rica, and the importance of the exporter involved in the non-compliance).

General information on oxamyl and the establishment of MRLs for oxamyl

General information on oxamyl

7.207. As mentioned above, the record contains sources of information on the use and harmful effects of oxamyl which constitute pertinent information.[565] The parties do not disagree on the toxicity and harmful effects of oxamyl.[566] The scientific sources in the record that precede the adoption of Measure 1 confirm that oxamyl is a highly hazardous substance for human health.[567] In the Panel's view, the proven high toxicity of oxamyl could be a relevant consideration in determining how to manage the risk of its potential presence in imported strawberries.

Establishment of MRLs for oxamyl

7.208. Panama asserts that Measure 1 is based on "the measures of the Codex and the United States, which were unable to establish MRLs for oxamyl in strawberries".[568] In this regard, Panama submits that the Codex and the United States were unable to establish an MRL for oxamyl in strawberries that was safe for human consumption.[569] Costa Rica appears to discount the relevance of this information in this particular case, given that it stresses that the measure it is challenging is not Panama's MRL for oxamyl in strawberries, but rather its response to a violation of this MRL.[570]

7.209. The Codex list of oxamyl MRLs includes various products, but not strawberries.[571] With respect to the EPA, a search of its database contained in the record shows that the United States has not set an MRL for oxamyl.[572] As mentioned above[573], the Panel observes that there is nothing

[561] Costa Rica's first written communication, para. 363.
[562] Panama's response to Panel question No. 123, para. 61.
[563] Costa Rica's second written submission, paras. 484-485.
[564] Panama's responses to Panel question No. 123, para. 61, and No. 124, para. 64.
[565] See para. 7.157 above.
[566] Panama describes this pesticide as "extremely toxic" and Costa Rica does not question that assertion. (Panama's first written submission, para. 199).
[567] FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41), p. 13. See also EPA, Oxamyl Facts (2000) (Exhibit PAN-39), pp. 2-3 (describing the severe adverse effects of oxamyl on the human nervous system and its acute and chronic risks to mammals).
[568] Panama's first written submission, para. 218 (referring to FAO, *Specifications and Evaluations for Agricultural Pesticides – Oxamyl* (2008) (Exhibit PAN-41); and EPA, Pesticide Database, oxamyl MRL search (Exhibit PAN-42)); second written submission, para. 121.
[569] Panama's first written submission, para. 202.
[570] Costa Rica's response to Panel question No. 13, paras. 2.86-2.87.
[571] Codex Alimentarius, Pesticide Index, "Oxamyl" (Exhibit CRI-125).
[572] EPA, Pesticide Database, oxamyl MRL search (Exhibit PAN-42).
[573] See para. 7.162 above.

in the record to explain the absence of Codex and United States MRLs for oxamyl in strawberries.[574] It should be recalled that, in the absence of an MRL for oxamyl in strawberries for both the Codex and the United States, Panama based its MRL on the European Union's "highly restrictive" MRL for oxamyl, with a minimum detection threshold of 0.01 mg/kg.[575]

7.210. As noted in paragraph 7.162 above, information on the existence or level of MRLs for oxamyl in strawberries from relevant international organizations or other Members could be pertinent to the adoption of an MRL for this pesticide. The Panel does not exclude the possibility that the level of an MRL or the considerations that led to its establishment may be pertinent, especially when the MRL is based on a risk assessment. However, since the reasons why the Codex and the United States have not established an MRL for oxamyl in strawberries are not in the record, the Panel does not consider that this absence of an MRL provides information on which the measure in question can be based. Moreover, the Panel does not deem this information pertinent when responding to risk arising from non-compliance with an MRL, which is the situation that Panama is seeking to address and that Costa Rica is challenging.

7.211. The rest of the information that the parties consider pertinent refers to managing non-compliance with an MRL and to Costa Rica's relevant strawberry production and control systems. In this regard, it should be recalled that Measure 1 was adopted in response to the non-compliance with Panama's oxamyl MRL detected in two shipments from the same Costa Rican exporter (Fresas Gego).[576]

Codex Guidelines and measures of other Members

7.212. The Panel observes that the parties disagree on the pertinence of the Codex Guidelines and the measures of other Members cited by Costa Rica. The Panel will address this matter below, starting with the pertinence of the Guidelines.

Pertinence of the Codex Guidelines and the measures of other Members

7.213. Regarding the pertinence of the Codex Guidelines, Costa Rica notes that Article 5.7 states that the pertinent information that must be considered when adopting a provisional SPS measure includes that from the relevant international organizations.[577] Costa Rica asserts that, given that Measure 1 was adopted due to Panama's food safety concerns, the Codex standards are pertinent to this measure, particularly Guidelines CAC/GL 26-1997 and CAC/GL 47-2003.[578] Costa Rica argues that the Codex Guidelines that it identifies are pertinent to Measure 1, as they set out appropriate measures in cases of non-compliance with imported food safety requirements.[579] For Costa Rica, nothing in the text of Article 5.7 indicates that "pertinent" information must refer to the "particular risk" that the Member is trying to mitigate.[580] Costa Rica asserts that the fact that an international organization issues standards or guidelines applicable to general situations does not mean that they are not relevant to a specific risk. According to Costa Rica, these standards and guidelines are designed to guide all countries in a general manner, regardless of their particular circumstances, and it is up to the importing Member to apply them to its specific circumstances when determining appropriate SPS measures.[581]

7.214. For its part, Panama submits that the Codex Guidelines to which Costa Rica refers are not pertinent information within the meaning of Article 5.7 because they do not say anything about the particular risk that Panama is assessing with respect to Measure 1. Panama asserts that these Guidelines are generic guidelines on the operation of inspection, certification, and control systems,

[574] As mentioned, the US EPA considers that, with the risk mitigation measures required, the individual and aggregate risks of oxamyl are within acceptable levels. (EPA, Oxamyl Facts (2000) (Exhibit PAN-39), pp. 1 and 3).

[575] Panama's response to Panel question No. 15, para. 72 (referring to Article 2 of the MRL Regulations, adopted by Executive Decree No. 467 (2007) (Exhibit CRI-8)).

[576] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[577] Costa Rica's first written communication, para. 339.

[578] Costa Rica's first written submission, paras. 339-340 (referring to Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126); Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127)).

[579] Costa Rica's second written submission, para. 480.

[580] Costa Rica's response to Panel question No. 87, paras. 3.148 and 3.150.

[581] Costa Rica's response to Panel question No. 13, para. 2.80.

and that they do not constitute an "international food safety standard that assesses the risk to human health arising from the presence of oxamyl residues in strawberries".[582] Panama is of the view that the reference to the word "pertinent" in Article 5.7 requires that the international standard in question should have at least some relationship to the particular risk being mitigated by the WTO Member.[583]

7.215. The third parties commented on the Spanish word "*pertinente*" (rendered as "relevant" and "pertinent" in English), which appears in Article 5.7 in relation to "scientific evidence" and "information", respectively. In Australia's view, "relevant" means any scientific evidence that is "pertinent" to performing a risk assessment.[584] Similarly, Brazil asserts that the information provided must fit in the context of the risk assessment under way, and that its pertinence will depend on the specific risk under examination.[585] Canada refers to the ordinary meaning of the term "relevant", namely "bearing upon or relating to the matter at hand; pertinent".[586] The European Union states that the scientific evidence must pertain to the risk assessed.[587] The United States is of the view that, in the context of Article 5.7, "relevance" must be understood in terms of the obligation under Article 5.1 to perform a risk assessment. The United States adds that the provisional measure is taken in consideration of "available pertinent information", which is *a fortiori* information that need not be of the same character or sufficiency as that necessary for a risk assessment under Annex A(4).[588]

7.216. The Panel recalls that Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 provide a framework for the development and operation of import and export inspection and certification systems.[589] The paragraphs of these Guidelines referred to by Costa Rica address the management of situations of non-compliance, and set out criteria to take into account and specific measures that may be applied in such situations.[590]

7.217. The Panel observes that the disagreement between the parties focuses on whether the information pertinent to the adoption of Measure 1 is limited to information on the particular risk in the sense of an international food safety standard, as asserted by Panama, or whether it can also include information relating to the management of this risk, such as that contained in Guidelines CAC/GL 26-1997 and CAC/GL 47-2003, as stated by Costa Rica.

7.218. The Panel observes that Article 5.7 provides that a Member may provisionally adopt sanitary or phytosanitary measures "on the basis of available *pertinent* information".[591] The ordinary meaning of "*pertinente*" ("pertinent") is "bearing upon or relating to the matter at hand"[592], or "*perteneciente o correspondiente a algo*" ("pertaining or corresponding to something").[593] As Costa Rica asserts[594], the term "pertinent" is not accompanied by a term that limits the pertinent information to the "particular risk" that the Member is trying to mitigate (namely the adverse effects of a particular pesticide or the entry, establishment or spread of a particular pest).

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[582] Panama's first written submission, paras. 211-212. See also Panama's opening statement at the first meeting of the Panel, para. 76 (in which Panama indicates that the only pertinent Codex information would be that related to food safety, and more specifically, that which addresses the risk arising from the presence of oxamyl residues in strawberries).

[583] Panama's opening statement at the first meeting of the Panel, para. 41.

[584] Australia's third-party response to Panel question No. 6, para 6.

[585] Brazil's third-party response to Panel question No. 6, para 6.

[586] Canada's third-party response to Panel question No. 6, para. 31 (quoting Panel Report, *EC – Sardines*, para. 7.68).

[587] European Union's third-party response to Panel question No. 6, para. 20.

[588] United States' third-party response to Panel question No. 6, paras. 22 and 26.

[589] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 1, para. 1; Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), section 1, para. 1.

[590] See paras. 34 and 35 of Guidelines CAC/GL 26-1997 and para. 20 of the appendix to Guidelines CAC/GL 47-2003.

[591] Italics added.

[592] Canada's third-party response to Panel question No. 6, para. 31 (quoting Panel Report, *EC – Sardines*, para. 7.68). Canada provides this definition in the context of the first sentence of Article 5.7, when referring to the phrase "relevant scientific evidence".

[593] *Diccionario de la Real Academia Española*, definition of *"pertinente"* https://dle.rae.es/pertinente?m=form (accessed 13 August 2024).

[594] Costa Rica's response to Panel question No. 87, para. 3,150.

7.219. In addition, the Panel shares the view, expressed in previous disputes, that in order for a measure to be considered adopted on the basis of pertinent information, "there must be a rational and objective relationship between the information *concerning a certain risk* and a Member's provisional SPS measure".[595] The Panel recalls that Article 5.7 contemplates temporary situations that last until information is obtained that permits a more objective assessment of the risk.[596] In the meantime, SPS measures must be based on the pertinent available information. Given this context, the Panel understands that the pertinent information on which the SPS measure must be based must provide the Member with useful guidance for performing a preliminary risk assessment and adopting a temporary regulatory response in this regard.

7.220. The Panel notes that the term "pertinent information" is followed by the phrase "including *that from the relevant international organizations* as well as from *sanitary or phytosanitary measures* applied by other Members".[597] This phrase indicates that international standards from relevant international organizations and SPS measures applied by other Members could constitute "pertinent information" for the purposes of Article 5.7. With regard to the "relevant international organizations", the preamble to the SPS Agreement mentions the Codex among such organizations[598], and Annex(3)(a) of the SPS Agreement establishes that the Codex is the relevant international organization for food safety. Accordingly, the Panel considers that the Guidelines developed under the auspices of Codex constitute information "from" that organization, and that they could therefore constitute "pertinent" information for the purposes of Article 5.7.

7.221. Annex A(3)(a) of the SPS Agreement refers specifically to "standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice". The Panel considers that this list may include Guidelines CAC/GL 26-1997 and CAC/GL 47-2003, given that these Guidelines cover inspection systems dealing with all types of risks arising from food imports, which may include risks related to pesticide residues in food. In this connection, the Panel observes that the preamble to the SPS Agreement recognizes the importance of standards that concern both the development as well as the adoption and enforcement of SPS measures.[599]

7.222. The Panel also observes that the term "*medida*" ("measure"), which refers to risk management given that the measure is a risk control tool[600], follows the phrase "*información pertinente*" ("pertinent information") in Article 5.7. For the Panel, this indicates that information that may help the Member decide how to manage a risk may constitute pertinent information within the meaning of Article 5.7.

7.223. The Panel also considers that the provisions of the SPS Agreement that relate to risk assessment in the framework of the Agreement provide relevant context for the interpretation of the phrase "pertinent information" in Article 5.7.[601] The Panel notes that Article 5.1 of the

[595] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678. (italics added)

[596] See para. 7.132 above.

[597] Italics added.

[598] See the sixth recital of the Preamble, which provides that Members desire "to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health".

[599] The fourth recital of the preamble to the SPS Agreement refers to the establishment of "a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures", and the fifth recital recognizes "the important contribution that international standards, guidelines and recommendations can make in this regard".

[600] For example, Guidelines CAC/GL 26-1997 define "[r]isk management" as "the process of weighing policy alternatives in the light of the results of risk assessment and, if required, selecting and implementing appropriate control options, including regulatory measures". (Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 2).

[601] The Panel recalls that Article 5.7 refers to the objective of performing a "more objective assessment of risk", which corresponds to the assessment of the risks provided for in Article 5.1 and the definition of risk assessment in Annex A(4). The Panel also notes that Article 2.2 requires that SPS measures be based on scientific principles. Therefore, the Panel considers that the pertinent information on which an SPS measure

SPS Agreement refers to "risk assessment techniques developed by the relevant international organizations", which must be taken into account in the risk assessment on which an SPS measure is based. In the Panel's view, this indicates that the information pertinent to the adoption of a measure is not limited to the information on the particular risk. The Panel also observes that Articles 5.2 and 5.3, which are linked to Article 5.1, relate to elements and factors that pertain to risk management, namely relevant inspection methods, quarantine treatment[602], and the cost-effectiveness of alternative approaches to limiting risks.[603]

7.224. In previous disputes, it has been considered that Article 5 and Annex A of the SPS Agreement do not support a restrictive interpretation of the concept of risk assessment, which is why in the context of the SPS Agreement no distinction is made between "risk assessment" and "risk management".[604] Similarly, the definition of the first type of risk assessment in Annex A(4) of the SPS Agreement includes considerations relating to risk management, as it refers to the "phytosanitary measures which might be applied, and of the associated potential biological and economic consequences".[605] The Panel therefore understands that the risk assessment referred to in the SPS Agreement also includes the risk management phase.[606]

7.225. In the light of the foregoing, the Panel considers that "pertinent information" within the meaning of Article 5.7 does not refer exclusively to information that addresses the particular risk in question, but may also refer to information relating to the *management* of that risk. Thus, in the Panel's view, Article 5.7 would not exclude international standards of a general nature that address the management of a particular situation, such as the adoption of measures in situations of non-conformity, although such standards do not specifically refer to the product or risk (pest or contaminant) in question that the Member seeks to mitigate.

7.226. After concluding that, in general, Article 5.7 does not necessarily exclude international standards of a general nature that address the management of a particular situation, the Panel must also determine whether the specific Guidelines or measures invoked by Costa Rica are "pertinent" in the specific context of Measure 1. In relation to Measure 1, Costa Rica challenges Panama's response to the detection of non-compliance with the oxamyl MRL in strawberries by two shipments of Costa Rican strawberries, rather than the MRL itself. Therefore, in the circumstances of this case, the pertinent information is not limited to information on the specific risk to human health of oxamyl, but also includes the information that would allow Panama to react to non-compliance with its MRL. As mentioned above[607], the paragraphs of the Codex Guidelines cited by Costa Rica specifically address situations of non-compliance with the safety requirements of the importing country. While these paragraphs are general in nature, and do not link the situation of non-compliance with any particular product, pest or contaminant, they do relate to the management of the particular risk situation at issue in this dispute, namely, non-compliance with the MRL of the importing country. Therefore, the Panel considers that Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 provide pertinent information for the adoption of Measure 1.

7.227. Panama further asserts that if these Guidelines were "pertinent" to the risk in question, this would automatically impose the particular ALOP reflected in the Codex Guidelines on all Members with respect to all products, contrary to Article 3.3 of the SPS Agreement.[608] The Panel understands

must be based, in the context of Article 5.7, includes information that would be relevant to an assessment of risk within the meaning of Article 5.1.

[602] Article 5.2 of the SPS Agreement.

[603] Article 5.3 of the SPS Agreement. The Panel observes that Article 5.3 concerns the assessment of risk to animal or plant life or health, and not the assessment of risk to human life and health. However, the Panel considers that the factors listed in this provision may inform its analysis of whether the information pertinent to risk assessment under the SPS Agreement includes information related to the management of that risk.

[604] Appellate Body Report, *EC – Hormones*, para. 181. See also Appellate Body Reports, *US/Canada – Continued Suspension*, para. 535.

[605] Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.450. The Panel observes that the two types of risk assessment in Annex A(4) of the SPS Agreement are defined differently. However, the Panel does not consider that this difference implies a more restrictive interpretation as regards whether the information pertinent to the first type of risk assessment includes information related to the management of that risk.

[606] The Panel observes that the Codex draws a distinction between "risk assessment" and "risk management", which are two elements of what the Codex calls "risk analysis". See para. 7.149 above and Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 535 and 541.

[607] See para. 7.216 above.

[608] Panama's first written submission, para. 214.

that Panama argues that its provisional measures could not be adopted on the basis of international standards because those standards did not reflect Panama's higher ALOP. The Panel considers that even if these standards reflect a different ALOP, this does not necessarily mean that the standards are not pertinent. The Panel also recalls that Article 3.3 of the SPS Agreement allows Members to "introduce or maintain [SPS] measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations" in certain circumstances.[609] The Panel finds nothing in the SPS Agreement to indicate that this right does not apply to provisional measures. In any case, the Panel notes that this is not an absolute right [610] and that Panama should substantiate its decision to deviate from the relevant international standards in the context of both Article 3.3 and Article 5.7. Under Article 5.7, Panama must provide some basis for selecting the measure in question in order to demonstrate that the measure is based on the pertinent information available at the time of its adoption.

7.228. Regarding the pertinence of other Members' SPS measures, Costa Rica notes that Article 5.7 states that the pertinent information to be considered when adopting a provisional SPS measure includes SPS measures applied by other Members.[611] Costa Rica identifies as pertinent the regulatory responses of the European Union, the United States and Australia in cases of non-compliance with MRLs.[612] According to Costa Rica, it was up to Panama to base Measure 1 on, *inter alia*, these measures, as part of its analysis of the appropriate provisional measure.[613] Costa Rica submits that, if such measures are not considered pertinent because they do not address Panama's specific circumstances, the requirement to consider other Members' measures when adopting a provisional measure due to insufficient scientific evidence would be deprived of practical effect.[614]

7.229. Panama submits that the other Members' measures referred to by Costa Rica are not pertinent to Measure 1. Panama argues that the other Members' measures "enforce, in a generic way, regulatory responses to instances of MRL non-compliance ".[615] Panama asserts that the way in which developed Members have designed and operate their inspection and control systems, and their responses to instances of non-compliance, bear no relation to the particular risk that Panama was trying to assess.[616]

7.230. For the same reasons as stated in relation to international standards, the Panel considers that other Members' measures in relation to food safety controls could be pertinent under Article 5.7, even if they are not specific to the product or risk (pest or contaminant) in question. In particular, the Panel recalls that, in relation to Measure 1, Costa Rica is challenging Panama's response to the non-conformity with the MRL for oxamyl in strawberries of two shipments of Costa Rican strawberries. Therefore, in the circumstances of this case, the pertinent information includes information on the management of the particular risk situation that Panama claims to address through the adoption of Measure 1, i.e. non-conformity with the MRL of the importing country. Moreover, the Panel considers that nothing in Article 5.7 indicates that the level of development of a Member affects the pertinence of its measures when they address the situation that the importing Member faces. The Panel observes that Panama itself refers to the measures of other Members in its arguments.[617]

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[609] This Article allows the Member to establish an ALOP higher than that which is implicit in the international standard, and to implement that ALOP in a measure not based on the international standard. (Appellate Body Report, *EC – Hormones*, para. 172.)

[610] Appellate Body Report, *EC – Hormones*, para. 173.

[611] See fn 400 above, in which the Panel explains that the reference to "*otras partes contratantes*" in Article 5.7 of the SPS Agreement in Spanish is understood to mean "Members".

[612] Costa Rica's first written submission, paras. 352-359. See also Costa Rica's second written submission, para. 480.

[613] Costa Rica's response to Panel question No. 85, para. 3.144.

[614] Costa Rica's responses to Panel question No. 13, para. 2.81, and No. 85, para. 3.143. Costa Rica adds that, in requiring the importing Member to base its action on the measures of other Members, Article 5.7 does not refer to measures adopted by other Members that address the specific factual context of the Member seeking to apply a measure under Article 5.7. (Costa Rica's second written submission, para. 479).

[615] Panama's first written submission, para. 215.

[616] Panama's first written submission, para. 215.

[617] Panama's response to Panel question No. 117, paras. 52-54 (in which Panama refers to measures of the European Union, the United States and Chinese Taipei regarding countries' practices when addressing the specific MRL violations that Panama considers relevant to the interpretation of certain terms in the Codex Guidelines).

7.231. Accordingly, the Panel concludes that the Guidelines and measures of other Members cited by Costa Rica are pertinent because, although they do not address non-conformity with oxamyl MRLs for strawberries in particular, they provide guidance on procedures applicable in cases of non-conformity with food safety requirements. Having determined the relevance of the Codex Guidelines and the measures of other Members cited by Costa Rica, the Panel will examine whether Panama adopted Measure 1 on the basis of those same Guidelines and measures.

Whether Measure 1 was adopted on the basis of the Codex Guidelines invoked by Costa Rica

7.232. The Panel will now examine whether Measure 1 was adopted on the basis of the Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (Guidelines CAC/GL 26-1997) and the Guidelines for Food Import Control Systems (Guidelines CAC/GL 47-2003).[618]

7.233. Costa Rica submits that, read in conjunction, these Guidelines make clear that in the event of a non-conformity with food safety requirements, the measures applied by the importing country must be proportionate and incremental. According to Costa Rica, these Guidelines establish that the importing country can, as a first step, change the manner in which risk is managed without suspending imports. Costa Rica argues that measures to change the manner in which risk is managed could have been holding the food pending a final judgement, enhancing sampling and testing from the establishment in question, requesting the Costa Rican authorities for information and cooperation, control programmes implemented by the Panamanian importer or the Costa Rican exporter to prevent future non-compliance, or even on-site visits.[619] Costa Rica adds that, if there is evidence of systemic problems, the importing country could extend the measures to other establishments. Costa Rica asserts that the suspension of imports is a last resort, justifiable only "in the most serious or persistent cases", and once it has been confirmed that previous measures proved insufficient in ensuring compliance with the safety requirements.[620] Costa Rica adds that Panama "failed to adhere" to these Guidelines, since Panama imposed, as its first and only measure, an outright prohibition on imports of strawberries from Costa Rica after it detected oxamyl residues at levels higher than its MRL in two shipments from a Costa Rican producer.[621]

7.234. Panama argues that, even assuming that these Guidelines are pertinent, the temporary suspension of imports from the relevant producer or country – which, in its view, overlap in this case – is one of the measures prescribed by the Codex for the most serious or persistent cases.[622] According to Panama, the situation in which Measure 1 was adopted constitutes a "serious" and "persistent" case of non-conformity.[623]

7.235. With regard to Guidelines CAC/GL 26-1997, the Panel notes that paragraphs 34 and 35, to which Costa Rica refers, concern the management of situations where "an imported product is found not to be in conformity" with food safety requirements.[624] Paragraph 34 indicates the criteria that should be taken into account to ensure that any action taken in these situations is "proportionate to the degree of public health risk, potential fraud or deception of consumers".[625] These criteria are: (a) repeated non-conformity in the same product or in the same category of products; (b) history of non-conformity of those responsible for handling the products; and (c) reliability of checks made by the country of origin.[626]

7.236. Paragraph 35 specifies examples of measures in respect of the non-conforming product and in respect of future imports. It states that these measures may be cumulative if necessary. The Panel notes that Costa Rica is not challenging Panama's decision to deny entry into its territory to

[618] Costa Rica's first written submission, paras. 339-340.
[619] Costa Rica's first written submission, paras. 347-348; second written submission, para. 453.
[620] Costa Rica's first written submission, para. 347; second written submission, para. 453.
[621] Costa Rica's first written submission, para. 348.
[622] Panama's second written submission, para. 119.
[623] Panama's response to Panel question No. 73, para. 208.
[624] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, paras. 34 and 35.
[625] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 34.
[626] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 34.

the two MRL-infringing shipments; rather it is challenging Panama's decision to prevent all future imports of Costa Rican strawberries.[627] Therefore, the pertinent examples of measures in paragraph 35 are those that apply to future imports, namely: (a) control programmes implemented by the importer or exporter to ensure problems do not re-occur; (b) increased intensity of checks on categories of products identified as being not in conformity and/or the undertakings concerned; (c) request for information and cooperation on the product or the category of products found not to be in conformity by the responsible authorities in the country of origin (increased checks at origin); (d) on-site visits; and, (e) "in the most serious or persistent cases", suspension of imports from establishments or countries.[628]

7.237. With regard to Guidelines CAC/GL 47-2003[629], Costa Rica refers to the appendix thereto, which provides competent authorities with information to assist them with the design and implementation of inspection programmes for imported food, based on food safety risks.[630] Paragraph 20 of the appendix addresses the scenario of a shipment that fails to meet the food safety requirements. It states that this situation might, besides other actions, trigger a change in the manner in which risk is managed by the importing country for the food concerned. According to this paragraph, this change in risk management could include food being held and enhanced sampling and testing from the establishment involved, as well as these actions being applied to other exporting establishments from the same country producing similar foods "where there is evidence of a systemic problem".[631] The suspension of the importation of a food should be reserved only for those situations "involving a serious food safety risk that has not been managed by other means".[632]

7.238. The Panel considers that these Guidelines can be read in conjunction, since they both address non-compliance with food safety requirements. On the basis of a joint reading of the relevant paragraphs of the Guidelines, the Panel understands that, when a shipment does not meet food safety requirements, the first line of response in respect of future imports should be limited to actions such as: the product being held pending final judgment; implementing control programmes; requesting information from, or increased controls by, the exporting country; increased intensity of checks by the importing country of the non-conforming product or of the exporter concerned[633] and of other exporters of this food (if there is evidence of systemic problems); and on-site visits.[634] The Panel understands that the measures may be applied cumulatively if necessary, and would need to be proportionate to the degree of risk, which could depend on whether there is repeated non-conformity and on the reliability of the importing country's checks.[635] The suspension of imports would be considered only in the "most serious or persistent cases"[636] or in situations involving a "serious food safety risk".[637]

7.239. Given that Measure 1 seeks to "disallow" imports of Costa Rican strawberries[638], this measure has the effect of suspending these imports. Therefore, the Panel will examine whether detecting non-compliance with the oxamyl MRL for strawberries, which is the basis for Measure 1,

[627] Costa Rica's response to Panel question No. 13, paras. 2.86-2.87.
[628] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35.
[629] These Guidelines provide specific information about imported food control that is an adjunct to Guidelines CAC/GL 26-1997. (Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), p. 1).
[630] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 2, para. 4.
[631] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.
[632] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.
[633] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35; Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.
[634] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.
[635] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 34.
[636] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35.
[637] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.
[638] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

can qualify as a serious or persistent case of non-conformity or as a serious risk that, according to the Codex Guidelines, would justify a suspension of imports.

7.240. Costa Rica asserts that Panama's submissions confirm that the non-conformities detected do not fall into the category of the "most serious or persistent cases" or of a "serious food safety risk"[639], nor do they qualify as "repeated cases of non-conformity".[640] According to Costa Rica, in the case of these non-conformities, the appropriate response would have been to implement measures to change the manner in which the risk is managed, without suspending imports from the producer responsible, let alone imports of all Costa Rican strawberries, which is the most stringent measure possible and not proportionate to the infringement.[641]

7.241. According to Costa Rica, a case is serious or persistent when an importing country continues to detect instances of non-compliance after having adopted measures to change the manner in which the risk is managed, for instance, increased controls for the producer responsible or food being held pending final judgment.[642] Costa Rica adds that these cases are considered serious because the foreign producer or exporter would not have improved its GAP despite the fact its shipments continue to be rejected by the importing country and it remains subject to additional control measures.[643] Costa Rica asserts that, as indicated by paragraph 24 of Guidelines CAC/GL 47-2003, the greater controls enable a compliance history to be created about the foreign producer in question. For Costa Rica, this history is important so that the importing country knows whether the exporter in question continues to be found non-compliant or whether the additional measures can be withdrawn due to a decrease in infringements.[644]

7.242. Costa Rica asserts that Panama cannot maintain that the Codex standards justify a prohibition on imports because precautionary measures would not achieve its ALOP. For Costa Rica, this argument reflects speculation on the part of Panama regarding what would have happened if Panama had adopted precautionary measures prior to implementing a "prohibition", which it did not do.[645]

7.243. Panama, for its part, submits that the non-conformities detected in shipments of Costa Rican strawberries under Measure 1 constitute a "serious or persistent" case, for which the Codex Guidelines would authorize the temporary suspension of imports from the corresponding country. For Panama, these "repeated cases of non-conformity suggested a systematic problem with the controls carried out by Costa Rica", meaning that precautionary measures would not reach Panama's ALOP.[646] Panama stresses that, in its view, there was a repeated infringement in relation to an extremely hazardous substance, coupled with the impossibility of verifying the reliability of the controls carried out by the exporting country.[647] Panama asserts that the ordinary meaning of the terms "serious" and "persistence" indicates that "serious or persistent" cases are those that involve repeated non-compliance of great significance. Panama adds that, according to the text and context of the Codex Guidelines, the seriousness of the risks to human health, repeated non-conformity, in addition to the reliability and effectiveness of the control systems, are criteria relevant to clarifying the meaning of "serious or persistent".[648]

[639] Costa Rica's first written submission, para. 350 (quoting Note AUPSA-0111-051-OIAR (Exhibit CRI-7), last para.).

[640] Costa Rica's second written submission, paras. 472-473.

[641] Costa Rica's first written submission, paras. 348-349.

[642] Costa Rica's response to Panel question No. 117, para. 3.17. In Costa Rica's view, the suspension of imports from the Costa Rican producer in question may only have been justified if, after adopting other measures to change the manner in which the risk is managed, Panama had ascertained that there continued to be instances of non-conformity with its MRLs in strawberry imports. (Costa Rica's first written submission, para. 348)

[643] Costa Rica's response to Panel question No. 117, para. 3.20.

[644] Costa Rica's response to Panel question No. 117, para. 3.21.

[645] Costa Rica's second written submission, para. 474 (referring to Panama's response to Panel question No. 73, para. 208).

[646] Panama's response to Panel question No. 73, para. 208; second written submission, para. 119.

[647] Panama's response to Panel question No. 117, para. 49.

[648] Panama's response to Panel question No. 117, paras. 47-51 (referring, as relevant context, to Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 34; Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, para. 15).

7.244. Panama submits that the authorities of the importing country enjoy wide discretion in determining how serious the violation is. Panama asserts the Codex Guidelines referred to do not dictate the order in which risk management measures must be applied, requiring the importing country to exhaust all other measures before resorting to the suspension of imports. Panama adds that the degree of deference to the importing authority, in the event of non-compliance, is reflected in the use of the words "may" and "should" in the Guidelines. For Panama, the text of both Guidelines makes it clear that an importing country may suspend imports immediately if the case of non-compliance is serious.[649] Panama refers to paragraph 15 of the appendix to Guidelines CAC/GL 47-2003 in its argument that the detection of contaminants and harmful residues in imported food may lead an importing country to suspend the trade in that food until it is confirmed that corrective measures have been introduced and are being implemented effectively.[650]

7.245. The Panel will now analyse the meaning and scope of the terms "serious" and "persistent" in Guidelines CAC/GL 26-1997 and "serious" in Guidelines CAC/GL 47-2003. While the Codex Guidelines do not define these terms, the Panel considers that the text of the relevant paragraphs of the Guidelines provide useful indications as to the meaning of these terms.[651]

7.246. Guidelines CAC/GL 26-1997 indicate that, in the event of non-conformity with food safety requirements, the measures implemented by the importing country should be *proportionate* to the degree of risk and *cumulative*, if necessary.[652] This means that the Guidelines recommend first implementing a measure and then, if justified, imposing additional measures to increase the degree of trade restrictiveness.

7.247. Moreover, the fact that Guidelines CAC/GL 47-2003 refer, first, to enhanced controls of the establishment involved, beside other actions; second, to controls of other establishments where there is evidence of a "systemic problem"[653]; and, third and lastly, to the suspension of the importation of the food from the country, illustrates the order in which, according to the Codex, the mitigation measures should be applied. It should be stressed that Guidelines CAC/GL 47-2003 indicate that the suspension of imports "should be *reserved only*" for situations involving a "serious food safety risk".[654] The same Guidelines also state that a "serious … risk" is one that "has not been managed by other means", since this is the phrase that immediately follows and qualifies "serious … risk".[655] The Panel understands that these considerations also apply when adopting a suspension in "the most serious or persistent cases" within the meaning of Guidelines CAC/GL 26-1997, given that the two Guidelines provide supplementary guidance on the same subject and there is nothing in them that contradicts this understanding.[656]

7.248. Panama refers to paragraph 15 of the appendix to Guidelines CAC/GL 47-2003, which notes that, *inter alia*, the "detection of pathogens, contaminants and harmful residues in imported food ... may lead an importing country to adjust the nature and frequency of inspection, or in extreme cases, to suspend the trade in that food until it is confirmed that corrective measures have been introduced and are being implemented effectively".[657] The Panel considers that this paragraph supports the interpretation that the Guidelines indicate the order in which measures should be adopted once an

[649] Panama's response to Panel questions No. 104, paras. 11-16; and 117, para. 54; comments on Costa Rica's response to Panel questions No. 104, para. 17; and 117, para. 44.

[650] Panama's response to Panel questions No. 104, para. 15; and 114, para. 35 (referring to Codex, Guidelines on Food Import Control Systems (2006) (Exhibit CRI-127), appendix, para. 15).

[651] In order to interpret the pertinent international standards, the Panel may be guided by the customary rules of interpretation of public international law. (Appellate Body Report, *India – Agricultural Products*, para. 5.79). The Panel refers to different sections of the Guidelines in question for context, within the meaning of Article 31 of the Vienna Convention on the Law of Treaties, to interpret the specific paragraphs cited by Costa Rica.

[652] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, paras. 34-35.

[653] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.

[654] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20. (italics added)

[655] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.

[656] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35.

[657] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 4, para. 15.

infringement has been detected, starting with an increase in inspections, and proceeding to a suspension of trade only in serious cases and until assurances are provided the situation has been resolved.

7.249. In the Panel's view, the context in which the term "*grave*" ("serious")[658] appears in both Guidelines indicates that a serious case of non-conformity or a "serious food safety risk" would be an instance where other mitigation measures have not worked. Contrary to what Panama asserts, the Codex Guidelines note that, for a risk to be qualified as serious and for the importing country to be able to decide to suspend imports, the country should first attempt to manage the risk through other measures. In this regard, suspension would be understood as a measure of last resort, as Costa Rica describes it. The Panel does not consider it necessary to rule on the degree to which the Guidelines must be followed, based on the use of the terms "may" and "should", in order to determine whether Measure 1 was adopted on the basis of said Guidelines. While the Guidelines do provide Panama with flexibility in determining which measure to impose based on its assessment of the circumstances, in the Panel's view, it is evident from these Guidelines that the suspension of imports is reserved for "serious" cases or cases involving a "serious risk".[659]

7.250. In this case, Panama has not responded to the detections of non-conformity by implementing measures in a incremental and cumulative manner. On the contrary, Panama has resorted to the most restrictive measure, without first attempting to manage the risk by other means. Panama does not dispute that Measure 1 was the first and only risk management measure that it adopted when oxamyl residues were detected at levels higher than its relevant MRL in two shipments of strawberries from Costa Rica. The Panel considers that the case of non-compliance with the oxamyl MRL in question does not qualify as "serious" or as involving a "serious risk", within the meaning of the Guidelines, given that this is the first detection of a non-conformity in two shipments from the same establishment that was not managed in an incremental manner by, for instance, applying enhanced controls initially. In this respect, Panama fails to explain how the fact that oxamyl is an extremely hazardous substance[660] could affect the possibility of managing the risk in question by means other than a suspension of imports. Therefore, the Panel considers that, by adopting a measure that is tantamount to a suspension of imports of strawberries, Panama failed to follow the guidance of Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 in relation to the management of non-compliance cases based on the seriousness of risk.

7.251. According to Guidelines CAC/GL 26-1997, the suspension of imports may also be adopted in "persistent" cases. The term *"reincidente"* ("persistent") is defined as *"[q]ue reincide o ha reincidido"* ("[t]hat an offence is repeated or has been repeated"), where *"reincidir"* ("persist") is defined as *"[v]olver a caer o incurrir en un error, falta o delito"* ("[t]o repeat or commit an error, offence or crime again").[661] In the light of the criteria for determining risk set out in paragraph 34 of Guidelines CAC/GL 26-1997, the Panel considers that the term "persistent" in paragraph 35 refers to a "repeated non-conformity in the same product or in the same category of products" or "history of non-conformity of those responsible for handling the products". Moreover, the Panel finds it instructive that Guidelines CAC/GL 47-2003 indicate that, in order to assess the risk associated with

[658] The ordinary meaning of *"grave"* ("serious") is *"grande"* ("major") or *"de importancia"* ("significant"). (*Diccionario de la Real Academia Española*, definition of *"grave"* https://dle.rae.es/grave?m=form (accessed 13 August 2024)).

[659] The Panel notes that the Codex Guidelines distinguish between situations of non-compliance with the importing country's requirements and food safety emergency (or urgent) situations. A food safety emergency is a situation, "accidental or intentional", "as yet uncontrolled". (Codex, Principles and Guidelines for the Exchange of Information in Food Safety Emergency Situations (Exhibit CRI-391)). Both parties agree that the definition of emergency situations is not relevant to an analysis of the term "serious" in this case. (Costa Rica's response to Panel question No. 118, para. 3.22; Panama's response to Panel question No. 118, paras. 55-56).

[660] Panama's response to Panel question No. 117, para. 49. The Panel understands that, in order to assess the risk associated with the imported food when designing a control system, one of the factors to take into account may be the risk to human health posed by the product or its packaging. (Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), section 4, para. 22). See also ibid. appendix, section 4, para. 6.

[661] *Diccionario de la Real Academia Española*, definition of *"reincidente"* ("persistent") https://dle.rae.es/reincidente?m=form and definition of *"reincidir"* ("persist") https://dle.rae.es/reincidir (accessed 13 August 2024).

the imported food when designing a control system, one of the factors to take into account is the compliance history of the food.[662]

7.252. As mentioned above, Measure 1 was adopted in response to non-compliance with Panama's oxamyl MRLs in two shipments from the same exporter (Fresas Gego) from Costa Rica. In Note AUPSA-AG-051-2020, through which Panama informed Costa Rica of the adoption of Measure 1, Panama refers to the detection of "various non-conformities in … February 2020".[663] However, in this Note, dated 20 February 2020, Panama only presents the non-conformity of the two shipments from Fresas Gego ascertained on 6 and 18 February, respectively. In the Panel's view, this non-conformity cannot be considered as "persistent" for the purposes of the relevant paragraphs of the Guidelines because it concerns only two samples of the shipments of one exporter that were analysed in the same month and notified together.[664] Otherwise, the recommendation of the Guidelines to adopt measures cumulatively before resorting to the suspension of imports in serious cases or when non-compliance persists would be rendered meaningless.[665]

7.253. In communications sent after Note AUSPA-AG-051-2020, Panama reports having detected other pesticides in shipments from Costa Rica in quantities exceeding Panama's MRLs[666] and notes that it considers these to be "repeated non-conformities detected" in Costa Rican strawberries.[667] However, Panama itself explains that the results of these detections were issued after it had suspended imports of strawberries from Costa Rica.[668] Therefore, given that this information was not available to Panama when it adopted Measure 1 on 20 February 2020, the Panel considers that these detections cannot be used to consider the non-conformities notified on that date as "persistent".

7.254. With respect to its compliance history with MRLs, Costa Rica asserts it has been exporting strawberries to Panama for decades, in accordance at all times with the relevant Panamanian regulations.[669] Costa Rica has submitted a compliance history of its producers with MRLs during the period 2018-2021, that, according to Costa Rica, was produced on the basis of sampling undertaken by the SFE, pursuant to the annual plan for monitoring pesticide residues. Costa Rica adds that the monitoring of Fresas Gego began in 2019, which is when that company was included in the SFE's register of exporters, packers, and traders in plant products for exportation.[670] According to Costa Rica, its history demonstrates that in that period, the Fresas Gego non-compliance is an isolated incident.[671]

7.255. With reference to Costa Rica's history, Panama asserts that Fresas Gego was the only producer of strawberries whose exports were controlled by the SFE for a period of nearly two years[672], and the result of the first sampling of Fresas Gego carried out on 27 February 2020 revealed non-compliance with the MRL.[673] Panama adds that the domestic compliance history of strawberry producers in Costa Rica from 2018-2019 is not relevant to the assessment of Measure 1,

[662] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), section 4, para. 22. See also ibid. appendix, section 4, para. 6.

[663] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[664] This is the first notification of MRL non-compliance in shipments of Costa Rican strawberries sent by Panama to Costa Rica that is in the record. Therefore, there is no evidence of repeated non-compliance, i.e. no evidence that this or any other exporter had failed to comply again after having been informed of an MRL violation.

[665] As Costa Rica points out, Guidelines CAC/GL 47-2003 indicate that more frequent sampling enables a compliance history to be created. The Guidelines also mention that, in cases of a poor compliance history, it may be necessary to physically inspect every consignment or to automatically detain product until their fitness is proven. (Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), para. 24).

[666] Note DNSV-0111-2021-OIAR (Exhibit CRI-13); Note DNSV-0128-2021 (Exhibit CRI-18).

[667] Note DNSV-0128-2021 (Exhibit CRI-18), penultimate para.

[668] Panama's response to Panel question No. 19, para. 83.

[669] Costa Rica's first written submission, para. 14.

[670] Costa Rica's response to Panel question No. 111, paras. 3.2-3.3 (referring to Fresas Gego registration decision (Exhibit CRI-373)).

[671] Costa Rica's response to Panel question No. 111, para. 3.5.

[672] Panama refers to the period between 30 September 2019 and 19 April 2021, which is when Costa Rica states that sampling of the producer Plantas y Flores Ornamentales CABH S.A was undertaken. (See the table in Costa Rica's response to Panel question No. 111).

[673] Panama's comments on Costa Rica's response to Panel question No. 111, para. 31.

adopted in 2020, because exports of strawberries from Costa Rica to Panama during the two years prior to 2020 were "sporadic".[674]

7.256. The Panel notes that the compliance history of domestic sampling by Costa Rica includes data of samples taken between October 2018 and November 2021 from three exporters: Plantas y Flores Ornamentales CABH S.A., Central de Flores RGJ, and Gregory Herrera Siles (Fresas Gego). Reference is made to 21 samples, four of which were taken from sampling of Plantas y Flores Ornamentales CABH S.A. and Central de Flores FGJ, and the other samples were taken from Fresas Gego as from 27 February 2020, after Measure 1 was adopted. The only case of non-compliance included is that of Fresas Gego on 27 February 2020. In any event, the Panel understands that the results of Costa Rica's domestic sampling were not available to Panama in February 2020.

7.257. Panama also submits an exhibit that, in its view, contains the history of compliance with its MRLs of imports from Costa Rica between 2017 and 2020. Panama asserts that, since Costa Rica exported hardly any strawberries to Panama up to 2020, there is no MRL compliance history for strawberry imports prior to 2020. According to Panama, its history indicates that all samples of strawberries from Costa Rica contained pesticides and 75% of them infringed the MRLs.[675]

7.258. Costa Rica asserts that Panama's compliance history cannot be considered to be a history of repeated cases of non-conformity because it does not reveal cases of non-compliance prior to the two shipments of February 2020 that triggered the adoption of Measure 1.[676] Costa Rica argues that the history submitted by Panama refers to (a) different imports of strawberries for the period 2016-2019; (b) the infringements that triggered Measure 1; (c) the infringements notified to Costa Rica on 1 March 2021, with respect to which Panama did not have any analysis results when Measure 1 was adopted; and (d) sample codes without any documentation or information that allows the shipments corresponding to these samples to be identified.[677]

7.259. The Panel notes that the entries from 2016 to 2019 in the MRL compliance history submitted by Panama correspond to products other than strawberries (specifically, mango, chayote, banana, lettuce, and pumpkin).[678] Panama fails to explain the relevance of these entries to the adoption of Measure 1.

7.260. The history submitted by Panama includes the same information arising from the control on strawberry imports in 2020 that Panama notified to Costa Rica in its communications of February 2020 and March 2021, referred to in paragraphs 7.252 -7.253 above.[679] As Costa Rica notes, the sample codes LRT-003-2020 and LRT-009-2020 in the compliance history submitted by Panama correspond to the detections notified in February 2020[680], while sample code LRT-091-2020 corresponds to the detections notified in March 2021.[681] As for sample code LRT-092-2020, this also

[674] Panama's comments on Costa Rica's response to Panel question No. 111, paras. 32 and 34 (referring to ITC, Trade Map – List of supplying markets for fresh strawberries imported by Panama (2015-2022) (Exhibit PAN-121)).

[675] Panama's response to Panel question No. 111, paras. 33-34 (referring to DNSV, MRL compliance history results for shipments from Costa Rica (2016-2020) (Exhibit PAN-122)). Although Panama refers to Exhibit PAN-123 in response to Panel question No. 111, the Panel understands that its assertions relate to the contents of Exhibit PAN-122.

[676] Costa Rica's comments on Panama's response to Panel question No. 111, paras. 3.6 and 3.12.

[677] Costa Rica's comments on Panama's response to Panel question No. 111, paras. 3.8-3.11.

[678] DNSV, MRL compliance history results for shipments from Costa Rica (2016-2020) (Exhibit PAN-122).

[679] Note AUPSA-AG-051-2020 (Exhibit CRI-7); Note DNSV-0128-2021 (Exhibit CRI-18).

[680] See the sample codes in Note AUPSA-AG-051-2020 (Exhibit CRI-7); and the recoding of the sample in DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Reception of Samples and Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-003-2020 (Exhibit PAN-36); and DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Reception of Samples and Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-009-2020 (Exhibit PAN-37).

[681] In the report by the Panamanian authorities regarding the detections notified in February 2020 and March 2021, code LRT-091-2020 is mentioned in addition to sample code LRT-003-2020. (DNSV, Internal communication of 19 August 2021, "Report and annexes setting out the analysis carried out on strawberries from Costa Rica" (Exhibit PAN-45), pp. 3, 48-50 and 54). The quantities of cypermethrin, spiromesifen, acephate, methamidophos and prochloraz given in the compliance history in Exhibit PAN-122 match those notified in March 2021. (See Note DNSV-0128-2021 (Exhibit CRI-18)).

corresponds to the detections notified in March 2021.[682] The Panel recalls that the results of these additional detections notified in March 2021 post-date the adoption of Measure 1 on 20 February 2020[683], and, therefore, would not form part of the compliance history upon which Panama could have based that measure.

7.261. In the light of the foregoing analysis, the Panel considers that Panama has failed to demonstrate that it adopted Measure 1 on the basis of information indicating repeated non-compliance, because Measure 1 was triggered by a single instance of non-compliance, which was notified in February 2020. Therefore, the Panel considers that, by adopting a measure that equates to a suspension of strawberry imports in a case that cannot be considered as "persistent", Panama has not followed the guidance of Guidelines CAC/GL 26-1997 regarding the management of cases of non-conformity.

7.262. Moreover, the Panel recalls that Panama argues that this case is a serious or persistent case because, in addition to the non-compliance in question, there was the "impossibility of verifying the reliability of the controls carried out by the exporting country".[684] In this respect, the Panel considers that Panama has failed to demonstrate that it was impossible for it to obtain information from Costa Rica with respect to its controls before Measure 1 was adopted. Accordingly, Panama has failed to demonstrate that Measure 1 was adopted on the basis of this consideration.

7.263. Given that Measure 1 equates to a suspension of imports of strawberries from Costa Rica without it having been demonstrated that there were "serious or persistent" cases of non-compliance or that posed a "serious risk", the Panel concludes that Panama did not adopt Measure 1 on the basis of Codex Guidelines CAC/GL 26-1997 and CAC/GL 47-2003.

7.264. The Panel will now examine whether Panama adopted Measure 1 on the basis of information arising from measures implemented by other Members invoked by the parties.

Whether Measure 1 was adopted on the basis of information arising from the measures of other Members

7.265. According to Costa Rica, the measures of the European Union, the United States, and Australia[685] support the provisions of the Codex Guidelines, namely that the measures adopted in response to non-compliance with food safety requirements must be proportionate and incremental, and that, as a general rule, they do not consist of a "prohibition on the importation" of a product originating in a specific country.[686] Costa Rica asserts that the appropriate measure would be to change the manner in which the risk is managed through measures such as increasing the frequency of border controls, requiring a shipment to be accompanied by analysis results confirming compliance with the MRL, and requiring prior notification on the arrival of the shipment.[687] Costa Rica notes that greater controls allow imports to go ahead, provided the importer demonstrates that the shipment

[682] In the report by the Panamanian authorities regarding the detections notified in February 2020 and March 2021, code LRT-092-2020 is mentioned in addition to sample codes LRT-003-2020 and LRT-091-2020. (DNSV, Internal communication of 19 August 2021, "Report and annexes setting out the analysis carried out on strawberries from Costa Rica" (Exhibit PAN-45), pp. 3 and 51-53). The quantities of cypermethrin and carbendazim given in the compliance history in Exhibit PAN-122 match those notified in March 2021. (See Note DNSV-0128-2021 (Exhibit CRI-18)).

[683] The results of the detections notified in February 2020 date from 6 and 18 February 2020, while the results of the detections notified in March 2021 date from 10 and 16 March 2020.

[684] Panama's response to Panel question No. 117, para. 49.

[685] Costa Rica refers to the European Union's imposition of official controls with respect to certain products from Türkiye, Viet Nam and India, prior to their exportation, including sampling and testing, in order to ensure that these products comply with the relevant requirements. Costa Rica notes that, in the case of the United States, the detection of non-compliance with an MRL may result in the adoption of a measure of detention without physical examination, according to which the product may enter, provided its compliance with the relevant MRL is demonstrated. Costa Rica adds that this measure can be withdrawn when a history of compliance is established. According to Costa Rica, Australia has a similar system to that of the United States. (Costa Rica's first written submission, paras. 353-355 (European Union); 356 (United States) and 357 (Australia); second written submission, paras. 455-462 (European Union); 464 (United States) and 465 (Australia)).

[686] Costa Rica's first written submission, paras. 338 and 352; second written submission, paras. 449, 454 and 468.

[687] Costa Rica's first written submission, para. 358; second written submission, paras. 449, 463 and 466.

complies with the relevant MRLs. Costa Rica adds that those controls are not permanent because they can be withdrawn when the producer demonstrates a history of compliance.[688]

7.266. Although Panama initially disagrees on the relevance of the measures identified by Costa Rica, Panama subsequently refers to measures by other Members and asserts that there is no uniform regulatory response in food safety cases. Panama argues that the pertinent regulations of the European Union do not exclude the possibility of introducing a prohibition on importation for all of the exporting country.[689] Panama also refers to the practices of Chinese Taipei and the United States. According to Panama, the importing country has broad discretion over deciding how serious the violation is, and it is not uncommon for it to adopt a temporary prohibition on imports in the event of repeated MRL infringements.[690]

7.267. The Panel will now analyse the measures of the European Union, the United States, Australia, and Chinese Taipei that are in the record.

7.268. With respect to the European Union's measure, the Panel refers to Regulation No. 178/2002 of 2002 laying down the general principles and requirements of food law. Both parties invoke Article 53, entitled "Emergency measures for food and feed of Community origin or imported from a third country".[691] This article establishes that "[w]here it is evident that food or feed ... is likely to constitute a serious risk to human health, animal health or the environment, and that such risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned", the European Commission shall immediately adopt one or more of the measures listed therein, "depending on the gravity of the situation". In the case of food or feed from a third country, these measures include: (a) suspension of imports of the food or feed in question from all or part of the third country concerned; (b) laying down special conditions for the food or feed in question from all or part of the third country concerned; and (c) any other appropriate interim measure.[692] Article 54, entitled "Other emergency measures", provides that Member States may adopt "interim protective measures" where the Commission has not acted in accordance with Article 53. In another European Union Regulation, it is explained that Articles 53 and 54 "shall apply where, as a result of new information or of a reassessment of existing information, pesticide residues or MRLs covered ... may endanger human or animal health requiring immediate action".[693]

7.269. The record also contains examples of the European Commission imposing special or specific conditions on the import of certain foods from third countries and an increased level of official controls pursuant to the aforementioned regulations.[694] Regulation No. 2018/1660 imposed special conditions on the import of vine leaves from Türkiye and pitahaya (dragon fruit) from Viet Nam. The Regulation refers to a previous increased level of official controls on imports of these products.[695] It notes that, even after increasing the frequency of controls at European Union borders, there was a "high frequency of non-compliance" with the respective MRLs for both products. In the case of Türkiye, information was obtained from the official controls, notifications received from member States, audit reports by the Commission, and reports received from third countries, among other sources. In the case of Viet Nam, an audit was also carried out that found there was no official effective pesticide control system for food exported to the European Union and that the authorities could not ensure compliance of Vietnamese products with MRLs.[696] For the European Union, this provided evidence that the import of vine leaves from Türkiye and of pitahaya from Viet Nam could constitute "a serious risk to health" that could not be "contained satisfactorily by the measures" in

[688] Costa Rica's first written submission, para. 358.

[689] Panama's opening statement at the second meeting of the Panel, paras. 94-95.

[690] Panama's response to Panel question No. 117, paras. 53-54.

[691] Costa Rica's first written submission, para. 353; Panama's response to Panel question No. 117, para. 52.

[692] European Union Regulation No. 178/2002 (Exhibit CRI-128), Article 53.1(b); European Union Regulation No. 178/2002 (Exhibit PAN-120), Article 53.1(b).

[693] European Union Regulation No. 396/2005 (Exhibit PAN-119), Article 35.

[694] In their preambles and recitals, the pertinent Regulations refer to Article 53 of Regulation No. 178/2002. (European Union Regulation No. 2018/1660 (Exhibit CRI-129); European Union Regulation No. 669/2009 (Exhibit CRI-130); and European Union Regulation No. 885/2014 (Exhibit CRI-131)).

[695] European Union Regulation No. 2018/1660 (Exhibit CRI-129), recital 2. This Regulation refers to European Union Regulation No. 669/2009 which lays down rules concerning the increased level of official controls at the points of entry into the European Union for certain products from third countries. These controls were documentary, identity and physical checks (including laboratory analysis) (European Union Regulation No. 669/2009 (Exhibit CRI-130), Article 8).

[696] European Union Regulation No. 2018/1660 (Exhibit CRI-129), recitals 3-4.

place. It was therefore necessary to establish special conditions of import for those products.[697] The same Regulation extends the application of the special conditions of import to curry leaves from India in light of data showing "a continuous high frequency of non-compliance".[698]

7.270. Regulation No. 2018/1660 provides that the products in question from India, Türkiye, and Viet Nam must be subject to official controls before export, including sampling and analysis by the country of origin, and accompanied by a health certificate. It also requires an identification code for each consignment of products and prior notification of consignments.[699] It provides for documentary, identity and physical checks on consignments, including sampling and analysis, carried out by the authorities at the point of entry[700], and mentions the possibility of the product being rejected due to non-compliance with an MRL.[701]

7.271. The Panel also notes that the European Union regulations reflect the practice of lifting special conditions where, following their application, the competent authorities do not detect concerning contaminants in the products in question. Regulation No. 669/2009 provides that, given that the frequency of the notifications in relation to the presence of certain substances in specific products imported from third countries had decreased, the special conditions applicable to those products were discontinued and, instead, said products were subject to an increased level of controls at the point of entry into the European Union.[702]

7.272. With regard to the measure applied by the United States, the Regulatory Procedures Manual of the Food and Drug Administration (FDA) states that if it appears from the examination of a product or otherwise that the product violates the requirements set out in United States legislation, it can be refused admission into the country. The Manual recommends detention without physical examination (DWPE) for future shipments when there exists a history of the importation of violative products, or products that may appear violative, of United States legislation, or when other information indicates that future entries of a product may violate that legislation.[703] If one sample of an imported product has been found violative and the violation represents a potentially significant health hazard, this may support a recommendation for DWPE of products from a specific manufacturer, shipper, grower, or from a specific growing area or country (if information is sufficient to establish an appearance that the violation extends to that area/country).[704] Where multiple samples show violations, recommendations for DWPE of a product from a geographic area or country should consider whether there have been at least 12 detentions in a recent six-month period or less, whether these detentions represent at least 25% of the total shipments of that product examined in that time-period, and whether these detentions represent a significant number of firms from the geographic area or country.[705]

7.273. To remove a product, exporter, or importer from DWPE, an important element of the FDA's decision is the extent to which the evidence shows that future shipments will be in compliance with United States legislation. In the event that illegal pesticide residue has been found in fresh produce, the DWPE may be removed following five consecutive shipments without violation and if adequate documentation demonstrates that the residue problem no longer exists, that the shipment has not

[697] European Union Regulation No. 2018/1660 (Exhibit CRI-129), recital 5.

[698] European Union Regulation No. 2018/1660 (Exhibit CRI-129), recital 6. European Union Regulation No. 885/2014, which initially lay down the specific conditions applicable to curry leaves from India, states that the increased frequency of controls had shown a "continuous high frequency of non-compliance" with the European Union's MRLs. It also notes that, despite the request from the European Commission, no action plan to remediate the shortcomings and deficiencies in the production and control systems was received from the Indian authorities. (European Union Regulation No. 885/2014 (Exhibit CRI-131), recitals 3-5 and Articles 3-8).

[699] European Union Regulation No. 2018/1660 (Exhibit CRI-129), recital 7 and Article 4.1. See also ibid. Articles 5-8. The Regulation stipulates that it should be reviewed before a year had elapsed. (Ibid. recital 12 and Article 13).

[700] European Union Regulation No. 2018/1660 (Exhibit CRI-129), Article 8.

[701] European Union Regulation No. 2018/1660 (Exhibit CRI-129), Article 11.

[702] European Union Regulation No. 669/2009 (Exhibit CRI-130), recitals 8-9.

[703] USFDA, "Import Operations and Actions" (2022) (Exhibit CRI-132), section 9-8-2, pp. 35-36, and section 9-8-7, p. 38. The recommendation for DWPE may be based on information that the produce was harvested from polluted water, manufactured or held under insanitary conditions, or manufactured in a manner that is non-compliant with Good Manufacturing Practices. (Ibid.)

[704] USFDA, "Import Operations and Actions" (2022) (Exhibit CRI-132), section 9-8-8, p. 38. See also USFDA, "FDA's Pesticide Residue Monitoring and Enforcement" (2018) (Exhibit PAN-125), p. 22.

[705] USFDA, "Import Operations and Actions" (2022) (Exhibit CRI-132), section 9-8-10, p. 40.

been treated with pesticides, that the produce originated in untreated fields, or that steps have been instituted to prevent occurrence of future violations.[706]

7.274. The evidence in the record also indicates that sampling by the United States authorities at the border targets commodities and countries that might warrant special attention based upon high violation rates of safety regulations and certain trends.[707]

7.275. With regard to the measure applied by Australia, a screenshot of the web page of the Australian Department of Agriculture, Water and the Environment explains that, under the Imported Food Control Act 1992, "failing foods" are those that have failed analytical testing or contain non-permitted additives or ingredients. It states that if the failing food is a surveillance food, a holding order can be applied. This will refer all future consignments of that food for inspection. A holding order remains in place until a history of compliance can be demonstrated, usually after five consecutive passes. The screenshot also states that if the failing food is a "risk food", 100% of future consignments will be referred for inspection until a compliance history is established.[708]

7.276. Panama also refers to the practice of Chinese Taipei, as described in a report of the Foreign Agricultural Service of the United States Department of Agriculture (USDA).[709] This report states that, with respect to imported fresh fruit, non-compliance with this Member's pesticide standards will result in the recall and rejection of the products. It indicates that inspection frequency of the same commodity imported by the same importer will be elevated to 20-50% from the regular 2-5% rate after one violation. Following two consecutive violations, inspections will be on a lot-by-lot basis. If the same cause of violation continues to occur in the same commodity, a plan of improvement may be required from the source exporter or country. If the plan of improvement is not satisfactory, imports from that source may be temporarily suspended, which could be extended to the entire territory of the supplying country.[710]

7.277. The Panel considers that the aforementioned measures applied by Members that are in the record demonstrate that, when a shipment is determined to be inconsistent with the relevant MRLs by means of laboratory tests or otherwise, other Members can reject that violative shipment. With respect to the measures imposed on future shipments, the Panel notes that each country has its own procedures for responding to cases of non-compliance with food safety requirements and, as Panama asserts, the possibility of suspending imports of a product from the entire country of origin in certain cases is not ruled out. However, the Panel considers that the evidence relating to the measures taken by other Members supports Costa Rica's assertion that the practices of those Members consist, initially, of changing the manner in which the risk is managed by imposing control measures of gradually increasing intensity.

7.278. While European Union legislation provides for the possibility of suspending imports of a food from all or part of the territory of the country in question, based on the examples in the record, it

[706] USFDA, "Import Operations and Actions" (2022) (Exhibit CRI-132), section 9-8-15, pp. 43-44, and section 9-8-17, pp. 45-46. The Manual sets out different conditions for importers placed on DWPE for the first time (which have to supply documentation for five shipments) and those who have already been placed on DWPE in the past (that have to supply documentation for 10 shipments). (See ibid. section 9-8-18, pp. 46-47). See also USFDA, *Pesticide Residue Monitoring Program Fiscal Year 2019 Pesticide Report* (Exhibit CRI-133), p. 10 (which notes that importers subject to DWPE can request removal of their product from DWPE by providing evidence that the issue has been resolved, and that the FDA can have confidence that future entries will be in compliance with United States legislation on MRLs. Generally, five consecutive non-violative shipments, as demonstrated by private laboratory analyses, as well as an effective, detailed approach to addressing the problem, are required) See also USFDA, "FDA's Pesticide Residue Monitoring and Enforcement" (2018) (Exhibit PAN-125), p. 24.

[707] USFDA, *Pesticide Residue Monitoring Program Fiscal Year 2019 Pesticide Report* (Exhibit CRI-133), pp. 11-12 and 32. Examination of the 2019 data indicates that import commodities that may warrant special attention are those with at least 20 samples analysed or with a minimum of 3 violations, or a violation rate of 10% or higher. (Ibid. p. 32). See also USFDA, "FDA's Pesticide Residue Monitoring and Enforcement" (2018) (Exhibit PAN-125), p. 29.

[708] Department of Agriculture, Water and the Environment of Australia, Failing food reports (Exhibit CRI-134).

[709] Panama's response to Panel question No.117, para 53 (where Panama notes that, after two consecutive detections, Chinese Taipei requires a plan of improvement and, if this is not satisfactory, imports may be suspended, including from the entire country).

[710] USDA, "Food and Agricultural Import Regulations and Standards - Narrative" (2009) (Exhibit PAN-124), p. 14.

does not seem that this is a measure that is imposed as a first response to an MRL infringement. In the Panel's view, the examples in the record indicate that the European Union gradually increases the intensity of its controls, up to requiring analysis and sampling at the point of origin and entry in cases where a continuous high frequency of non-compliance is observed.[711] The Panel finds the explanation of this approach in one of the European Union Regulations, which states that an increased level of control should allow the known or emerging risk to be countered, and, on the other hand, the collection of accurate monitoring data on the occurrence and prevalence of unfavourable results from laboratory analysis.[712] Moreover, the Panel notes that for the European authorities, another way of collecting relevant data is through audits at origin and requests for information addressed to the country of origin.[713]

7.279. Likewise, in the case of Chinese Taipei, import controls are gradually intensified as violations increase, before requiring a plan of improvement if non-compliance persists. Only if that plan is not satisfactory may imports of the product from the same origin be suspended.[714]

7.280. With regards to the detention/holding orders of the United States (DWPE) and Australia, the Panel notes that these practices allow the products of a producer, importer, area, or country to be monitored, thus establishing a compliance history that builds trust in the conformity of future shipments. The United States authorities, in particular, permit the importer to prove that the conditions that gave rise to the violation have been overcome and that the problem has been addressed in a manner that will prevent future non-compliance.[715]

7.281. Therefore, the Panel considers that, in cases of non-compliance, the Members mentioned decide which measures to impose on future consignments based on the seriousness of the situation, taking into account the risk posed by the contaminant, whether that risk could be controlled satisfactorily with other measures, as well as the likelihood of persistent non-compliance. For these Members, the compliance history, including the rate or frequency of non-compliance, appears to be a deciding factor. Hence, the control measures of these Members seek to obtain data on this matter. Evidence of the existence or absence of an effective official control system in the country of origin or that is implemented by the producer in question also appears to be a relevant factor.

7.282. The Panel recalls that Measure 1 seeks to "disallow" imports of strawberries from Costa Rica in response to the non-compliance with Panama's oxamyl MRLs in two shipments from the same exporter from Costa Rica (Fresas Gego).[716] As mentioned[717], Panama does not dispute that this measure was the first and only risk management measure that it adopted following the detection in question. Panama did not adopt measures following the incremental approach outlined in the examples of measures adopted by other Members following a first detection of non-conformity.

7.283. Accordingly, the Panel considers that Panama did not adopt Measure 1 on the basis of pertinent information derived from measures applied by other Members that are in the record.

Information on Costa Rica's control system

7.284. Panama also argues that Measure 1 was based on its knowledge of Costa Rica's production and control system.[718] In this respect, the parties disagree as to whether the detections of non-conformity that Panama notified to Costa Rica on 20 February 2020 pointed to the existence of a "systemic problem" with Costa Rica's controls.

7.285. Costa Rica claims that the information available to Panama did not point to the existence of a "generalized or systematic problem" that affected all Costa Rican strawberry producers, but rather a risk limited to the Costa Rican producer involved.[719] In this respect, Costa Rica asserts that non-compliance with an MRL in food shipments means that the specific producer responsible for that

[711] See paras. 7.268 -7.271 above.
[712] European Union Regulation No. 669/2009 (Exhibit CRI-130), recital 1.
[713] See para. 7.269 above and fn 698.
[714] See para. 7.276 above.
[715] See paras. 7.272 -7.275 above.
[716] See para. 2.5 above.
[717] See para. 7.250 above.
[718] Panama's response to Panel question No. 123, para. 61.
[719] Costa Rica's first written submission, paras. 362-363.

shipment may have used a pesticide in quantities higher than those permitted, whether due to an inadvertent error or a lack of care by that producer in relation to that specific shipment. Costa Rica argues that it cannot be concluded that the food shipments of other producers are also failing or will fail to comply, given that responsibility for using pesticides properly lies with each individual producer.[720] Costa Rica maintains it is pertinent to take into account the fact that the use of oxamyl in strawberry production is not authorized in its territory.[721] Costa Rica adds that its *Manual on good agricultural and production practices for strawberry crops* confirms that Costa Rica maintains a GAP system that is mandatory for strawberry producers, which suggests that it is unlikely there is a systemic problem with oxamyl use in strawberry production in Costa Rica.[722]

7.286. Panama submits that the available information pointed to the existence of a "systemic problem with Costa Rica's sanitary control system" that it describes as being related to the adequacy of existing processing controls in Costa Rica, including its infrastructure and ability to enforce food safety requirements effectively.[723] First, Panama asserts the detection of oxamyl residues in quantities 2.2 and 8.6 times greater than the relevant MRL pointed to the existence of a broader "systemic problem" with Costa Rica's sanitary control systems, a fact that was corroborated a few days later by the detection of five other pesticides in shipments of strawberries from Costa Rica.[724] Panama adds that MRL non-compliance is not simply the responsibility of the individual producer, and that the authorities of exporting countries play an active role when it comes to ensuring the adequacy of their national production and control systems. Thus, according to Panama, importing countries have the right to extend risk management measures to other producers in the importing country.[725] Second, according to Panama, the evidence suggests that the prohibition on the use of oxamyl in strawberry production in Costa Rica is not being implemented effectively, which would suggest a greater potential for adverse effects than is acceptable to Panama with respect to human health arising from the consumption of oxamyl in strawberries.[726] Third, Panama argues that, given Fresas Gego is the only exporter of Costa Rican strawberries to Panama, imports from that company correspond to the total volume of imports of Costa Rican strawberries to Panama, and non-compliance on the part of that producer would immediately make the problem a systemic one.[727]

7.287. Based on the arguments of the parties, the Panel will determine whether Panama has demonstrated that there was a "systemic problem" with Costa Rica's sanitary control systems. As mentioned in paragraph 7.166 above, the Panel understands that, when assessing the risk, Panama may consider the information relating to Costa Rica's ability to enforce Panama's food safety requirements to be pertinent. The arguments of the parties on this issue focus on three elements of information: (a) the detected level of oxamyl residues that triggered Measure 1; (b) the absence of authorization to use oxamyl in strawberry crops in Costa Rica; and (c) the importance of the producer responsible for the non-compliance, Fresas Gego.

7.288. The Panel begins its analysis with the information on Costa Rica's controls, which derives from the non-compliance of an exporter of strawberries from Costa Rica with Panama's oxamyl

[720] Costa Rica's opening statement at the first meeting of the Panel, para. 71.
[721] Costa Rica's first written submission, para. 363.
[722] Costa Rica's response to Panel question No. 116, paras. 3.10 and 3.16.
[723] Panama's response to Panel question No. 125, para. 67.
[724] Panama's first written submission, para. 217. According to Panama, detections of pesticide residues of cypermethrin, spiromesifen, acephate, methamidophos, prochloraz, and carbendazim at levels higher than the relevant MRLs of Panama in shipments of strawberries from Costa Rica were not included in the pertinent information available to Panama when it adopted Measure 1. However, these additional instances of non-conformity were a factor in favour of maintaining the measure, since they raised potentially wider issues with Costa Rica's sanitary controls. (Panama's response to Panel question No. 17, para. 81).
[725] Panama's response to Panel question No. 114, paras. 35-38. Panama considers that the Codex Guidelines provide for the possibility of the importing country extending measures to other producers and that they reflect the national practices cited by Costa Rica, and it quotes European Union Regulation No. 885/2014 (Exhibit CRI-131); and USFDA, *Pesticide Residue Monitoring Program Fiscal Year 2019 Pesticide Report* (Exhibit CRI-133).
[726] Panama's first written submission, para. 217; second written submission, para. 117. Panama notes that, since Costa Rica's controls were identified as potentially ineffective, Panama adopted "precautionary measures" while it sought to obtain the additional information for a more objective assessment of risk. (Panama's second written submission, para. 117).
[727] Panama's second written submission, para. 116.

MRL.[728] When Panama informed Costa Rica of the adoption of Measure 1, it provided the following data on the detection of oxamyl in shipments of Costa Rican strawberries[729]:

Table 5 - Detections of oxamyl in shipments of Costa Rican strawberries notified to Costa Rica in February 2020[730]

Notification No./ exporter	Product	Date of entry to the laboratory	Parameter	Result/date	Legal basis
4590400 FRESASGEGO	Strawberries	14/01/2020	Oxamyl	**NON-COMPLIANT** 0.056 mg/kg 06/02/2020	According to Executive Decree No. 467 of 7 November 2007, the MRL for oxamyl is 0.01 mg/kg
4579814 FRESASGEGO	Strawberries	23/01/2020	Oxamyl	**NON-COMPLIANT** 0.022 mg/kg 18/02/2020	According to Executive Decree No. 467 of 7 November 2007, the MRL for oxamyl is 0.01 mg/kg

7.289. According to the data reported, oxamyl residues in samples of two shipments of strawberries from the exporter Fresas Gego are 0.056 mg/kg and 0.022 mg/kg. This means that the level of residues in these samples was 2.2 and 5.6 times higher than Panama's MRL for oxamyl in strawberries, which was set at 0.01 mg/kg.

7.290. The Panel notes that the evidence in the record suggests that the European Union considers both the frequency and level of non-compliance as proof that the importation of certain food poses a risk.[731] The Panel understands that, as Panama asserts[732], the level of pesticide residue in the food may be linked to consumer exposure to that pesticide. Accordingly, the Panel considers it reasonable that, among other factors, the quantity of pesticide residue detected (or the degree to which it exceeds the relevant MRL) might influence the level of risk posed by the product in question. However, Panama has failed to explain how the quantities of oxamyl residue detected in the two Costa Rican shipments in question would affect the relevant risk. Panama only argues that these quantities show a "systemic problem" with Costa Rica's controls.

7.291. Moreover, the Panel stresses that the detection of oxamyl residues in quantities 2.2 and 5.6 times higher than the MRL corresponds solely to two strawberry shipments from the same producer made at around the same time. The Panel does not consider that Panama has demonstrated that its MRL being exceeded in the case in question is, by itself, proof of a systemic problem with Costa Rica's controls or a serious situation justifying the suspension of all imports of Costa Rican strawberries.

7.292. The Panel understands that, according to the Codex Guidelines, in cases of non-compliance, a factor that must be taken into account in order to adopt measures proportionate to the degree of risk is the reliability of the checks made by the exporting country.[733]

7.293. However, the Panel finds no evidence of a systemic problem with Costa Rica's controls in Panama's Note announcing the adoption of Measure 1, or in the relevant laboratory analyses.[734] The

[728] As noted in para. 7.184 above, the information on the detections constitutes pertinent information, given that Panama adopted Measure 1 in response to these detections.

[729] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[730] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[731] European Union Regulation No. 885/2014 (Exhibit CRI-131), recital 4 (which notes that a high frequency of non-compliance and very high levels were observed).

[732] Panama's response to Panel question No. 123, para. 62.

[733] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 34. See also Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 4, para. 6 (which notes that, in order to assess the level of risk associated with the imported food, the competent authority may consider the exporting country's ability to effectively enforce food safety requirements, as may verified by audits and sampling results by the competent authority of the importing country).

[734] Note AUPSA-AG-051-2020 (Exhibit CRI-7); DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Reception of Samples and Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-003-2020 (Exhibit PAN-36); DINASA, Laboratory for the Analysis of Pesticide Residues in Plants and Plant Products, Analysis Report CSTAQ-LRT-PON-F-30, Sample LRT-009-2020 (Exhibit PAN-37); DNSV,

Panel also observes that there is no information in the record about the cause of the non-compliance, in particular, where contamination with the pesticide occurred and why it was not detected by field checks and at the border in Costa Rica.[735] Moreover, Panama does not provide any other details from which it could be concluded that the non-compliance in question is indicative of a systemic problem with the controls ensuring the safety of strawberries exported from Costa Rica.

7.294. With regard to the use of oxamyl in Costa Rica, Costa Rica asserts that oxamyl may not be used in strawberry production within its territory because it is not on the list of pesticides authorized for that purpose.[736] Costa Rica asserts that the fact it does not authorize the use of oxamyl in strawberry production within its territory demonstrates there is no generalized or systemic problem with strawberry production in the country.[737] Panama does not question this assertion, but responds that the detection of oxamyl in shipments of Costa Rican strawberries cast doubt on whether the prohibition on its use in Costa Rica is being implemented effectively, which, in Panama's view, suggests a greater potential for adverse effects on human health arising from the consumption of oxamyl in strawberries than is acceptable to Panama.[738]

7.295. As mentioned in paragraph 7.168 above, the record contains a certified list of pesticides and related substances authorized in strawberry crops in Costa Rica, which does not include oxamyl.[739] Although this document post-dates the adoption of Measure 1 in February 2020, Panama confirms that it was aware that Costa Rica did not authorize the use of oxamyl in strawberry production at that time.[740] Furthermore, the *Manual on good agricultural and production practices for strawberry crops*, which covers management of the production, packing, and transport of strawberries in Costa Rica, was available to Panama. Although Panama asserts that it did not possess information about the implementation of this Manual[741], Panama has not argued that any of Costa Rica's GAP outlined therein[742] were insufficient or problematic with regard to pesticide control in strawberry production in Costa Rica.[743]

7.296. In relation to the existence or not of a generalized or systemic problem with Costa Rica's control systems, the parties also disagree on the representativeness of the non-compliant shipments in question. Panama asserts that Fresas Gego was the only exporter of Costa Rican strawberries to Panama and that, therefore, its imports would correspond to the total volume of Costa Rican imports.[744] For Panama, this suggests that non-compliance by this producer would immediately make the problem a systemic one.[745] Costa Rica submits that there are four other Costa Rican

Internal communication of 19 August 2021, "Report and annexes setting out the analysis carried out on strawberries from Costa Rica" (Exhibit PAN-45); and DNSV, Internal communication of 19 August 2021, "Subject STRAWBERRIES Costa Rica - Missing annexes" (Exhibit PAN-46).

[735] The Panel understands that, as Costa Rica asserts, non-compliance with an MRL in food shipments may indicate that the specific producer responsible used a pesticide in quantities higher than those permitted, whether due to an inadvertent error or a lack of care by that producer in relation to that specific shipment. At the same time, the Panel considers that the authorities of the exporting country are responsible for exercising control over food production within its territory. In any event, the Panel notes that Costa Rica agrees with the foregoing, given that it points out that its competent authority monitors GAP compliance. (Costa Rica's comment on Panama's response to Panel question No. 114, para. 3.18).

[736] Costa Rica's response to Panel question No. 112, para. 3.6.

[737] Costa Rica's first written submission, para. 363. According to Costa Rica, Panama should have concluded that, given the prohibition on the use of oxamyl in strawberry production in Costa Rica, it is unlikely that there is a systemic problem with the use of oxamyl in strawberry production in Costa Rica. (Costa Rica's second written submission, para. 483).

[738] Panama's first written submission, para. 217. See also Panama's second written submission, para. 117.

[739] SFE, Certification of pesticides for use in strawberries, AE-REG-C-0035-2022 (Exhibit CRI-5).

[740] Panama's second written submission, para. 117.

[741] Panama also asserts that the Manual is not pertinent because it does not address the management of the risk of non-compliance with MRLs. (Panama's response to Panel question No. 116, paras. 44-45). The Panel notes that Panama considers Costa Rican regulations to be pertinent, hence the Panel sees no reason to exclude this Manual from its analysis.

[742] See paras. 7.169 -7.173 above.

[743] See para. 7.170 above.

[744] In its responses to the Panel questions, Panama also asserts that, when taking the relevant risk management decisions, the Panamanian authorities took into account, *inter alia*, the "systemic importance of the non-compliant provider". See Panama's responses to Panel question No. 123, para. 61, and No. 124, para. 64.

[745] Panama's second written submission, para. 116. See also Panama's response to Panel question No. 18, para. 84. Panama asserts that, in the light of the fact that Fresas Gego was the only Costa Rican

exporters[746], and that the information available did not point to a systemic problem affecting all Costa Rican producers of strawberries.[747]

7.297. The Panel refers to its conclusions in paragraphs 7.197 and 7.199 above that: (a) Panama has failed to demonstrate that Fresas Gego was the only exporter of Costa Rican strawberries to Panama; and (b) the relevance of the data on Costa Rican strawberry exports to Panama in 2020 is limited, given that Measure 1 was adopted in February 2020. As noted in paragraph 7.261 above, Panama has also failed to demonstrate that it had detected other infringements in shipments of Costa Rican strawberries prior to the adoption of Measure 1.

7.298. On the basis of the foregoing, the Panel considers that Panama has failed to substantiate its position that there was a "systemic problem" with strawberry production controls in Costa Rica when Measure 1 was adopted.

Conclusion on whether Panama adopted Measure 1 on the basis of available pertinent information

7.299. In the light of the foregoing, the Panel concludes that Measure 1, which consists of "disallow[ing]" imports of strawberries from Costa Rica, bears no rational and objective relationship to, and therefore was not adopted on the basis of, the following information: (a) Codex Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 with reference to cases of non-compliance with MRLs; (b) the measures of the European Union, the United States, Australia, and Chinese Taipei in cases of non-compliance with MRLs; (c) the fact that Measure 1 was triggered by the detection of non-compliance in two shipments from the same producer (which is not the only Costa Rican exporter of strawberries); and (d) the fact that Costa Rica does not authorize the use of oxamyl in strawberry production in Costa Rica.

7.300. Accordingly, the Panel finds that Panama has not demonstrated that it adopted Measure 1 on the basis of available pertinent information within the meaning of Article 5.7 of the SPS Agreement.

7.3.1.2.2.3 Conclusion on Article 5.7 of the SPS Agreement

7.301. In paragraphs 7.202 and 7.300 above, the Panel found that Panama has not demonstrated that it adopted Measure 1 in a situation of insufficient relevant scientific evidence, or on the basis of available pertinent information, in breach of two of the requirements under Article 5.7. Considering these findings and the fact that the four requirements of Article 5.7 are cumulative[748], the Panel does not consider it necessary to address the two requirements of Article 5.7 set out in its second sentence, which concern the maintenance of the measure, in order to resolve this dispute.[749]

7.302. In the light of the foregoing, the Panel finds that Measure 1 does not constitute a provisional measure covered by Article 5.7 of the SPS Agreement.

7.3.1.2.3 Claims under Articles 5.1, 5.2, and 2.2 of the SPS Agreement

7.303. As the Panel has found that Measure 1 is not a provisional measure under Article 5.7 of the SPS Agreement, Articles 5.1, 5.2, and 2.2 of the SPS Agreement are applicable to this measure. The Panel will therefore proceed with the examination of Costa Rica's claims under Articles 5.1 and 5.2, which concern the risk assessment and the elements to be taken into account in that assessment,

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exporter of strawberries for February 2020 and that it had supplied a quantity equivalent to the total volume of strawberry imports from Costa Rica to Panama over three years, it was reasonable and prudent to consider that its non-compliance was representative of all exports from Costa Rica. (Panama's response to Panel question No. 115, para. 41). See also Panama's comments on Costa Rica's response to Panel question No. 113, para. 39.

[746] Costa Rica's second written submission, paras. 484-485; and responses to Panel question No. 113, para. 3.8, and No. 231, para. 4.2 (quoting SIVUCE, Exporters of strawberries to Panama (2019-2020) (Exhibit CRI-403)).

[747] Costa Rica's first written submission, para. 362.

[748] See para. 7.110 above.

[749] These requirements are that (a) Panama seek to obtain the additional information necessary for a more objective assessment of risk; and (b) Panama review the SPS measure accordingly within a reasonable period of time.

and under Article 2.2, relating to the obligation to ensure that SPS measures are based on scientific principles and are not maintained without sufficient scientific evidence.

7.3.1.2.3.1 Main arguments of the parties

Costa Rica

7.304. Costa Rica claims that Measure 1 is inconsistent with Articles 5.1, 5.2, and 2.2 of the SPS Agreement, as it is not based on a risk analysis.[750]

7.305. Costa Rica claims that Panama acted inconsistently with Article 5.1 of the SPS Agreement, as it failed to perform a risk assessment to support the introduction of Measure 1[751], that is, there was no scientific process aimed at establishing the scientific basis for the measures in order to determine the risk supposedly identified.[752] Costa Rica notes that Measure 1 falls within the scope of Annex A(1)(b) and, therefore, the applicable risk assessment is that defined in the second sentence of Annex A(4) to the SPS Agreement, namely, "the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs".[753] Costa Rica submits that a mere finding of non-conformity with the MRL in two shipments of strawberries from the same producer does not amount to a risk assessment under this definition.[754]

7.306. Costa Rica submits that, at the time Measure 1 was adopted, the only explanation provided by Panama was the limited information concerning the detection of oxamyl in two shipments of strawberries from a Costa Rican producer. For Costa Rica, the detection described does not constitute or resemble a risk assessment within the meaning of the SPS Agreement.[755] Costa Rica adds that Panama "did not at any time attempt to 'connect the possibility of adverse effects with an antecedent or cause' in the circumstances relating to this measure".[756] Costa Rica notes that Panama has not at any point said what the alleged adverse effects might be or what the causal link might be with the two isolated findings of non-conformity it invokes.[757]

7.307. Costa Rica considers that Panama did not perform a risk assessment that served as the basis for Measure 1. Costa Rica states that confirmation that there was an absence of a risk assessment is sufficient to find a violation of Article 5.1 of the SPS Agreement.[758] Costa Rica claims that, as a result of this violation, Panama also acted inconsistently with Articles 5.2 and 2.2 of the SPS Agreement.[759]

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[750] Costa Rica's panel request, p. 6; and first written submission, para. 302.

[751] Costa Rica's first written submission, paras. 308 and 314. In Costa Rica's view, the fact that the importing Member did not perform a risk assessment is sufficient grounds for finding a violation of Article 5.1 of the SPS Agreement. (Costa Rica's first written submission, para. 305 (quoting Panel Reports, *Russia – Pigs (EU)*, para. 7.713; *US – Poultry (China)*, paras. 7.191 and 7.192)).

[752] Costa Rica's first written submission, para. 308.

[753] Costa Rica's first written submission, para. 306 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.461). Costa Rica notes that a risk assessment should: (a) identify the additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs at issue (if any); (b) identify any possible adverse effect on human or animal health; and (c) evaluate the potential for that adverse effect to arise from the presence of the identified additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs. (Ibid. para. 307 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.479)).

[754] Costa Rica's first written submission, para. 312.

[755] Costa Rica's first written submission, paras. 309-310 (quoting Note AUPSA-AG-051-2020 (Exhibit CRI-7), first para.). Costa Rica states that, in Note AUPSA-AG-051-2020, Panama indicates that it identified "various non-conformities in this month of February 2020", providing a table that gives the name of the Costa Rican exporter, the laboratory entry dates and the results of the analysis, as well as the quantity of oxamyl detected. (Ibid.).

[756] Costa Rica's first written submission, para. 311 (quoting Appellate Body Report, *Japan – Apples*, fn 372). The circumstances to which Costa Rica is referring relate to the fact that the non-conformity with the MRL was caused by a single Costa Rican strawberry producer concerning a pesticide that is prohibited for use in strawberries in Costa Rica. (Ibid.).

[757] Costa Rica's first written submission, para. 322.

[758] Costa Rica's first written submission, para. 314; second written submission, paras. 429 and 430.

[759] Costa Rica's first written submission, paras. 314 and 324.

Panama

7.308. Panama claims that it adopted provisional measures, which included Measure 1, as a precaution and in response to scientific evidence that called into question its previous conclusions concerning the sanitary risk posed by imports from Costa Rica of the products at issue.[760] Panama submits that the provisional measures are not inconsistent with Articles 2.2, 5.1, and 5.2 of the SPS Agreement, given that it acted strictly within the limits of its rights under Article 5.7 and that provisional measures justified under Article 5.7 are exempt from the basic obligations set forth in Article 2.2.[761]

7.3.1.2.3.2 Assessment by the Panel

Relevant legal standard

7.309. Article 5.1 reads as follows:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

7.310. Pursuant to the text of Article 5.1 of the SPS Agreement, the evaluation of a claim under this provision has been understood to mean that a panel is required to examine:

a. whether there is a risk assessment[762], as appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations; and

b. if there is a risk assessment, whether the SPS measure of the Member concerned is based on that risk assessment.[763]

7.311. With regard to the risk assessment, it has been deemed that the review power of a panel is to determine whether the risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.[764] With regard to the examination of whether the SPS measure is "based on" the risk assessment, this implies determining whether the results of that assessment "sufficiently warrant" or "reasonably support" the SPS measure at issue.[765]

7.312. Article 5.2, reproduced below, sets forth the elements that must be taken into account when assessing risks:

> In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest – or disease – free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

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[760] Panama's first written submission, para. 166.
[761] Panama's first written submission, paras. 166 and 435-436.
[762] Annex A(4) to the SPS Agreement defines a "risk assessment" as follows:
The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.
[763] Appellate Body Report, *India – Agricultural Products*, para. 5.8; and Panel Reports, *US – Poultry (China)*, para. 7.173; *Costa Rica – Avocados (Mexico)*, para. 7.321.
[764] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 590.
[765] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 591 (referring to Appellate Body Report, *EC – Hormones*, para. 193); Panel Report, *US – Animals*, para. 7.648.

7.313. In previous disputes, a relationship has been found to exist between Articles 5.1 and 5.2 of the SPS Agreement, in that Article 5.2 sheds light on the elements that are of relevance in the assessment of risks foreseen in Article 5.1.[766] Accordingly, previous panels have considered, in their analysis under Article 5.1, whether Members considered the elements contained in Article 5.2.[767]

7.314. Article 2.2 of the SPS Agreement reads as follows:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

7.315. Article 2.2 essentially focuses on the necessity of an SPS measure to be based on scientific principles and sufficient scientific evidence.[768] In previous disputes, the obligation that an SPS measure not be maintained without sufficient scientific evidence has been understood to mean that there must be a rational or objective relationship between the SPS measure and the scientific evidence. Whether there is such a relationship is determined on a case-by-case basis and depends upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.[769] As Articles 5.1 and 5.2 of the SPS Agreement constitute a "specific application"[770] of the obligations under Article 2.2, it has been noted that a finding of a violation of Articles 5.1 and 5.2 may give rise to a rebuttable presumption of inconsistency with Article 2.2.[771]

7.316. The Panel shares these assessments of the legal standard applicable under Articles 5.1, 5.2, and 2.2 made in the aforementioned disputes, and will proceed with its evaluation on that basis. The Panel now turns to Costa Rica's claims under Articles 5.1, 5.2, and 2.2 with respect to Measure 1.

Whether Measure 1 is based on a risk assessment in accordance with Article 5.1 of the SPS Agreement

7.317. Panama has confirmed that Measure 1 is not based on a risk assessment, arguing that it is a provisional measure adopted in circumstances where the body of available scientific evidence did not allow an appropriate risk assessment to be conducted, as required under Article 5.1 of and as defined in Annex A to the SPS Agreement.[772]

7.318. The Panel considers that, as claimed by Costa Rica, a measure cannot be based on a risk assessment if no such assessment exists. Accordingly, the Panel finds that Measure 1 is inconsistent with Article 5.1 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to human health, taking into account risk assessment techniques developed by the relevant international organizations.

Whether Panama took into account the elements listed in Article 5.2 of the SPS Agreement in the assessment of risk

7.319. As stated in paragraphs 7.312 and 7.313 above, Article 5.2 is linked to Article 5.1, in that it sheds light on the elements that are of relevance in the assessment of risks foreseen in Article 5.1.[773] Given that, with respect to Measure 1, Panama failed to perform a risk assessment in accordance with Article 5.1, the Panel finds that Measure 1 is inconsistent with Article 5.2 of the SPS Agreement

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[766] Panel Report, *Japan – Apples*, para. 8.230. Article 5.2 has been deemed to be inextricably linked to Article 5.1. (Panel Report, *Australia – Apples*, para. 7.211).

[767] Panel Reports, *Japan – Apples*, para. 8.232; *US – Poultry (China)*, para. 7.172; *Australia – Apples*, para. 7.211; *US – Animals*, para. 7.230; and *Costa Rica – Avocados (Mexico)*, paras. 7.340-7.344 and 7.405.

[768] Appellate Body Report, *Australia – Apples*, para. 209.

[769] Appellate Body Report, *Japan – Agricultural Products II*, para. 84.

[770] Appellate Body Reports, *Japan – Agricultural Products II*, para. 82 (quoting Appellate Body Report, *EC – Hormones*, para. 180); and *Australia* – Apples, para. 209 (quoting Appellate Body Report, *EC – Hormones*, para. 180).

[771] Appellate Body Report, *India – Agricultural Products*, paras. 5.23-5.24; and Panel Reports, *Russia – Pigs (EU)*, para. 7.627; and *Costa Rica – Avocados (Mexico)*, para. 7.368.

[772] Panama's response to Panel question No. 9, para. 32.

[773] Panel Report, *Japan – Apples*, para. 8.230.

because Panama did not take into account the elements set out under that Article in the assessment of risks.

Whether Measure 1 is based on scientific principles and is not maintained without sufficient scientific evidence in accordance with Article 2.2 of the SPS Agreement

7.320. The Panel recalls that Article 5.1 constitutes a "specific application" of the basic obligations under Article 2.2 of the SPS Agreement.[774] The Panel shares the view expressed in previous disputes that a measure not based on a risk assessment pursuant to Article 5.1 of the SPS Agreement can be presumed not to be based on scientific principles or to be maintained without sufficient scientific evidence within the meaning of Article 2.2 of the Agreement.[775] The Panel considers that the same can be presumed in this case, as it has found that, in the absence of a risk assessment, Measure 1 is inconsistent with Articles 5.1 and 5.2 of the SPS Agreement. The Panel further notes that Panama has not presented arguments to rebut this presumption.

7.321. Accordingly, in the light of its finding that Measure 1 is not based on a risk assessment, in breach of Articles 5.1 and 5.2 of the SPS Agreement, and in the absence of a rebuttal by Panama of the presumption of inconsistency with Article 2.2 of the Agreement, the Panel finds that Measure 1 is inconsistent with Article 2.2 because it is not based on scientific principles and is maintained without sufficient scientific evidence.

7.3.1.2.3.3 Conclusion concerning Articles 5.1, 5.2, and 2.2 of the SPS Agreement

7.322. In the light of the foregoing, the Panel finds that Measure 1 is inconsistent with the following provisions:

a. Article 5.1 of the SPS Agreement, because it is not based on an assessment, as appropriate to the circumstances, of the risks to human health, taking into account risk assessment techniques developed by the relevant international organizations;

b. Article 5.2 of the SPS Agreement, because, in the absence of a risk assessment, Panama did not take into account the elements listed in this provision in the assessment of risks; and

c. Article 2.2 of the SPS Agreement, because it is not based on scientific principles and is maintained without sufficient scientific evidence.

7.3.1.3 Claims under Articles 5.6 and 2.2 of the SPS Agreement

7.323. The Panel notes that the parties disagree on whether Articles 5.6 and 2.2 of the SPS Agreement apply to a provisional measure covered by Article 5.7 of that Agreement.[776] The Panel recalls that it has found that Measure 1 is not a provisional measure under Article 5.7[777], and therefore does not consider it necessary to rule on Panama's argument that Articles 5.6 and 2.2 do not apply to provisional measures adopted pursuant to Article 5.7. Accordingly, the Panel will now proceed with its analysis of Costa Rica's claims under these provisions.

[774] Appellate Body Reports, *Japan – Agricultural Products II*, para. 82 (quoting Appellate Body Report, *EC – Hormones*, para. 180); and *Australia* – Apples, para. 209 (quoting Appellate Body Report, *EC – Hormones*, para. 180).

[775] Panel Report, *Russia – Pigs (EU)*, para. 7.627. An SPS measure found to be inconsistent with Articles 5.1 and 5.2 has been held to be inconsistent with Article 2.2. (Appellate Body Report, *India – Agricultural Products*, para. 5.23).

[776] Panama's first written submission, paras. 165-166 and 435-436; response to Panel questions Nos. 63, para. 190, and 75, paras. 210 and 212; second written submission, para. 238; and Costa Rica's response to Panel question No. 75, paras. 3.60-3.62.

[777] See para. 7.302 above.

7.3.1.3.1 Main arguments of the parties

7.3.1.3.1.1 Costa Rica

7.324. Costa Rica alleges that Measure 1 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP. Costa Rica considers that there are alternative measures that are reasonably available to Panama, that achieve its ALOP, and are significantly less restrictive to trade. Costa Rica also alleges that, accordingly, Measure 1 is inconsistent with Article 2.2 of the SPS Agreement, as it is not applied only to the extent necessary to protect human life or health.[778]

7.325. Costa Rica submits that Panama adopted the most restrictive measure possible despite the fact that it had reasonably available alternatives that are significantly less restrictive to trade than the challenged measure, and that would have enabled Panama to achieve its ALOP.[779] Costa Rica asserts that the alternative measures to Measure 1 consist of measures to change the manner in which risk is managed in respect of future imports of Costa Rican strawberries. According to Costa Rica, in the event of non-compliance with sanitary requirements, these measures are set out in paragraph 35 of Guidelines CAC/GL 26-1997 and in paragraph 20 of the appendix to Guidelines CAC/GL 47-2003. Costa Rica lists the following alternative measures: (a) control programmes implemented by the importer or exporter; (b) increased intensity of checks on the product at issue or on a specific undertaking; (c) request for information and cooperation from the country of origin (in this case, Costa Rica); (d) on-site visits to the Costa Rican producer concerned; (e) food intended for import to be held pending a final judgment; and (f) enhanced sampling and testing from the Costa Rican establishment involved in the non-compliance.[780] Costa Rica adds that these measures are applied by other Members[781], and that the type and number of measures can be adjusted to Panama's ALOP[782] and the specific circumstances of non-compliance.[783]

7.326. Costa Rica submits that the alternative measures that it proposes fulfil the three requirements under footnote 3 to Article 5.6 of the SPS Agreement.[784]

7.327. First, Costa Rica argues that the alternative measures are reasonably available taking into account technical and economic feasibility, because measures to change the manner in which risk is managed are part of the duties assigned to the Panamanian food safety authorities under the Panamanian regulatory framework.[785]

7.328. Second, Costa Rica submits that the alternative measures would achieve Panama's ALOP[786] because, regardless of whether the ALOP is high or low, different measures exist to manage the risk.

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[778] Costa Rica's panel request, p. 7; first written submission, paras. 466-467; and second written submission, paras. 528-538.

[779] Costa Rica's first written submission, paras. 447-448. See also ibid. para. 446 on the extent to which an import prohibition restricts trade.

[780] Costa Rica's first written submission, para. 457. See also ibid. paras. 449-455.

[781] Costa Rica's first written submission, para. 456; second written submission, para. 529. Costa Rica also refers to its description of the measures of the European Union, the United States, and Australia. (Costa Rica's first written submission, para. 456 (referring to Costa Rica's first written submission, paras. 353-358)).

[782] Costa Rica's first written submission, paras. 449, 453, and 457.

[783] In this connection, Costa Rica noted that the introductory clause of para. 35 of Guidelines CAC/GL 26-1997 states that the measures described therein may be cumulative if necessary. (Costa Rica's first written submission, para. 453).

[784] Costa Rica's first written submission, para. 448; second written submission, paras. 529-530.

[785] Costa Rica's first written submission, paras. 459-460; second written submission, paras. 531-532. Costa Rica refers to the duties of two operational directorates of AUPSA, namely the National Food Import Verification Directorate and the National Imported Food Analysis and Control Directorate. (Ibid.).

[786] Costa Rica notes that, although Measure 1 relates to human health, during these proceedings, Panama referred to an ALOP that addresses plant health. (Costa Rica's second written submission, paras. 533-534 (quoting Panama's response to Panel question No. 95, para. 267)). Following Panama's clarification that its ALOP in the case of Measure 1 is "to minimize the risks of toxic residues in plants and the environment", Costa Rica stated that the ALOP remains ambiguous. (See Costa Rica's comments on Panama's response to Panel question No. 131, para. 3.97; and Panama's response to Panel question No. 131, para. 79).

According to Costa Rica, the type and number of measures can be adjusted to Panama's specific ALOP.[787]

7.329. Third, according to Costa Rica, the alternative measures are significantly less restrictive to trade than Measure 1, as these measures would not prohibit imports of Costa Rican strawberries, rather they would allow them, provided that controls do not show oxamyl residues that exceed the MRLs.[788] Costa Rica asserts that "an alternative measure that allows imports, albeit with conditions, 'would still be significantly less restrictive to trade than an outright prohibition'".[789]

7.3.1.3.1.2 Panama

7.330. Panama submits that Measure 1 is exempt from the obligations under Articles 2.2 and 5.6 of the SPS Agreement, as this measure is a provisional measure covered by Article 5.7 of the SPS Agreement.[790]

7.331. Panama adds that, even if Article 5.6 applied to Measure 1, Costa Rica has not demonstrated the feasibility of the proposed alternative measures. Panama asserts that, in terms of feasibility, these alternatives (a) are already covered by Panama's request for cooperation from Costa Rica[791]; (b) were not feasible during the COVID-19 pandemic[792]; or (c) do not apply because the product at issue is fresh fruit.[793] Panama further maintains that, in order to achieve its ALOP, it had no other choice but to resort to the import suspension measure provided for in the Codex Guidelines.[794] Panama adds that it cannot assess whether any of the alternative measures proposed by Costa Rica could achieve its ALOP without sufficient information on Costa Rica's production control system.[795]

7.3.1.3.2 Assessment by the Panel

7.3.1.3.2.1 Relevant legal standard

7.332. Article 5.6 of the SPS Agreement reads as follows:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]
>
> [3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7.333. Pursuant to footnote 3 to Article 5.6, in previous disputes it has been held that, to prove an SPS measure is inconsistent with Article 5.6, the complainant must demonstrate that there is an

[787] Costa Rica's first written submission, para. 463.
[788] Costa Rica's second written submission, para. 535.
[789] Costa Rica's first written submission, para. 465 (quoting Panel Report, *Russia – Pigs (EU)*, para. 7.829; in turn quoting Panel Reports, *India – Agricultural Products,* para. 7.590; *Australia – Salmon*, para. 8.182); and second written submission, para. 535.
[790] Panama's first written submission, paras. 166 and 435-436; and second written submission, para. 238.
[791] For the following alternatives: (a) control programmes implemented by the exporter; and (b) request for information and cooperation from the country of origin. See Panama's response to Panel question No. 132, para. 81; comments on Costa Rica's response to Panel question 105, para. 24.
[792] For the following alternatives: (a) increased intensity of checks on the product at issue or on a specific undertaking; (b) enhanced sampling and testing from the Costa Rican establishment involved; and (c) on-site visits to the Costa Rican producer concerned. See Panama's response to Panel question No. 132, para. 82; comments on Costa Rica's response to Panel question 105, para. 24.
[793] For the alternative measure of holding food intended for import pending a final judgment. See Panama's response to Panel question No. 132, para. 82; comments on Costa Rica's response to Panel question 105, para. 24.
[794] Panama's comments on Costa Rica's response to Panel question No. 130, para. 55.
[795] Panama's comments on Costa Rica's response to Panel question No. 105, paras. 21 and 24.

alternative measure that meets three requirements cumulatively[796]: (a) it is reasonably available taking into account technical and economic feasibility; (b) it achieves the importing Member's ALOP[797]; and (c) it is significantly less restrictive to trade than the challenged SPS measure.[798] The analysis under Article 5.6 therefore involves assessing an alternative measure proposed by the complainant, which serves as a conceptual tool to be used in comparison with the measure at issue.[799]

7.334. Given that the three requirements in footnote 3 to Article 5.6 are cumulative, the order in which the Panel assesses them would not have an impact on the final outcome of the assessment.[800] Some previous panels have started by assessing whether the alternative measures achieved the Member's ALOP, as this was the principal point of contention between the parties.[801] Others have followed the order in which the requirements appear in the text of the provision.[802]

7.335. The first requirement states that the alternative measure must *be reasonably available taking into account technical and economic feasibility*. To meet this requirement, an alternative measure must constitute "an option reasonably available taking into account technical and economic feasibility in the real world", including "the risk of incorrect enforcement".[803] In previous disputes, consideration has been given to the fact that the respondent's existing use of an alternative measure proposed by the complainant, even if in a different context, weighs in favour of a finding of feasibility.[804] Moreover, it has been found that an additional administrative burden imposed by an alternative measure does not *per se* render the measure infeasible.[805]

7.336. The second requirement is that the alternative measure *achieve the importing Member's ALOP* (i.e. the respondent's ALOP), which must be demonstrated by comparing the importing Member's ALOP with the level of protection that would be achieved by the alternative measure.[806] Therefore, in order to analyse a claim under Article 5.6, a panel would need to identify the level of protection that the importing Member has set as its ALOP. In that connection, Members have the "prerogative"[807] and the obligation ("implicit[ly]"contained in the Agreement) to set its ALOP.[808] In

[796] If any of these elements is not fulfilled, the measure would be consistent with Article 5.6 of the SPS Agreement. (Appellate Body Report, *Australia – Salmon*, para. 194).

[797] Annex A(5) to the SPS Agreement defines the appropriate level of protection (ALOP) as the "level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory".

[798] Appellate Body Report, *Korea – Radionuclides*, para. 5.21 (referring to Appellate Body Reports, *India – Agricultural Products*, para. 5.203; *Australia – Salmon*, para. 194).

[799] Appellate Body Report, *Korea – Radionuclides*, para. 5.21 (referring to Appellate Body Report, *Australia – Apples*, para. 363). The Appellate Body has noted that a demonstration that an alternative measure meets the three requirements of footnote 3 to Article 5.6 suffices to prove that the measure at issue is more trade-restrictive than necessary. However, the Appellate Body added that this does not imply that the importing Member must adopt that alternative measure or that the alternative measure is the only option that would achieve the desired level of protection. (Appellate Body Report, *Australia – Apples*, para. 363).

[800] Panel Report, *India – Agricultural Products*, para. 7.524.

[801] See e.g. Panel Reports, *US – Animals*, para. 7.434; *Costa Rica – Avocados (Mexico)*, para. 7.1813.

[802] See e.g. Panel Reports, *India – Agricultural Products,* para. 7.523 (where the panel indicated that it would follow the order in which the elements had been described despite the parties suggesting that the panel could examine the second element first); *Russia – Pigs*, paras. 7.816-7.834. In *Korea – Radionuclides*, the panel began with the first element, followed by the third element, and left the second element until last, after noting that, if an alternative measure meets the first requirement, a comprehensive assessment of the second requirement may not be necessary, and that the respondent argued that the alternative measure was not significantly less trade-restrictive that the measure at issue. (See Panel Report, *Korea – Radionuclides*, para. 7.118).

[803] Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.171. See also Panel Reports, *India – Agricultural Products*, para. 7.540; *Korea – Radionuclides*, para. 7.144.

[804] Panel Reports, *Korea – Radionuclides*, para. 7.144 (quoting Panel Reports, *India – Agricultural Products*, paras. 7.540-7.542; *Japan – Apples (Article 21.5 – US)*, para. 8.187).

[805] Panel Report, *Korea – Radionuclides*, para. 7.144 (quoting Panel Report, *India – Agricultural Products*, para. 7.543).

[806] Appellate Body Report, *Australia – Apples*, para. 344.

[807] Appellate Body Reports, *Korea – Radionuclides*, para. 5.23; *India – Agricultural Products*, para. 5.205; *Australia – Apples*, para. 342; and *Australia – Salmon*, para. 199.

[808] Appellate Body Reports, *Australia – Salmon*, paras. 205-206; *US/Canada – Continued Suspension*, para. 523; *Australia – Apples*, para. 343; and *India – Agricultural Products*, para. 5.221 (in which the Appellate Body stated that "the specification of such appropriate level of protection is both a prerogative and an obligation of the responding Member"). The relevant SPS Committee Guidelines note that a Member should indicate the level of protection which it considers to be appropriate with respect to risks to human life or

previous disputes, weight has been accorded to the importing Member's articulation of the ALOP, particularly where that ALOP is specified with sufficient precision in advance of the adoption of the SPS measure, and where it has been consistently expressed.[809] However, if a Member does not determine its ALOP, or does so with insufficient precision, it has been considered that the "[ALOP] may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied"[810], on the basis of the totality of the arguments and evidence on the record.[811]

7.337. The third requirement provides that the alternative measure must *be significantly less restrictive to trade* than the challenged SPS measure. To meet this requirement, the complainant must demonstrate, in the specific case, that the difference in the degree of trade restrictiveness can be characterized as significant in the sense of "important, notable or consequential", or of "sufficient magnitude or degree, seen in the context of the particular product at issue, to be able to meaningfully affect suppliers".[812] Any condition upon importation has to be considered significantly less restrictive than an "outright prohibition".[813]

7.338. For its part, Article 2.2 of the SPS Agreement reads:

> Members shall ensure that any sanitary or phytosanitary measure is applied *only to the extent necessary to protect human, animal or plant life or health*, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.[814]

7.339. As is evident from the text of Articles 5.6 and 2.2, these provisions establish similar and closely linked[815] obligations with respect to the necessity of an SPS measure. In particular, there are similarities between the requirement in Article 2.2 that Members ensure that SPS measures are applied only to the extent necessary to protect human, animal or plant life or health, on the one hand, and the requirement in Article 5.6 that SPS measures "are not more trade-restrictive than required to achieve" the importing Member's ALOP, on the other hand.[816] In this connection, Article 5.6 has been considered to elaborate on the more general obligation under Article 2.2.[817]

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health, to animal life or health or to plant life or health in a sufficiently clear manner so as to permit examination of the extent to which any sanitary or phytosanitary measure achieves that level. Such an ALOP indication "may be contained in a published statement or other text generally available to interested parties". Examples might include government policy statements with regard to ALOPs in response to certain risks, or documents on animal health protection objectives or with respect to plant protection. (Guidelines to Further the Practical Implementation of Article 5.5 (G/SPS/15), 18 July 2000, para. A.1).

[809] Appellate Body Report, *Korea – Radionuclides*, para. 5.24 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.221). In *India – Agricultural Products*, the Appellate Body noted that "a responding Member is generally better placed than the complainant to know what objective it has set in terms of the level of SPS protection it wishes to achieve". (Appellate Body Report, *India – Agricultural Products*, para. 5.221).

[810] Appellate Body Report, *Australia – Salmon*, para. 207.

[811] Appellate Body Report, *Korea – Radionuclides*, para. 5.24 (referring to Appellate Body Report, *India – Agricultural Products*, para. 5.221).

[812] To interpret the adverb "significantly" in footnote 3 to Article 5.6 of the SPS Agreement, the panel in *Korea – Radionuclides* relied on the interpretations given to the word "significant" in the context of the Agreement on Subsidies and Countervailing Measures. (Panel Report, *Korea – Radionuclides*, para. 7.153 (quoting Appellate Body Report, *US – Upland Cotton*, para. 426; and Panel Reports, *Korea – Commercial Vessels*, para. 7.571; and *Indonesia – Autos*, para. 14.254)). See also Panel Report, *Costa Rica – Avocados* (Mexico), para. 7.1929.

[813] Panel Report, *India – Agricultural Products*, para. 7.590 (quoting Panel Report, *Australia – Salmon*, para. 8.182).

[814] Italics added

[815] Appellate Body Report, *India – Agricultural Products*, para. 5.208.

[816] Appellate Body Report, *Australia – Apples*, para. 339. See also Panel Report, *India – Agricultural Products*, paras. 7.606-7.613 (in which the panel considered that the meaning of the word "necessity", in the context of other provisions of the covered agreements, *inter alia*, Article XX of the GATT 1944 and Article 2.2 of the TBT Agreement, involves an assessment of a measure's trade-restrictiveness, the contribution of a measure to its purported objective, and whether that contribution may be made by a less trade-restrictive alternative. The panel noted that its analysis demonstrates that Article 5.6 elaborates on the obligation of necessity in Article 2.2, as the interpretation of "necessity" accords to a substantial degree with the requirements of Article 5.6).

[817] Panel Report, *India – Agricultural Products*, para. 7.613. See also Panel Reports, *EC – Hormones (Canada)*, para. 8.99; *EC – Hormones (US)*, para. 8.66.

Hence, in previous disputes, a finding of inconsistency with Article 5.6 was considered to create a rebuttable presumption of inconsistency with Article 2.2.[818]

7.340. The Panel shares these assessments of the applicable legal standard under Articles 5.6 and 2.2 made in the aforementioned disputes and will proceed with its assessment on that basis.

7.341. The Panel will first assess whether Costa Rica has demonstrated that Measure 1 is inconsistent with Article 5.6 of the SPS Agreement. The Panel will then address Costa Rica's consequential claim under Article 2.2 of the Agreement.

7.3.1.3.2.2 Whether Measure 1 is inconsistent with Article 5.6 of the SPS Agreement

The alternative measures proposed by Costa Rica

7.342. Costa Rica states that, in cases of non-compliance with sanitary requirements, alternative measures to Measure 1 consist of changing the manner in which the relevant risk is managed.[819] Costa Rica proposes as alternative measures the type of measures described in paragraph 35 of Guidelines CAC/GL 26-1997 and in paragraph 20 of the appendix to Guidelines CAC/GL 47-2003.[820] Costa Rica adds that these measures are applied by other Members.[821] For instance, Costa Rica lists the following alternative measures: (a) control programmes implemented by the importer or exporter; (b) increased intensity of checks on the product at issue or on a specific undertaking; (c) request for information and cooperation from the country of origin (in this case, Costa Rica); (d) on-site visits to the Costa Rican producer concerned; (e) food intended for import to be held pending a final judgment; and (f) enhanced sampling and testing from the Costa Rican establishment involved in the non-compliance.[822]

7.343. Although Panama considers that Measure 1 is exempt from the obligations under Article 5.6, Panama also asserts that Costa Rica has failed to demonstrate the feasibility of the alternative measures.[823]

7.344. In determining whether Measure 1 is inconsistent with Article 5.6, under the legal standard set out above, the Panel will examine whether the alternative measures proposed by Costa Rica meet the three requirements in footnote 3 to Article 5.6, namely that they: (a) are reasonably available taking into account technical and economic feasibility; (b) achieve Panama's ALOP; and (c) are significantly less restrictive to trade than Measure 1.[824]

7.345. The Panel notes that Costa Rica proposes the individual or joint application of alternative measures, stating that the type and number of alternative measures can be adjusted, at Panama's discretion to apply only one or several of them cumulatively.[825] The Panel considers that, in order to demonstrate the inconsistency of Measure 1 with Article 5.6, Costa Rica must establish that at least one of its proposed alternative measures meets the three requirements in footnote 3 to Article 5.6.

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[818] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; and Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; and *Russia – Pigs (EU)*, paras. 7.841 and 7.846. See also Appellate Body Report, *Australia – Salmon*, fn 166 (in which the Appellate Body noted that "[t]he establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a violation of the necessity requirement of Article 2.2").

[819] Costa Rica's first written submission, para. 449; second written submission, para. 529.

[820] Costa Rica's first written submission, paras. 450-455 (quoting Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126); Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127)).

[821] Costa Rica's first written submission, para. 456 (referring to Costa Rica's first written submission, paras. 353-358).

[822] Costa Rica's first written submission, para. 457.

[823] Panama's comments on Costa Rica's response to Panel question No. 105, paras. 22 and 24.

[824] Appellate Body Report, *Korea – Radionuclides*, para. 5.21 (referring to Appellate Body Reports, *India – Agricultural Products*, para. 5.203; *Australia – Salmon*, para. 194).

[825] Costa Rica's first written submission, paras. 449 and 463.

Whether the alternative measures are reasonably available

7.346. Costa Rica asserts that the alternative measures are reasonably available in terms of technical and economic feasibility because the application of this type of measure falls within the duties assigned to the Panamanian food safety authorities under the Panamanian regulatory framework. In particular, Costa Rica refers to the duties of two operational directorates of AUPSA, namely the National Food Import Verification Directorate and the National Imported Food Analysis and Control Directorate.[826] In Costa Rica's view, the fact that a measure is provided for in the regulatory framework of an importing Member presupposes an internal decision on the feasibility of that measure, and inevitably tips the balance in favour of finding the measure feasible.[827] According to Costa Rica, an alternative measure that is feasible in practice and does not impose prohibitive costs or significant technical difficulties should be considered "reasonably available" within the meaning of footnote 3 to Article 5.6 of the SPS Agreement.[828]

7.347. Panama asserts that, in terms of feasibility, the proposed alternative measures (a) are already covered by Panama's request for cooperation from Costa Rica[829]; (b) were not feasible during the COVID-19 pandemic[830]; or (c) do not apply because the product at issue is fresh fruit.[831]

7.348. As to whether Panama's legislation provides for alternative measures, as Costa Rica asserts, the Panel notes that Decree Law No. 11 assigns, *inter alia*, the following duties to the National Food Import Verification Directorate: (a) [v]erify compliance with the sanitary requirements that foods must meet to be introduced into the national territory"; (b) "[c]arry out the actions required as a result of sanitary and/or phytosanitary measures adopted by the National Standards for Food Imports Directorate and/or the Scientific and Technical Food Safety Council" of AUPSA; (c) "[i]nspect foods introduced into the national territory at air terminals, seaports, and land border posts"; (d) [i]nspect … any vehicle … that introduces foods into the national territory"; (e) "[i]mplement the sanitary measures of retention, treatment, isolation"; and (f) "[i]mplement the sanitary measures of rejection, return to the country of origin, re-export, seizure, destruction" of foods that represent a danger.[832]

7.349. Pursuant to Decree Law No. 11, among the duties of the National Food Import Verification Directorate are: (a) [t]ak[ing] samples and commission[ing] analyses of foods introduced into the national territory", including to ensure compliance with sanitary standards and measures; and (b) "[p]erform[ing] diagnoses, analyses, and technical tests required by other national directorates of the Authority and/or Scientific and Technical Food Safety Council".[833]

7.350. In view of the foregoing, the AUPSA Directorates that are responsible for food import controls to ensure food safety would have the authority to: conduct border inspections; take samples and perform laboratory testing to ensure compliance with Panamanian sanitary standards and measures; detain or treat products; and, if necessary, reject or destroy a shipment. Panama does not argue, and nothing in the record indicates that, in principle, these Directorates could not perform these duties. The Panel further notes that Resolution AUPSA-DINAN-006-2008, concerning the importation of strawberries from Costa Rica into Panama, specifies that AUPSA will take samples for entomological testing upon entry of the food into the country, and reserves the right to take other

[826] Costa Rica's first written submission, paras. 459-461; second written submission, paras. 531-532.
[827] Costa Rica's response to Panel question No. 105, para. 2.11.
[828] Costa Rica's response to Panel question No. 105, para. 2.9.
[829] For the following alternatives: (a) control programmes implemented by the exporter; and (b) request for information and cooperation from the country of origin. See Panama's response to Panel question No. 132, para. 81; comments on Costa Rica's response to Panel question 105, para. 24.
[830] For the following alternatives: (a) increased intensity of checks on the product at issue or on a specific undertaking; (b) enhanced sampling and testing from the Costa Rican establishment involved; and (c)on-site visits to the Costa Rican producer concerned. See Panama's response to Panel question No. 132, para. 82; comments on Costa Rica's response to Panel question 105, para. 24.
[831] For the alternative measure of holding food intended for import pending a final judgment. See Panama's response to Panel question No. 132, para. 82; comments on Costa Rica's response to Panel question 105, para. 24.
[832] National Assembly of Panama, Decree Law No. 11 (2006) (Exhibit CRI-2), Article 39, paras. 1, 3-4, and 6-8.
[833] National Assembly of Panama, Decree Law No. 11 (2006) (Exhibit CRI-2), Article 40, paras. 1-2 and 4.

samples, at that time or at any point in the food chain, in order to carry out other tests, including for toxic residues.[834]

7.351. The Panel considers that the measures mentioned in the preceding paragraph correspond to the following measures suggested by Costa Rica: (a) control programmes implemented by the importer; (b) increased intensity of checks on the product at issue or on a specific undertaking; (c) food intended for import to be held; and (d) enhanced sampling and testing from the Costa Rican establishment involved in the non-compliance.[835]

7.352. As to whether such alternative measures are reasonably available to Panama, the Panel notes that, based on the text of footnote 3 to Article 5.6, it follows that the technical and economic feasibility of the alternative measure affects the determination of whether that measure is reasonably available.[836] In the Panel's view, measures provided for in Panama's regulatory framework would, in principle, be feasible, given that the regulations themselves provide for such measures to be carried out.[837] The fact that the Panamanian authorities are authorized to apply the measures mentioned in the preceding paragraph with a view to ensuring compliance with Panama's sanitary standards and measures suggests that these measures were evaluated and considered technically and economically feasible. Therefore, the specific alternative measures identified by Costa Rica that are provided for under the Panamanian regulatory framework are, in principle, reasonably available to Panama.

7.353. Nevertheless, the Panel is mindful that there may be circumstances where measures that, in principle, are available to a Member cannot be carried out. As noted in previous disputes, the technical and economic feasibility of the alternative measures must be assessed in the context of the "real world".[838] Hence the Panel will now address Panama's arguments on why the alternative measures in question were not feasible under the circumstances surrounding the adoption of Measure 1.

7.354. With regard to the alternative measure of increasing the intensity of checks, Panama argues that this measure was not feasible at the time of the onset of the COVID-19 pandemic because of the reduced capacity available to maintain a fully functioning food safety programme.[839] Costa Rica did not respond to this argument made by Panama following the second substantive meeting.

7.355. The Panel notes that, in January 2020, Panama issued a preventive alert and ordered the activation of the Health Emergency Operations Centre in relation to the COVID-19 pandemic[840], and adopted the measures set out in the Ministry of Health's "National Plan to Address the Threat of the New Coronavirus Outbreak (2019-nCoV)"[841] pursuant to Resolution No. 75 of 23 January 2020 and Executive Decree No. 64 of 28 January 2020.[842] In the Panel's view, these regulations do not demonstrate that the capacity of Panama's border food inspection system was limited, but simply

[834] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Article 11.

[835] The Panel notes that two of the alternative measures identified by Costa Rica are not listed among the competencies of the AUPSA operational directorates to which Costa Rica refers. These measures are the request for information and cooperation from the country of origin and on-site visits to the Costa Rican producer concerned.

[836] Fn 3 to Article 5.6 refers to a measure that is "reasonably available *taking into account technical and economic feasibility*". (italics added)

[837] The Diccionario de la Real Academia Española defines "*viabilidad*" (feasibility) as "*[c]ualidad de viable*" ("quality of being feasible ") and "*viable*" ("feasible") as a matter "*que, por sus circunstancias, tiene probabilidad de poderse llevar a cabo*" (that, given its circumstances, is likely to be able to be carried out"). Diccionario de la Real Academia Española, definition of "viabilidad" https://dle.rae.es/viabilidad; and "viable", https://dle.rae.es/viable#G9uuTqo (accessed 13 August 2024).

[838] Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.171. See also Panel Reports, *India – Agricultural Products*, para. 7.540; *Korea – Radionuclides*, para. 7.144.

[839] Panama's response to Panel question No. 132, para. 82 (referring to Panama's first written submission, paras. 135-136).

[840] Ministry of Health of Panama, Resolution No. 75 (2020) (Exhibit PAN-3), Articles 1 and 5.

[841] Ministry of Health of Panama, Executive Decree No. 64 (2020) (Exhibit PAN-4), Article 1.

[842] Panama's first written submission, para. 135 (referring to Ministry of Health of Panama, Resolution No. 75 (2020) (Exhibit PAN-3); Ministry of Health of Panama, Executive Decree No. 64 (2020) (Exhibit PAN-4)).

that Panama was beginning to make preparations in case any action related to the onset of COVID-19 became necessary.

7.356. The Panel considers that the limitations on the operational capacity of Panamanian agencies began when Panama declared a state of national emergency as a result of the COVID-19 pandemic on 13 March 2020[843] and began implementing measures to deal with that pandemic.[844] The Panel recalls that Measure 1 was adopted on 20 February 2020, three weeks before the national emergency was declared. The Panel finds nothing in the record that indicates that, at the time Measure 1 was adopted, it was not feasible for Panama to increase the intensity of its checks on food. However, the Panel notes that the relevant period for its analysis extends from the date on which Measure 1 was adopted, 20 February 2020, to the date on which the Panel was established, 27 September 2021.[845] In this connection, even if the operational capacity of the relevant Panamanian agencies was reduced between March and June 2020 because of the COVID-19 pandemic[846], rendering the alternative measure unfeasible, the Panel is of the view that Panama has not demonstrated that the measure remained unfeasible as of the date of the Panel's establishment in September 2021.

7.357. With respect to the alternative measure of detaining food intended for import, Panama asserts that this measure does not apply to fresh produce. Panama makes reference to Article 35, entitled "Emergency measures", of the European Union Regulation on maximum residue levels of pesticides in or on food and feed of plant and animal origin.[847] Costa Rica did not respond to this argument made by Panama following the second substantive meeting.

7.358. The Panel notes that Article 35, cited by Panama, states that the time limit within which the European Commission must take its decision on emergency measures on food or feed shall be reduced to seven days in the case of fresh produce.[848] In the Panel's view, this provision concerns the time limit for taking decisions, and not whether detention applies to fresh produce. Therefore, this provision does not support Panama's assertion that detaining the product does not apply to fresh produce. Moreover, the Panel notes that the United States' detention measure (detention without physical examination (DWPE)), referred to by Costa Rica as an example[849], does apply to fresh produce.[850]

7.359. With regard to the alternative measure of requesting information and cooperation from the country of origin[851], Panama submits that this measure was covered by the corrective measures it requested from Costa Rica on 20 February 2020. Panama adds that the implementation of corrective measures necessarily involves, *inter alia*, investigating how the non-compliance occurred; providing an explanation supported by evidence; presenting the producer's plans to ensure compliance; demonstrating the adequacy of Costa Rica's sanitary control system; and, ideally, ensuring future compliance.[852] Costa Rica responds that to demonstrate the inconsistency of the measure at issue with Article 5.6, it must show that an alternative measure exists that the respondent could adopt, while Panama refers to measures that Costa Rica could adopt.[853]

7.360. The Panel notes that some of the alternatives proposed by Costa Rica —for example, control programmes implemented by the importing country— involve the cooperation of and implementation

[843] Cabinet Council of Panama, Cabinet Resolution No. 11 (2020) (Exhibit PAN-5).
[844] See Table 8 - Key events related to the COVID-19 pandemic below.
[845] The Panel notes that Article 5.6 refers to the establishment or maintenance of SPS measures, and therefore the relevant assessment period is not limited to the moment Measure 1 was adopted.
[846] The Panel examines in detail whether the measures taken by Panama to deal with the COVID-19 pandemic had an impact on the operational capacity of the Panamanian authorities as part of its assessment of Costa Rica's claim under Annex C(1)(a) with respect to Measure 2. (See section 7.4.2.3.1 below).
[847] Panama's response to Panel question No. 132, para. 82 (quoting European Union Regulation No. 396/2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin (Exhibit PAN-119), Article 35).
[848] European Union Regulation No. 396/2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin (Exhibit PAN-119), Article 35.
[849] Costa Rica's first written submission, para. 456 (referring to Costa Rica's first written submission, paras. 353-358).
[850] USFDA, "Import Operations and Actions" (2022) (Exhibit CRI-132), section 9-8-8, p. 38; and section 9-8-17, pp. 46-47.
[851] The Panel recalls that this measure is not included among the competencies of the AUPSA operational directorates to which Costa Rica refers. (See fn 835 above).
[852] Panama's response to Panel question No. 132, para. 81.
[853] Costa Rica's comments on Panama's response to Panel question No. 132, paras. 3.102-3.103.

of measures by the country of origin. However, regardless of the question of who is responsible for adopting the alternative measure, the Panel considers that Panama's argument does not contradict, but rather supports, the idea that the alternative measure of requesting information and cooperation constitutes a feasible alternative. By stating that its request for corrective measures covers the alternative proposed by Costa Rica, Panama confirms the feasibility of that alternative. In this connection, the Panel agrees with the approach taken in previous disputes that a measure already adopted may be a feasible alternative within the meaning of footnote 3 to Article 5.6.[854]

7.361. In respect of the alternative measure of on-site visits to the Costa Rican producer concerned[855], Panama asserts that this measure was not applicable during the COVID-19 pandemic when travel was restricted.[856] First, the Panel notes that Panama does not argue that this measure, in principle, is not feasible from a technical or economic perspective. In fact, Panama itself makes reference to the possibility of its authorities conducting on-site visits to establishments in Costa Rica in the context of Measures 2 and 4. Second, with respect to Panama's argument that the COVID-19 pandemic prevented on-site visits, the Panel notes that flights between Panama and Costa Rica were suspended between March and October 2020[857], so no on-site visits could take place during that period. The Panel recalls that Measure 1 was adopted on 20 February 2020, when flights were still permitted and, therefore, on-site visits were a feasible alternative to Measure 1. Even if the resumption of flights did not guarantee that on-site visits would take place immediately thereafter, rendering the alternative measure unfeasible during that period[858], the Panel notes that Panama has not shown that this measure remained unfeasible as of the date of the Panel's establishment in September 2021.

7.362. In the light of the foregoing, the Panel considers that the alternative measures proposed by Costa Rica were reasonably available to Panama. With respect to the alternative measures proposed by Costa Rica, which consist of (a) increased intensity of checks on the product at issue or on a specific undertaking; (b) on-site visits to the Costa Rican producer concerned; and (c) enhanced sampling and testing of the Costa Rican establishment involved, the Panel considers that these measures were reasonably available to Panama when Measure 1 was adopted. Furthermore, although these measures were not reasonably available to Panama during certain periods of the COVID-19 pandemic, the Panel considers that, as of the date the Panel was established, these measures were again reasonably available to Panama within the meaning of footnote 3 of Article 5.6.

7.363. In relation to the alternative measures proposed by Costa Rica, which are (a) control programmes implemented by the importer or exporter; (b) request for information and cooperation from the country of origin (in this case, Costa Rica); and (c) food intended for import to be held pending a final judgment, the Panel considers that these measures were reasonably available to Panama throughout the period that Measure 1 was applied and maintained.

7.364. Accordingly, the Panel concludes that Costa Rica has demonstrated that alternative measures are reasonably available taking into account technical and economic feasibility, within the meaning of footnote 3 to Article 5.6.

7.365. The Panel will now proceed to assess whether the alternative measures identified by Costa Rica achieved Panama's ALOP.

[854] See Panel Reports, *Korea – Radionuclides*, para. 7.127; *Costa Rica – Avocados (Mexico)*, paras. 7.1839-7.1841.

[855] The Panel recalls that this measure is not included among the competencies of the AUPSAoperational directorates to which Costa Rica refers. (See fn 853 above).

[856] Panama's response to Panel question No. 132, para. 82.

[857] Ministry of the Interior of Panama, Executive Decree No. 244 (2020) (Exhibit PAN-86), Article 1; Ministry of the Interior of Panama, Executive Decree No. 244 (2020) (Exhibit PAN-86); Civil Aviation Authority of Panama, Resolution No. 150-DG-DJ-AAC (2020) (Exhibit PAN-92), Article 1; and Office of the President of the Republic of Costa Rica, "Extended opening hours for beaches and additional flights from Central America and Panama will create more jobs" (October 2020) (Exhibit CRI-273).

[858] See para. 7.629 below addressing the possibility of Panamanian inspectors travelling to Costa Rica to carry out on-site audits during the COVID-19 pandemic.

Whether the alternative measures achieved Panama's ALOP

7.366. Under the legal standard described above[859], the Panel will first identify Panama's ALOP, and subsequently compare it to the level of protection that would be achieved through the alternative measures proposed by Costa Rica.

Panama's ALOP

7.367. The Panel notes that Panama has submitted three different formulations of its ALOP with respect to Measure 1. In its first written submission, in the context of Article 5.7, Panama expressed its ALOP with respect to Measure 1 as an "ALOP with the lowest possible risk of adverse effects on human health".[860] After the first substantive meeting, Panama stated that, in the area of plant health, its ALOP is to "prevent and control, in a comprehensive manner" and, therefore, to totally avoid "the introduction, establishment, and spread of pests of plants and plant products in the territory of the Republic of Panama".[861] Lastly, following the second substantive meeting, Panama clarified that its ALOP in the case of Measure 1 is "to minimize the risks of toxic residues in plants and the environment", as, in its view, is set out in Executive Decree No. 63 of 1997.[862]

7.368. Costa Rica stated at the outset that Panama's ALOP should address human health and not plant health[863], and subsequently added that, even after Panama's last clarification, Panama's definition of its ALOP remains ambiguous. Costa Rica emphasizes that, although Panama acknowledges that Measure 1 refers to sanitary risks, Panama states that its ALOP is "to minimize the risks of toxic residues in plants and the environment".[864]

7.369. The Panel notes that the ALOP could be understood as an "objective" that the SPS measure seeks to attain[865], and recalls that the objective of Measure 1 is to protect human life and health within Panamanian territory from risks arising from contaminants (oxamyl) in foods (strawberries).[866] The Panel also notes that the definition of ALOP given in Annex A(5) of the SPS Agreement states that the ALOP must reflect the "*level* of protection" deemed appropriate by the Member to achieve its protection objectives (in this case, human life and health). Bearing in mind that the ALOP is also defined as the "acceptable level of *risk*"[867], Panama's ALOP relevant to Measure 1 should reflect the level of risk acceptable to Panama with respect to the potential for adverse effects on human health arising from oxamyl in Costa Rican strawberries.[868]

7.370. The Panel is aware that general government policy statements on ALOPs in response to certain risks and documents listing the health protection objectives may indicate the Member's ALOP.[869] In this sense, the Panel considers that the objectives expressed in Executive Decree No. 63 of 1997 could inform Panama's ALOP.

7.371. The preamble of Executive Decree No. 63 of 1997, to which Panama refers, includes the objective "to have good quality pesticides and fertilizers, as well as additives and technical materials, which must be used safely and effectively to *help minimize the risks of toxic residues in plants and the environment, safeguarding human health*".[870] The Panel understands that this preamble

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[859] See para. 7.335 above.
[860] Panama's first written submission, paras. 217 and 240.
[861] Panama's response to Panel question No. 95, para. 267 (quoting Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98), Articles 1, 2.2, and 8).
[862] Panama's response to Panel question No. 131, para. 79 (quoting Ministry of Agricultural Development, Executive Decree No. 63 (1997) (Exhibit PAN-123), p. 1).
[863] Costa Rica's second written submission, paras. 533-534 (quoting Panama's response to Panel question No. 95, para. 267).
[864] Costa Rica's comments on Panama's response to Panel question No. 131, para. 3.97. (underlining original)
[865] Appellate Body Report, *Australia – Salmon*, para. 200.
[866] See para. 7.71 above.
[867] The note to Annex A(5) stipulates that "[m]any Members otherwise refer to this concept [ALOP] as the 'acceptable level of *risk*'". (italics added)
[868] The Panel recalls that the risk at issue is the potential for adverse effects on human health arising from the presence of oxamyl in shipments of strawberries from Costa Rica. (See para. 7.142 above).
[869] See fn 808 above.
[870] Ministry of Agricultural Development, Executive Decree No. 63 (1997) (Exhibit PAN-123), second recital. (italics added) The Panel understands that the word "plant" in this sentence covers all products of plant origin, including fresh strawberries for human consumption.

establishes a general policy objective for Panama applicable to the use of pesticides, which is to minimize the risks of toxic residues, and thus safeguard human health.[871]

7.372. The Panel recalls that the ALOP should be expressed in a sufficiently clear manner so as to permit examination of the extent to which any SPS measure achieves that ALOP.[872] The use of the verb "minimize" in Executive Decree No. 63 of 1997 indicates that Panama seeks a very high level of protection, reducing the relevant risk to a minimum. However, the Panel considers that the Decree does not clearly establish the extent to which the relevant risks must be minimized in order to safeguard human health, i.e. the acceptable level of risk.

7.373. In order to obtain further clarity on Panama's ALOP, the Panel will also address the arguments of the parties and Panama's MRL for oxamyl for strawberries.

7.374. In these proceedings, Panama states that its ALOP with respect to Measure 1 is an "ALOP with the lowest possible risk of adverse effects on human health".[873] Panama further notes that it applied an MRL for oxamyl in strawberries of 0.01 mg/kg which "corresponds to the *lowest possible residue levels* that can be detected using current analytical quantification techniques".[874] Panama adds that the application of the MRL of 0.01 mg/kg for oxamyl in strawberries satisfied "Panama's ALOP of the *lowest possible risk of contamination*" because it corresponded to the lower limit of analytical quantification. Panama argues that this MRL operated in conjunction with the fact that oxamyl is not generally approved for use in strawberries by Panama's trading partners.[875]

7.375. The Panel considers that Panama's MRL for oxamyl for strawberries is relevant for the purpose of identifying Panama's ALOP, since MRLs represent a reference value of the highest acceptable level of a pesticide residue in a product from a crop to which that pesticide can be applied.[876] In the Panel's view, MRLs indicate the importing Member's tolerance level for adverse effects arising from the presence of residues of a pesticide in imported food. The Panel considers that, as noted by Panama[877], the MRL may be the instrument by which Members seek to address a health risk. Although the ALOP normally precedes the establishment of the measure, and the measure will not always achieve the ALOP[878], the Panel notes that, in this case, Panama considers that the implementation of its MRL satisfied its ALOP.[879]

7.376. Therefore, in the Panel's view, Panama's MRL of 0.01 mg/kg for oxamyl in strawberries could be used to indicate the amount of oxamyl residues in Costa Rican strawberries that, for Panama, constitutes an unacceptable risk to human health within its territory. The Panel notes that Panama has set the most restrictive MRL possible considering the detection techniques available at that time, given that this MRL corresponds to the minimum detection threshold.[880] In this connection, any amount of oxamyl detected in Costa Rican strawberries would be inconsistent with Panama's MRL for this pesticide. In the Panel's view, Panama's ALOP as reflected in its restrictive MRL corresponding

[871] This objective is similar to the objectives expressed in the recitals of Executive Decree No. 467 promulgating the Sanitary Regulations that establish the MRLs for pesticides in Panama. These recitals refer to the objectives of reducing the risks of pesticide residues in food of plant origin, as a safeguard of human health. (Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulations (2007) (Exhibit CRI-8), fifth recital of Executive Decree No. 467).

[872] See fn 808 above.

[873] Panama's first written submission, paras. 217 and 240. See also Panama's response to Panel question No. 16, para. 72.

[874] Panama's first written submission, para. 202. (italics original)

[875] Panama's first written submission, para. 203. (italics original)

[876] In accordance with Panama's MRL Regulations, an MRL is "the maximum concentration of a pesticide residue (expressed in mg/kg), legally permitted in the Republic of Panama in foodstuffs". (Ministry of Health of Panama, Executive Decree No. 467 adopting the MRL Regulations (2007) (Exhibit CRI-8), chapter I, Article I of the MRL Regulations). See also Codex, Maximum residue limits (MRLs) (2021) (Exhibit CRI-370).

[877] Panama's second written submission, para. 108.

[878] Appellate Body Report, *Australia – Salmon*, paras. 201 and 203.

[879] Panama's first written submission, para. 203.

[880] See Panama's first written submission, para. 202. See also EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 8.

to the minimum detection threshold[881] is one that Panama defines as an "ALOP with the lowest possible risk of adverse effects on human health".[882]

7.377. As mentioned above, Panama argues that its MRL operated in conjunction with the fact that oxamyl is not generally approved for use in strawberries by Panama's trading partners.[883] In the Panel's view, even if Panama considered that its ALOP had been achieved because oxamyl was not approved for use in strawberries in Costa Rica, there is no evidence in the record that the status of that approval had changed. Panama confirms that in February 2020 it was aware that Costa Rica did not authorize the use of oxamyl in strawberry production[884], and has not demonstrated the existence of a systemic problem in Costa Rica's controls.[885]

7.378. Panama confirms that its ALOP has not changed following the adoption of Measure 1[886], which is intended to respond to the finding of non-compliance in two shipments of Costa Rican strawberries. Accordingly, and considering that there is nothing in the record to suggest that the fact that oxamyl is not authorized in Costa Rica for use in strawberries had changed, the alternative measure to Measure 1 should achieve the same ALOP as the MRL for oxamyl in strawberries. Such an alternative measure should therefore ensure, to the extent possible, that strawberries containing residues of oxamyl at levels greater than 0.01mg/kg are not imported, given that the ALOP would be the ALOP with the lowest possible risk of adverse effects on human health.

7.379. In the light of the foregoing, the Panel concludes that Panama's relevant ALOP with respect to imports of strawberries from Costa Rica could be formulated as the highest possible level of protection, which ensures the lowest possible risk of adverse effects on human health arising from the presence of oxamyl residues in Costa Rican strawberries.

The level of protection that the alternative measures achieve

7.380. The Panel will now proceed to examine whether the alternative measures achieve Panama's ALOP as identified in paragraph 7.389 below. To that end, the Panel will compare Panama's ALOP with the level of protection that would be achieved by the alternative measures.

7.381. Costa Rica submits that, regardless of how high or low Panama's ALOP may be, the various alternative measures can achieve it, as the type and number of measures can be adjusted in accordance with this ALOP.[887] Costa Rica further argues that Panama's level of protection relates to the protection of human health through imported food controls to ensure compliance with the MRL for oxamyl in strawberries, which, in its view, is consistent with the objective of Guidelines CAC/GL 26-1997 and CAC/GL 47-2003.[888]

7.382. Panama responds that Guidelines CAC/GL 26-1997 establish that the choice of measure(s) to be applied where an imported product is found not to be in conformity with sanitary requirements depends on three criteria: (a) repeated non-conformity in the same product or in the same category of products; (b) history of non-conformity of those responsible for handling the products; and (c) reliability of checks made by the country of origin. Panama asserts that it had no choice but to provisionally suspend imports to achieve its ALOP because it was faced with repeated non-conformity with the relevant MRL for an extremely hazardous substance by a major exporter of strawberries from Costa Rica, and because it could not verify the effectiveness of Costa Rica's export control system. Panama adds that paragraph 15 of the appendix to Guidelines CAC/GL 47-2003 justifies the application of a provisional import prohibition "until it is confirmed that corrective measures have been introduced and are being implemented effectively". Panama also reiterates that the alternative

[881] See Panama's first written submission, para. 202. See also EFSA, Reasoned Opinion (2010) (Exhibit PAN-40), p. 8.
[882] Panama's first written submission, paras. 217 and 240. See also Panama's response to Panel question No. 16, para. 72.
[883] Panama's first written submission, para. 203.
[884] Panama's second written submission, para. 117.
[885] See para. 7.298 above.
[886] Panama's response to Panel question No. 95, para. 267.
[887] Costa Rica's first written submission, para. 463. According to Costa Rica, it is at Panama's discretion to apply only one of these measures or several cumulatively. (Ibid.) See also Costa Rica's response to Panel question No. 130, para. 3.52.
[888] Costa Rica's response to Panel question No. 130, paras. 3.44-3.46 and 3.50.

measures proposed by Costa Rica could not achieve Panama's ALOP at the time of the onset of COVID-19.[889]

7.383. The Panel notes that Guidelines CAC/GL 26-1997 "are intended to assist countries in the application of requirements and the determination of equivalency, thereby protecting consumers and facilitating trade in foodstuffs".[890] Application of the Guidelines "should help build and maintain the necessary confidence in the inspection and certification system of an exporting country … taking account of the expectations of consumers for an appropriate level of protection".[891] Guidelines CAC/GL 47-2003 complement Guidelines CAC/GL 26-1997 and "provide[] a framework for the development and operation of an import control system to", *inter alia*, "protect consumers".[892]

7.384. Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 do not establish a specific ALOP that can be compared to Panama's ALOP. However, as stated by Costa Rica, the objective of these Guidelines coincides with Panama's objective of protecting human health. The Guidelines in question seek to assist Panama in achieving its ALOP by providing a framework so that Panama can establish an inspection system that ensures the protection of human health from risks associated with imported food, taking into account its ALOP. This inspection system would ensure the compliance of imported food with Panama's food safety requirements.

7.385. The measures that Costa Rica suggests as alternatives to Measure 1 are contained in paragraph 35 of Guidelines CAC/GL 26-1997 and in paragraph 20 of the appendix to Guidelines CAC/GL 47-2003. The Panel recalls that these Guidelines indicate that the measures recommended in respect of future imports in situations where non-compliance with food safety requirements is detected include: control programmes implemented by the importer or exporter to ensure problems do not re-occur; increased intensity of checks on categories of products identified as being not in conformity and/or the undertakings concerned; request for information and cooperation on the product or the category of products found not to be in conformity by the responsible authorities in the country of origin (increased checks at origin); on-site visits[893]; enhanced sampling and testing from the establishment involved; and food being held pending final judgment.[894] The suspension of imports would be considered only in the "most serious or persistent cases"[895] or in situations involving a "serious food safety risk".[896]

7.386. The Panel considers that Guidelines CAC/GL 26-1997 support Costa Rica's argument that the type and number of measures applied may be adjusted in accordance with Panama's specific ALOP[897] by providing that the measures applied may be "cumulative if necessary" and "may include" those listed in paragraph 35 of those Guidelines.[898]

7.387. Panama claims that, in order to achieve its ALOP with respect to imports of Costa Rican strawberries in the circumstances of this dispute, it had no choice but to resort to the import suspension measure provided for in the Guidelines.[899] Panama maintains that the "repeated

[889] Panama's comments on Costa Rica's response to Panel question No. 130, paras. 55-56.

[890] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section I(1). (fn omitted)

[891] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section I(3).

[892] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section I(1). The appendix to these Guidelines focuses on imported food inspection based on risk, which "provides a more effective means for addressing the food safety risks that are associated with imported food, ensuring compliance of imported foods with importing countries' food safety requirements". (Ibid., appendix, section I(2)).

[893] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35; Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.

[894] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.

[895] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35.

[896] Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127), appendix, section 6, para. 20.

[897] Costa Rica's first written submission, paras. 449 and 463.

[898] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section 6, para. 35.

[899] Panama's comments on Costa Rica's response to Panel question No. 130, para. 55.

instances of non-conformity suggested a systematic problem with the controls operated by Costa Rica", meaning that the preventive measures would not achieve Panama's ALOP.[900]

7.388. These arguments suggest that Panama considered the case of non-conformity targeted by Measure 1 to be serious and recurrent, so that only the suspension of imports would achieve Panama's ALOP. The Panel considers that the level of risk or, in this case, the seriousness and recurrence of non-compliance, may be relevant to the issue of whether a measure achieves a Member's ALOP.[901] In this connection, the Panel recalls that Panama has not demonstrated that the finding of non-compliance with the MRL for oxamyl in two shipments of Costa Rican strawberries is a case that qualifies as serious and recurring or as a serious risk within the meaning of Guidelines CAC/GL 26-1997 and CAC/GL 47-2003.[902] The Panel therefore considers that Panama has not demonstrated that it was necessary to resort to the suspension of imports in order to achieve its ALOP.

7.389. The Panel also considers that the evidence in the record confirms that at least some of the measures proposed by Costa Rica achieve Panama's ALOP. The Panel notes that, when notifying Measure 1 to Costa Rica on 20 February 2020, Panama states that "imports of strawberries from Costa Rica to the Republic of Panama [are] temporarily disallowed until the health authority of the sister country indicates the corrective measures implemented".[903] Panama confirms that the control programmes implemented by the exporting country and the request for information and cooperation from the competent authorities of the country of origin were part of the "corrective measures" that Panama requested from Costa Rica.[904] In the Panel's view, by indicating in its communication of 20 February 2020 that imports of Costa Rican strawberries were disallowed until Costa Rica took corrective measures, Panama would appear to consider that such corrective measures might be sufficient to achieve its relevant ALOP. Accordingly, the alternative measures, consisting of the control programmes implemented by the exporting country and the request for information and cooperation from the competent authorities of the country of origin, would achieve Panama's relevant ALOP.

7.390. With respect to increased intensity of checks, including sampling and testing, the Panel notes that the detection of oxamyl which led to Measure 1 occurred as a result of the checks performed by the Panamanian authorities. Therefore, in the Panel's view, a measure that consisted of increasing the intensity of checks would allow Panama to detect non-compliance with the oxamyl MRL, ensuring, to the extent possible, that strawberries containing oxamyl residues at levels above the MRL of 0.01 mg/kg were not being imported. Even if Panama harboured concerns with respect to Costa Rica's sanitary controls, this alternative measure would allow it to ensure that its consumers are exposed to the lowest possible risk of adverse effects on human health arising from the presence of oxamyl residues in Costa Rican strawberries, thus achieving its ALOP. The Panel recalls that Panama had considered the possibility of failures occurring in the monitoring of compliance with GAPs and GMPs during production, harvesting, and packaging of Costa Rican strawberries.[905] In this connection, the Panel also notes that the Resolution governing imports of strawberries from Costa Rica prior to the adoption of Measure 1 states that AUPSA reserves the right to take additional samples, upon entry of the food into the country or at any point in the food chain, for analysis, including for toxic residues.[906]

7.391. Similarly, should Panama consider it necessary, in addition to increasing the intensity of checks, Panama could cumulatively apply other alternatives to achieve its ALOP as suggested by Costa Rica, such as control programmes and cooperation with Costa Rica.

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[900] Panama's response to Panel question No. 73, para. 208.

[901] The Panel agrees with the point made in *Australia – Salmon* that "one given situation might only represent a small risk for which a lenient sanitary measure will achieve a high level of protection, whereas another situation might pose very high risks requiring a very strict and different sanitary measure in order to meet that same high level of protection". (Panel Report, *Australia – Salmon*, para. 8.123).

[902] See para. 7.263 above.

[903] Note AUPSA-AG-051-2020 (Exhibit CRI-7).

[904] Panama's response to Panel question No. 132, para. 81.

[905] See para. 7.190 above.

[906] Resolution AUPSA-DINAN-006-2008 concerning the importation of strawberries (Exhibit PAN-34), Article 11.

7.392. With respect to Panama's argument that the alternative measures could not achieve its ALOP at the time of the onset of COVID-19[907], the Panel does not consider that these arguments are different from those made by Panama in relation to the issue of whether alternative measures are reasonably available. The Panel therefore refers to its explanation under the first requirement of footnote 3 to Article 5.6 above.[908]

7.393. As indicated by Costa Rica, the level of protection to be achieved by alternative measures may vary depending on the type and number of measures applied. However, in the light of the foregoing, the measures described in the Codex Guidelines in cases of non-compliance with sanitary requirements would help ensure, to the extent possible, that products that exceed Panama's MRL of 0.01 mg/kg for oxamyl in strawberries are not imported. Accordingly, in the Panel's view, the measures suggested by Costa Rica on the basis of those Guidelines would enable Panama to achieve the highest level of protection possible, which ensures the lowest possible risk of adverse effects on human health arising from the presence of oxamyl residues in Costa Rican strawberries.

7.394. Accordingly, the Panel concludes that Costa Rica has demonstrated that the measures included in the provisions of Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 cited by Costa Rica, applied individually or collectively, would achieve Panama's ALOP.

7.395. The Panel will now proceed to examine the third requirement of footnote 3 to Article 5.6, which is to determine whether the alternative measures identified by Costa Rica are significantly less restrictive to trade than Measure 1.

Whether the alternative measures are significantly less restrictive to trade

7.396. Costa Rica asserts that the alternative measures it proposes are significantly less restrictive to trade than Measure 1, given that "an alternative measure that allows imports, albeit with conditions, 'would be significantly less restrictive to trade than a[] … prohibition'".[909] Panama has not responded to Costa Rica's argument.

7.397. Measure 1 consists of "disallow[ing]" imports of strawberries from Costa Rica into Panama[910], which means that Costa Rican strawberries may not be imported into Panama. As such, that measure represents the highest possible degree of restrictiveness.[911] As the Panel noted above, in its analysis of Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 in the context of Article 5.7, the suspension of imports can be understood as a measure of last resort[912], which would indicate that it would be the most restrictive measure that can be applied to imports in the event of non-compliance with safety requirements.

7.398. The Panel recalls that, for alternative measures to meet this requirement under footnote 3 to Article 5.6, the difference in the degree of restrictiveness must be significant.[913] In previous disputes, an alternative measure that imposes import conditions but allows trade has been considered to be significantly less restrictive to trade than a prohibition.[914] The Panel concurs with this statement and will proceed to consider the restrictiveness of the alternative measures proposed by Costa Rica to determine whether they are "significantly" less restrictive than Measure 1.

7.399. The alternative measures that Costa Rica proposes may have different levels of trade restrictiveness depending on the number and type of measures adopted. The difference, therefore, between the restrictiveness of Measure 1 and that of the alternative measures may vary. However,

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[907] Panama's comments on Costa Rica's response to Panel question No. 130, paras. 55-56.
[908] See paras. 7.354 -7.356 , and 7.361 above.
[909] Costa Rica's first written submission, para. 465 (quoting Panel Report, *Russia – Pigs (EU)*, para. 7.829; in turn quoting Panel Reports, *India – Agricultural Products,* para. 7.590; and *Australia – Salmon*, para. 8.182); and second written submission, para. 535.
[910] See para. 2.5 above.
[911] See e.g. Appellate Body Report, *US – Shrimp*, para. 171 (which states that "an import prohibition is, ordinarily, the heaviest 'weapon' in a Member's armoury of trade measures"); Panel Report, *Brazil – Retreaded Tyres*, para. 7.114 (which notes that "Brazil's measure is as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil").
[912] See para. 7.249 above.
[913] See para. 7.336 above.
[914] Panel Reports, *Australia – Salmon*, para. 8.182; and *India – Agricultural Products*, paras. 7.590 and 7.595-7.596. See also para. 7.336 above.

unlike Measure 1, all of the alternative measures permit trade. In the Panel's view, for exporters, there would be a significant difference between being unable to export, on the one hand, and being able to export, on the other hand, even if exports are subject to measures such as control programmes or enhanced inspections and sampling to verify compliance with the relevant sanitary requirements. The Panel considers that this would be the case, even if a specific consignment that fails to comply with the relevant sanitary requirements may be held and, if necessary, rejected or destroyed. The Panel further recalls that Guidelines CAC/GL 26-1997 "are intended to assist countries in the application of requirements and the determination of equivalency, thereby protecting consumers and *facilitating trade in foodstuffs*".[915]

7.400. Accordingly, the Panel concludes that Costa Rica has demonstrated that the alternative measures are significantly less restrictive to trade than Measure 1.

7.3.1.3.2.3 Conclusion on Article 5.6 of the SPS Agreement

7.401. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the alternative measures to Measure 1 that it proposes meet the three cumulative requirements of footnote 3 to Article 5.6, given that they are reasonably available taking into account technical and economic feasibility, they achieve Panama's ALOP, and they are significantly less restrictive to trade.

7.402. Accordingly, the Panel finds that Costa Rica has demonstrated that Measure 1 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP.

7.3.1.3.2.4 Whether Measure 1 is inconsistent with Article 2.2 of the SPS Agreement

7.403. The Panel shares the observation made in previous disputes that a finding that a measure is more trade-restrictive than required to achieve the Member's ALOP, in breach of Article 5.6, leads to a rebuttable presumption of inconsistency with the obligation under Article 2.2 that SPS measures should be applied only to the extent necessary to protect human, animal or plant life or health.[916] The Panel considers that this rebuttable presumption can be made in this case because of its finding that Measure 1 is inconsistent with Article 5.6 of the SPS Agreement.[917] Panama has not presented arguments to rebut this presumption of inconsistency with Article 2.2.

7.404. Accordingly, in the light of its finding that Measure 1 is inconsistent with Article 5.6 of the SPS Agreement, and in the absence of a rebuttal by Panama of the presumption of inconsistency with Article 2.2 of the SPS Agreement, the Panel finds that Costa Rica has demonstrated that Measure 1 is inconsistent with Article 2.2 because it is not applied only to the extent necessary to protect human health.

7.3.1.3.2.5 Conclusion on Article 2.2 of the SPS Agreement

7.405. In the light of the above, the Panel finds that Costa Rica has demonstrated that Measure 1 is inconsistent with Article 2.2 because it is not applied only to the extent necessary to protect human health.

7.3.1.4 Claims under Article 3.1 of the SPS Agreement

7.3.1.4.1 Main arguments of the parties

7.3.1.4.1.1 Costa Rica

7.406. Costa Rica claims that Measure 1 is inconsistent with Article 3.1 of the SPS Agreement, as it is not based on the following three Codex Guidelines: (a) Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems

[915] Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126), section I(1).

[916] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; and Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; and *Russia – Pigs (EU)*, paras. 7.841 and 7.846.

[917] See para. 7.401 above.

(CAC/GL 26–1997); (b) Guidelines for Food Import Control Systems (CAC/GL 47–2003); and (c) Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (CAC/GL 25-1997).[918] Costa Rica considers these Guidelines to be relevant because Measure 1 relates to food safety, and Annex A(3)(a) to the SPS Agreement stipulates that, for food safety, the international standards, guidelines and recommendations are those established by the Codex.[919]

7.407. Costa Rica submits that Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 are relevant for the purposes of Article 3.1, because they regulate the inspection of imported food, and Measure 1 was adopted following the operation of an inspection system.[920] Costa Rica asserts that two notions emerge from paragraphs 34 and 35 of Guidelines CAC/GL 26-1997: (a) that, where imported products are found not to be in conformity with sanitary requirements, the importing country should ensure that the adopted measure is proportionate to the public health risk posed by the non-conformity; and (b) that food imports may be suspended only in the most serious and persistent cases (provided that various measures of differing degrees of severity are available to the importing country).[921] Costa Rica submits that, similarly, paragraph 20 of Guidelines CAC/GL 47-2003 provides that suspending imports is a measure of last resort that should be reserved only for those situations involving a serious food safety risk that has not been managed by other means.[922]

7.408. Costa Rica claims that Panama failed to base Measure 1 on Guidelines CAC/GL 26-1997 and CAC/GL 47-2003 because it adopted what Costa Rica describes as a "prohibition on strawberries from Costa Rica".[923] In Costa Rica's view, implementing an import *prohibition* in cases where an international standard provides for the *continuation* of trade amounts to a contradiction of the international standard, so it logically follows that the measure is not based on that international standard.[924]

7.409. Costa Rica submits that Guidelines CAC/GL 25-1997 are relevant because they provide the basis for structured information exchange on rejections of imported food where the reason for the rejection is related to food safety. According to Costa Rica, Panama's refusal to provide details of the analytical methods employed for the samples from the shipments of strawberries in which oxamyl and other pesticides were detected relates to a rejection of imported food for reasons of food safety.[925]

7.410. Costa Rica claims that Panama failed to base Measure 1 on Guidelines CAC/GL 25-1997, because it refused to provide details of the analytical methods employed, as requested by Costa Rica.[926]

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[918] Costa Rica's request for the establishment of a panel, p. 6; first written submission, paras. 403 and 444; and second written submission, para. 513. See also Costa Rica's first written submission, para. 406 (referring to Codex, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems (2010) (Exhibit CRI-126); Codex, Guidelines for Food Import Control Systems (2006) (Exhibit CRI-127); and Codex, Guidelines for the Exchange of Information between Countries on Rejections of Imported Food (2016) (Exhibit CRI-135)).

[919] Costa Rica's first written submission, paras. 404-405.

[920] Costa Rica's first written submission, paras. 408-409 and 415. According to Costa Rica, the detection of pesticide residues at levels exceeding the MRL constitutes the "operation" of an "inspection system" for the purposes of these Codex Guidelines. (Ibid. para. 409).

[921] Costa Rica's first written submission, paras. 411-414. For Costa Rica, the authorities should opt for other, less severe measures in cases that do not qualify as "the most serious or persistent". (Ibid. para. 414).

[922] Costa Rica's first written submission, paras. 415-416.

[923] Costa Rica's first written submission, para. 422. See also ibid. para. 428.

[924] Costa Rica's first written submission, paras. 424-428. (italics original) According to Costa Rica, the Guidelines in question provide for the continuation of trade through the adoption of measures to improve risk management. (Ibid. paras. 426 and 428). See also ibid. para. 423 (quoting Panel Reports, *India – Agricultural Products*, paras. 7.270-7.274; and *Korea – Radionuclides*, para. 7.100, which in turn quote Appellate Body Report, *EC – Sardines*, para. 248; and Appellate Body Report *India – Agricultural Products*, para. 5.111); and Costa Rica's second written submission, para. 518.

[925] Costa Rica's first written submission, paras. 418-419. Costa Rica adds that Panama itself has made reference to the Guidelines in its communications concerning the results of the analyses requested by Costa Rica, which confirms the Guidelines' relevance to this case. (Ibid. (referring to Note DNSV-0128-2021, (Exhibit CRI-18), para. 4)).

[926] Costa Rica's first written submission, para. 429; second written submission, para. 519. Costa Rica asserts that Measure 1 encompasses a series of acts and omissions, including the fact that, on 1 March 2021, Costa Rica asked Panama to provide a copy of the results of the analysis performed, as well as the details of

7.411. Costa Rica notes that it asked Panama to provide the information that section 3 of Guidelines CAC/GL 25-1997 requires the importing country to make available upon request, and that it clearly specified which documents were requested.[927] Costa Rica claims that it submitted the request for information to Panama in writing on at least two occasions: (a) on 1 March 2021, when it requested details of the sampling and analytical methods employed to detect non-conformities in the two shipments of Costa Rican strawberries; and (b) on 18 March 2021, when it again requested details of the analytical methods employed, as well as additional information about the other findings detected in other shipments of strawberries from Costa Rica.[928] Costa Rica submits that the information provided by Panama was insufficient to meet the requirements set out in the Codex Guidelines[929], and that Panama therefore acted in a manner contrary to the relevant international guidelines, which indicates that its actions were not based on those international guidelines.[930]

7.3.1.4.1.2 Panama

7.412. Panama submits that Costa Rica cannot establish a violation under Article 3.1 of the SPS Agreement, as Article 5.7 requires Members to base SPS measures on available pertinent information, including that from the relevant international organizations, but does not require Members to base provisional SPS measures on international standards.[931] In Panama's view, this is especially the case when the scientific information that a Member requires to perform a risk assessment was not examined as part of the process that led to the adoption of the international standard or guideline.[932]

7.3.1.4.2 Assessment by the Panel

7.413. Article 3.1 of the SPS Agreement provides:

> To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

7.414. The Panel has found that Measure 1 is not covered by Article 5.7 of the SPS Agreement. In its analysis under that provision, the Panel concluded that Panama did not adopt Measure 1 on the basis of Guidelines CAC/GL 26-1997 and CAC/GL 47-2003.[933] The Panel has also found that Measure 1 is inconsistent with Articles 5.1, 5.2, 2.2, and 5.6 of the SPS Agreement. These findings relate both to the scientific basis for Measure 1 and to the necessity and trade-restrictiveness of the measure.

7.415. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[934]

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the sampling and analytical methods employed to detect oxamyl in the two shipments of strawberries in question. (Costa Rica's response to Panel question No. 135, para. 3.59).

[927] Costa Rica's first written submission, para. 442. Costa Rica notes that the Guidelines require the importing country to "make available, upon request, details of the sampling and analytical methods employed, the results obtained and the details of the testing laboratory". (Ibid.).

[928] Costa Rica's first written submission, paras. 430-432, 434, and 439 (referring to Memorandum DSFE-0128-2021, (Exhibit CRI-17); Memorandum DSFE-0393-2021, (Exhibit CRI-21)); second written submission, paras. 521-522.

[929] Costa Rica's first written submission, para. 442. Costa Rica claims that, in its memorandum of 18 May 2021, it informed Panama of the information needed for it to be able to verify the validity of the results of the analysis performed by Panama, and why it was important for it to have access to the details of the sampling and analytical methods employed. Costa Rica states that there are numerous technical aspects that could result in a false positive, which is why the Codex standards allow for the exporting country to request details of the sampling and analytical methods employed, the results obtained and the details of the testing laboratory. (Ibid. paras. 434-435).

[930] Costa Rica's first written submission, para. 443.

[931] Panama's first written submission, para. 438.

[932] Panama's responses to Panel question No. 71, para. 204, and No. 75, para. 214.

[933] See para. 7.299 above.

[934] See Articles 3.4, 3.7, 11, and 21.1 of the DSU. The Panel notes that other panels have refrained from making findings with respect to claims under Article 3 following a finding that the measure at issue is

Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under Article 3.1 with respect to Measure 1, and decides to exercise judicial economy in respect of those claims.

7.3.1.5 Claims under Article 7 and Annex B of the SPS Agreement

7.3.1.5.1 Main arguments of the parties

7.3.1.5.1.1 Costa Rica

7.416. In its panel request, Costa Rica claims that all of the measures at issue are inconsistent with Article 7 and Annex B(1) of the SPS Agreement, "because Panama failed to meet its transparency and publication obligations in relation to each of the measures at issue, including by failing to publish the MRLs for substances in respect of which Panama stated that it had detected non-conformities in imports from Costa Rica".[935]

7.417. In its first written submission, Costa Rica submits that Panama acted inconsistently with the obligation under Annex B(5)(b) or, alternatively, with Annex B(6)(a). Costa Rica requests the Panel to find that Panama acted inconsistently with Article 7 as a consequence of the inconsistency with Annex B.[936]

7.418. Costa Rica argues that its panel request also includes a claim under Article 7 of the SPS Agreement that "can be applied independently of Annex B".[937] Costa Rica adds that, in the event that the Panel were to consider that Article 7 can be invoked independently of Annex B, the Panel would have all of the elements necessary to "find that Panama failed to notify the prohibitions to the WTO".[938]

7.3.1.5.1.2 Panama

7.419. Panama notes that Costa Rica's first written submission does not contain any claim under Annex B(1) with respect to Measure 1.[939]

7.420. Panama also submits that Costa Rica's claims under Article 7 and Annex B(5)(b) and Annex B(6)(a) of the SPS Agreement are not within the Panel's terms of reference.[940]

7.3.1.5.2 Assessment by the Panel

7.421. The Panel recalls that, in its preliminary ruling of 5 April 2023, it found that Costa Rica's claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement fall outside the Panel's terms of reference.[941] Therefore, its assessment in this section will address only the claims that Costa Rica included in its panel request, namely, the claims under Article 7 and Annex B(1).

7.422. Article 7 of the SPS Agreement reads as follows:

> Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

7.423. In its preliminary ruling, the Panel noted that the phrase "in accordance with the provisions of Annex B" in Article 7 qualifies both of the preceding obligations, namely, to notify changes in

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inconsistent with other provisions of the SPS Agreement, namely, Articles 2.2, 2.3, 5.1, 5.5, and 5.6. (Panel Reports, *Australia – Salmon*, para. 8.184; *Costa Rica – Avocados (Mexico)*, para. 7.2285).

[935] Costa Rica's request for the establishment of a panel, p. 7. Costa Rica also states that the inconsistency of the measures at issue with Article 7 and Annex B(1) "also gives rise to a violation of Article X:1 of the GATT 1994, since Panama failed to publish laws, regulations and administrative rulings of general application pertaining to requirements, restrictions or prohibitions on imports". (Ibid.).

[936] Costa Rica's first written submission, para. 507.

[937] Costa Rica's response to Panel question No. 66, paras. 3.25 and 3.28.

[938] Costa Rica's response to Panel question No. 106, paras. 2.15-2.17.

[939] Panama's first written submission, para. 33.

[940] Panama's first written submission, para. 17.

[941] Preliminary ruling of the Panel (5 April 2023), para. 5.1(b). See Annex D-1 to this report.

SPS measures and to provide information on SPS measures. The Panel considered that the wording of Article 7 does not support Costa Rica's reading that Article 7 contains an obligation that is independent of Annex B.[942] On the contrary, in the Panel's view, Annex B elaborates on the obligations that must be met under Article 7. In the same vein, previous panels have found that Article 7 and Annex B are intertwined and must be read together.[943] In view of the foregoing, these panels concluded that a finding of inconsistency with the provisions of Annex B would result in a finding of inconsistency with Article 7.[944]

7.424. In these proceedings, Costa Rica has not advanced any argument to support its claim concerning the publication of the measures at issue under Article 7 and Annex B(1). Therefore, in the absence of any argumentation by Costa Rica, the Panel considers that Costa Rica has failed to demonstrate that Measure 1 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations established thereunder.

7.3.1.5.3 Conclusion on Article 7 and Annex B(1) of the SPS Agreement

7.425. In view of the foregoing, the Panel finds that Costa Rica has failed to demonstrate that Measure 1 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement.

7.3.1.6 Claims under Articles 1.1 and 2.1 of the SPS Agreement

7.3.1.6.1 Main arguments of the parties

7.426. Costa Rica claims that Measure 1 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement. In the light of all the inconsistencies that, according to Costa Rica, it has demonstrated, Costa Rica requests the Panel to find that Panama has, consequently, acted inconsistently with its obligations under Articles 1.1 and 2.1 of the SPS Agreement.[945]

7.427. Panama submits that Costa Rica cannot establish claims under Articles 1.1 and 2.1, as it has not demonstrated that Measure 1 is inconsistent with the provisions of the SPS Agreement.[946]

7.3.1.6.2 Assessment by the Panel

7.428. Article 1.1 of the SPS Agreement provides as follows:

> This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

7.429. For its part, Article 2.1 of the SPS Agreement states that:

> Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

7.430. The Panel notes that the SPS Agreement recognizes the right of Members to take SPS measures necessary for the protection of human, animal or plant life or health.[947] This right is,

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[942] Preliminary ruling of the Panel (5 April 2023), para. 4.17.

[943] See e.g. Panel Reports, *India – Agricultural Products*, para. 7.741; *Russia – Pigs (EU)*, para. 7.1416. The Panel notes that, in its first written submission, Costa Rica itself recognizes that Article 7 and Annex B must be read together, by asserting that Panama acted inconsistently with Article 7 *as a consequence* of acting inconsistently with Annex B(5)(b) or Annex B(6)(a). (Costa Rica's first written submission, paras. 1205 (quoting Panel Report, *India – Agricultural Products*, para. 7.741) and 1220) (italics added); see also the preliminary ruling of the Panel (5 April 2023), para. 4.16.

[944] See e.g. Panel Reports, *India – Agricultural Products*, para. 7.741; *Russia – Pigs (EU)*, para. 7.1416.

[945] Costa Rica's request for the establishment of a panel, p. 6; first written submission, paras. 508-511; and second written submission, paras. 559-561.

[946] Panama's first written submission, para. 443; second written submission, para. 245.

[947] First recital of the preamble to the SPS Agreement, in which Members reaffirm "that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or

however, subject to the requirement to comply with the provisions of the Agreement, as provided for in Articles 1.1 and 2.1. In previous disputes in which the complainant submitted claims under Articles 1.1 and 2.1, the panels found there to be an inconsistency with these provisions after having found the measure at issue to be inconsistent with at least one of the obligations under the SPS Agreement.[948]

7.431. The Panel has found that Measure 1 is inconsistent with Articles 5.1, 5.2, 2.2, and 5.6 of the SPS Agreement. Accordingly, the Panel finds that Measure 1 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement.

7.3.2 Claims under the GATT 1994 and the Agreement on Agriculture

7.432. Having examined Costa Rica's claims under the SPS Agreement with respect to Measure 1, the Panel will address below Costa Rica's claims under Article XI:1 of the GATT 1994 and Article 4.2 and footnote 1 of the Agreement on Agriculture with respect this measure.

7.3.2.1 Main arguments of the parties

7.3.2.1.1 Costa Rica

7.433. Costa Rica claims that Measure 1 is inconsistent with Article XI:1 of the GATT 1994, as this measure: (a) falls within the broad residual category of "other measures" that may be challenged under Article XI:1 of the GATT 1994; and (b) amounts to an import prohibition, since Panama's decision to inactivate imports of strawberries constitutes "a legal ban on the trade or importation of a specified commodity".[949]

7.434. Costa Rica also claims that Measure 1 is inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture. According to Costa Rica, the Agreement on Agriculture applies to Measure 1, as strawberries are an agricultural product classified under Chapter 8 of the Harmonized System. Costa Rica argues that a violation of Article XI:1 of the GATT 1994 implies a violation of the obligation not to resort to quantitative import restrictions or similar border measures on agricultural products, set forth in Article 4.2 and footnote 1 of the Agreement on Agriculture.[950]

7.3.2.1.2 Panama

7.435. Panama submits that Costa Rica "has not established its claims" under Article XI:1 of the GATT 1994 and Article 4.2 and footnote 1 of the Agreement on Agriculture.[951]

7.3.2.2 Assessment by the Panel

7.436. With respect to the claims under the GATT 1994, the Panel notes that previous panels have recognized that the relationship between the SPS Agreement and the GATT 1994 could lead to circular reasoning that does not aid in providing a positive resolution to the dispute. Those panels have reasoned that any findings of inconsistency with GATT 1994 provisions would also require an examination of whether the measure was justified under Article XX(b) of the GATT 1994, which refers to measures necessary to protect human, animal or plant life or health.[952] The Panel agrees

health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade"; Article 2.1 of the SPS Agreement.

[948] See Panel Reports, *US – Animals*, para. 7.719 (with respect to Article 1.1 of the SPS Agreement); *Costa Rica – Avocados (Mexico)*, para. 7.2304 (with respect to Articles 1.1 and 2.1 of the SPS Agreement).

[949] Costa Rica's first written submission, paras. 1237-1241; second written submission, paras. 574-577.

[950] Costa Rica's first written submission, paras. 1242-1246; second written submission, paras. 578-582.

[951] Panama's second written submission, para. 246. See also Panama's first written submission, para. 443.

[952] Panel Reports, *Australia – Salmon*, para. 7.19; *US – Poultry (China)*, para. 7.481; *US – Animals*, para. 7.730; and *Costa Rica – Avocados (Mexico)*, para. 7.2318.

with this reasoning and recalls that the SPS Agreement elaborates on Article XX(b) of the GATT 1994.[953]

7.437. Furthermore, the Panel recalls that it has found that Measure 1 is inconsistent with Articles 5.1, 5.2, 2.2, and 5.6 of the SPS Agreement.[954] These findings relate both to the scientific basis for Measure 1 and to the necessity and trade-restrictiveness of the measure.

7.438. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[955] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the GATT 1994, and decides to exercise judicial economy in respect of those claims.[956]

7.439. With respect to the claims under the Agreement on Agriculture, the Panel notes that, according to Costa Rica, the inconsistency of Measure 1 with Article 4.2 and footnote 1 of the Agreement on Agriculture stems from its inconsistency with Article XI:1 of the GATT 1994. The Panel recalls that it has decided to exercise judicial economy in respect of Costa Rica's claim under the GATT 1994. Furthermore, the Panel has addressed the issue of the trade-restrictiveness of Measure 1 in relation to Article 5.6 of the SPS Agreement. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[957] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the Agreement on Agriculture, and decides to exercise judicial economy in respect of those claims.[958]

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

7.440. The Panel will now examine Costa Rica's claims with respect to Measure 2. To this end, it will first determine the content of the measure, an issue on which the parties disagree.

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[953] See the last preambular paragraph of the SPS Agreement, which states:
Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).
See also Article 2.4 of the SPS Agreement, which provides that SPS measures which conform to the SPS Agreement shall be presumed to be in accordance with the obligations under the provisions of GATT 1994 which relate to the use of SPS measures, in particular the provisions of Article XX(b).

[954] See paras. 7.322 (with respect to Articles 5.1, 5.2, and 2.2), 7.402 (with respect to Article 5.6) and 7.405 (with respect to Article 2.2) above.

[955] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[956] In previous disputes in which measures were challenged under the SPS Agreement and the GATT 1994, the panels applied the principle of judicial economy with respect to the claims under the GATT 1994 after having found inconsistencies with the provisions of the SPS Agreement. (See e.g. Panel Reports, *EC – Hormones (Canada)*, para. 8.275; *EC – Hormones (US)*, para. 8.272; *Australia – Salmon*, para. 8.185; *Japan – Apples*, para. 8.328; *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 6.3429; *India – Agricultural Products*, para. 7.803; *US – Animals*, paras. 7.731-7.732; and *Costa Rica – Avocados (Mexico)*, para. 7.2319).

[957] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[958] The panel in *Japan – Apples*, in which measures were challenged under the SPS Agreement and the Agreement on Agriculture, applied the principle of judicial economy in respect of the claims under the Agreement on Agriculture, after having found inconsistencies with the provisions of the SPS Agreement. (See Panel Report, *Japan – Apples*, para. 8.332). The panel in *US – Poultry (China)*, in which measures were challenged under the SPS Agreement, the GATT 1994, and the Agreement on Agriculture, applied the principle of judicial economy in respect of the claims under the Agreement on Agriculture, after having found inconsistencies with the provisions of the SPS Agreement and the GATT 1994. In particular, the panel noted that it had resolved the aspects in the dispute related to the "restrictions". (See Panel Report, *US – Poultry (China)*, paras 7.69 and 7.485-7.487).

7.4.1 Content of Measure 2

7.4.1.1 Main arguments of the parties

7.4.1.1.1 Costa Rica

7.441. Costa Rica considers Measure 2 to consist of an import prohibition on dairy and meat products in force since 30 June 2020[959] that is maintained by virtue of: (a) the non-renewal of the sanitary approvals of 18 Costa Rican establishments that export the products in question[960], and (b) Panama's requirement for a new animal health eligibility procedure to be conducted as a condition for resuming trade in these products, as if Costa Rica were a country that will be exporting for the first time.[961]

7.442. Costa Rica submits that Panama's conduct that it is challenging in the context of Measure 2 "comprises a number of acts and omissions".[962] Costa Rica states that, despite its requests, Panama decided not to renew the sanitary approvals for various exporting establishments, which expired on 30 June 2020.[963] According to Costa Rica, Panama reported that the sanitary approvals could not be renewed owing to its decision to revoke Costa Rica's sanitary eligibility, which is a precondition for renewal.[964]

7.443. Regarding the non-renewal of the sanitary approvals of the 18 Costa Rican establishments in question[965], Costa Rica states that the Panamanian authorities did not take any formal steps to renew the sanitary approvals of the Costa Rican establishments, despite the renewal requests submitted by Costa Rica between 2017 and 2020. In Costa Rica's view, the sanitary approval extensions granted by AUPSA to the Costa Rican establishments before the approvals expired, on 30 June 2020, were automatic and informal. Accordingly, Costa Rica submits that, despite the extensions granted by AUPSA and their publication on the AUPSA website, Panama has not renewed the sanitary approvals of the 18 Costa Rican establishments in question.[966]

7.444. Regarding the revocation of its country-level sanitary eligibility, Costa Rica submits that Panama revoked this eligibility for the products in question. According to Costa Rica, Panama initiated a sanitary eligibility procedure for Costa Rica that applies to countries seeking to export to Panama for the first time and that prevents exports while it is taking place, thus constituting an import prohibition. For Costa Rica, this means that the country's sanitary eligibility, originally recognized by Panama in 2009, and which had enabled the Costa Rican establishments to obtain their sanitary approvals and export the products in question to Panama, was revoked by the Panamanian authorities.[967] Costa Rica submits that these same considerations apply to its animal

[959] Costa Rica's panel request, p. 3. See also Costa Rica's first written submission, para. 41; second written submission, para. 9.

[960] Costa Rica's panel request, p. 3, fn 6 and Annex – List of Costa Rican establishments affected by the non-renewal of permits by Panama. Hereinafter, the Panel will refer to these establishments as "the Costa Rican establishments in question".

[961] Costa Rica's panel request, p. 4. See also ibid. p. 3, fn 9; Costa Rica's first written submission, para. 42; second written submission, para. 15; and response to Panel question No. 153, para. 3.84. The Panel notes that, in some of its submissions, Costa Rica describes this aspect of Measure 2 as "Panama's decision to revoke Costa Rica's sanitary eligibility". (Costa Rica's second written submission, para. 15). See also Costa Rica's response to Panel question No. 68, para. 3.37; second written submission, para. 35 (where Costa Rica indicates that, when referring to sanitary eligibility, Panama also uses the term "animal health eligibility"); and comments on Panama's responses to Panel question No. 140, paras. 3.134-3.140, and No. 142, para. 3.148 (where Costa Rica refers to Panama's revocation of its sanitary and animal health eligibility).

[962] Costa Rica's opening statement at the second meeting of the Panel, para. 19.

[963] Costa Rica's panel request, p. 3.

[964] Costa Rica's first written submission, para. 5(b).

[965] Costa Rica's panel request, annex, pp. 9-10. See also Costa Rica's first written submission, annex.

[966] Costa Rica's first written submission, paras. 60-68; response to Panel question No. 23, para. 2.112; opening statement at the first meeting of the Panel, paras. 31-32; second written submission, paras. 130-133; and response to Panel question No. 169, paras. 3.109-3.112.

[967] Costa Rica's second written submission, paras. 10, 23, 34-43, 46, and 66. See also Costa Rica's first written submission, para. 101.

health eligibility.[968] Costa Rica states that AUPSA first informed it that AUPSA had ceased to recognize its sanitary eligibility on 21 August 2020.[969]

7.445. Costa Rica adds that Panama has not referred to either of the two cases provided for in Panama's regulatory framework for revoking or suspending sanitary eligibility, namely proof of substantial changes in the country's sanitary status, or the existence of scientific and technical elements demonstrating non-compliance with the sanitary standards in force. In Costa Rica's view, the foregoing demonstrates that the revocation of Costa Rica's sanitary eligibility cannot be justified under Panama's regulatory framework.[970]

7.446. Costa Rica considers that its position regarding the validity of its sanitary eligibility, which, according to Costa Rica, Panama has referred to as animal health eligibility, is supported not only by the communication of 21 August 2020 (Note AUPSA-AG-395-2020), but also by the following communications sent by Panama to Costa Rica[971]:

a. Communication of 9 October 2020, in which AUPSA states that it was "waiting for your reply to be able to initiate the animal health evaluation process for Costa Rica that would make it possible to determine its eligibility to export animals and products and by-products of animal origin to Panama through the procedures carried out by the competent Panamanian authorities".[972]

b. Communication of 23 November 2020, in which AUPSA repeated that it was still waiting for Costa Rica's reply in order to initiate the animal health evaluation process, without mentioning the questionnaire completed by Costa Rica.[973]

c. Communication of 22 February 2021, through which Panama sent Costa Rica a questionnaire the title and content of which, in Costa Rica's view, clarify that the procedure to which Costa Rica is subject, and which was being initiated formally, is a sanitary eligibility procedure for exporting dairy products of animal origin to Panama that applies to countries without valid sanitary eligibility.[974]

d. Communication of 1 April 2021, in which AUPSA argued that the updated information submitted by Costa Rica "fails to provide the information requested through Note AUPSA-AG-100-2021 of 22 February 2021", and again requested that Costa Rica respond to the questionnaire sent on 22 February 2021.[975]

e. Communication of 12 July 2021, in which Panama stated that the information provided by Costa Rica in response to the questionnaire sent by AUPSA was being reviewed in the context of a "sanitary evaluation procedure". Costa Rica adds that, in this communication,

[968] Costa Rica's first written submission, para. 536; comments on Panama's response to Panel question No. 140, paras. 3.138-3.140. See also Costa Rica's response to Panel question No. 68, para. 3.40.

[969] Costa Rica's second written submission, paras. 34-35 (referring to Note AUPSA-AG-395-2020 (Exhibit CRI-51), final para.); response to Panel question No. 141, paras. 3.78-3.79. The Panel notes that Costa Rica also indicated that Panama had revoked its sanitary eligibility at least as of 12 June 2020, the date when it requested the renewal of the sanitary approvals of the Costa Rican establishments. (Costa Rica's second written submission, para. 46). Costa Rica adds that, by initiating a sanitary eligibility procedure, Panama kept the market closed for the products affected by the expiry of the establishment sanitary approvals, on 30 June 2020. (See Costa Rica's responses to Panel question No. 4, para. 2.26, and No. 68, para. 3.41; opening statement at the first meeting of the Panel, paras. 26-27).

[970] Costa Rica's second written submission, paras. 44-45 (referring to Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26), Article 4). Costa Rica also refers to Article 67 of Law No. 23 of 1997 as evidence that the renewal of sanitary approvals is automatic, unless the aforementioned cases for non-renewal arise. (Costa Rica's second written submission, paras. 54-55 (referring to Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-105), Article 67)). See also Costa Rica's first written submission, para. 101.

[971] Costa Rica's second written submission, para. 36.

[972] Costa Rica's second written submission, paras. 37-38 (quoting Note AUPSA-AG-481-2020 (Exhibit CRI-52), final para.). (emphasis omitted)

[973] Costa Rica's first written submission, para. 85 (referring to Note AUPSA-AG-571-2020 (Exhibit CRI-55)).

[974] Panama's first written submission, para. 90; Costa Rica's second written communication, paras. 40-41 (quoting the Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268)).

[975] Costa Rica's first written submission, para. 96 (quoting Note AUPSA-AG-176-2021 (Exhibit CRI-62)).

> Panama stated that its competent authority would request additional information from Costa Rica "once this stage of the analysis and evaluation process for animal health eligibility is over".[976]

7.447. Costa Rica also submits that, during the meeting held in Paso Canoas on 12 February 2021, Panama and Costa Rica agreed that Panama would conduct an evaluation of the Costa Rican sanitary system within 30 days. However, Costa Rica considers that Panama failed to meet this commitment, given that it initiated a sanitary eligibility procedure.[977]

7.448. Costa Rica considers that, if Panama's argument that sanitary evaluation and animal health evaluation are distinct concepts under Panamanian regulatory framework is accepted, the evidence in the record demonstrates that the Panamanian authorities processed these evaluations together. According to Costa Rica, Panama had no justification under the terms of its own regulatory framework to revoke or cease to recognize Costa Rica's sanitary or animal health eligibility.[978]

7.4.1.1.2 Panama

7.449. Panama, for its part, submits that it did not adopt a broad import prohibition on all products of animal origin from Costa Rica.[979] Panama notes that, on 30 June 2020, the sanitary approvals of 16 Costa Rican dairy and meat product establishments expired.[980] Panama adds that the sanitary approvals of the Central Veterinaria and Biomar establishments remained valid after that date, meaning that these establishments could continue to export their products to Panama.[981] Therefore, Panama considers that the measure challenged by Costa Rica in this dispute "is attributable exclusively to the expiry of the 16 authorizations of dairy and meat product establishments, and to Panama's alleged delays in finalizing the necessary approval procedures to renew them".[982] Panama submits that it has never revoked Costa Rica's sanitary eligibility[983] and that Costa Rica has failed to meet its burden of proof in this respect.[984]

7.450. Regarding the non-renewal of the sanitary approvals of the 18 Costa Rican establishments in question, Panama submits that it completed the procedures for renewing the sanitary approvals of each and every one of the Costa Rican establishments in question at least until 30 June 2020, when the extensions granted by Panama for these sanitary approvals expired.[985] In Panama's view, the inclusion on the AUPSA website of the extensions granted to the Costa Rican establishments and the issuance of AUPSA Resolution No. 145-AG-2019, pursuant to which these extensions were approved, demonstrate that the procedure for renewing the sanitary approvals of the Costa Rican establishments formally ended on 30 June 2020.[986]

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[976] Costa Rica's second written submission, para. 42 (quoting Note DSA-335-21 (Exhibit CRI-64), first and final paras.). (emphasis omitted)

[977] Costa Rica's second written submission, para. 10. See also Costa Rica's first written submission, para. 90 (where Costa Rica refers to Panama's notification of the "formal initiation [of the] animal health evaluation procedure for Costa Rica in order to determine its sanitary eligibility to export products and by-products of animal origin (dairy products) to Panama") (Ibid. quoting Note AUPSA-AG-100-2021 (Exhibit CRI-57)).

[978] Costa Rica's comments on Panama's responses to Panel question No. 140, paras. 3.134-3.140, and No. 142, para. 3.148.

[979] Panama's second written submission, para. 18.

[980] Panama, Timeline of Panama's approval procedures for dairy and meat product establishments (Exhibit PAN-78).

[981] Panama's first written submission, para. 84 and fn 35. According to Panama, "Biomar had sanitary approval until 30 June 2023" and "was able to export its products to Panama", and "Central Veterinaria continued exporting to Panama" during the period from 28 February 2022 to 17 March 2022. (Panama's responses to Panel question No. 138, para. 91, and No. 139, para. 94). Regarding Biomar, Panama states that Note APA-DD-410-2023 (Exhibit CRI-397) demonstrates that this establishment could export at least until 16 May 2025. (Panama's comments on Costa Rica's response to Panel question No. 138, para. 63).

[982] Panama's first written submission, para. 83. (emphasis omitted) See also Panama's second written submission, para. 18 (where Panama states that the measure at issue "resulted *solely* from Panama's alleged failure to renew the sanitary approvals of 16 Costa Rican dairy and beef establishments"). (emphasis original)

[983] Panama's first written submission, para. 84. (emphasis omitted)

[984] Panama's comments on Costa Rica's response to Panel question No. 141, para. 66.

[985] Panama's first written submission, paras. 103 and 128.

[986] Panama's first written submission, para. 128; response to Panel question No. 145, paras. 121-123 (referring to AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217); AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2)).

7.451. Regarding the revocation of Costa Rica's sanitary eligibility for the products at issue, Panama submits that Costa Rica has failed to demonstrate that there is a Panamanian decision revoking "the country-level admissibility of all products of animal origin from Costa Rica", resulting in an import prohibition. For Panama, the evidence on which Costa Rica bases the existence of the alleged decision is insufficient.[987] Panama submits that the evidence in the record shows that, contrary to what Costa Rica argues, Panama has not revoked Costa Rica's sanitary eligibility for the products at issue.[988] According to Panama, the legal instruments through which it granted sanitary eligibility to Costa Rica for the products in question, namely Resolution No. 28 (2009) (on bovine meat products) and the Annex to Decree-Law No. 11 of 2006 (on fresh meat of bovine animals, dairy products, and processed ripened cheese), remain in force.[989] In this regard, Panama indicates that two of the Costa Rican establishments in question (Biomar and Central Veterinaria) still have valid sanitary approvals to export products of animal origin (aquatic animal and dog food) to Panama.[990]

7.452. Panama notes that, under its regulatory framework, the expiry of the sanitary approvals of establishments does not revoke, nullify, or affect a country's eligibility while the renewal procedures are pending. This is without prejudice to the fact that the *AUPSA Manual for the approval of establishments* requires an evaluation of sanitary systems as a precondition for renewing the sanitary approvals of establishments.[991] In this regard, Panama clarifies that Note AUPSA-AG-229-2020 of 10 July 2020 refers only to an evaluation and recognition of Costa Rica's sanitary system, *not* to the revocation of Costa Rica's sanitary eligibility for products of animal origin.[992]

7.453. In addition, Panama explains that the aim of the questionnaires sent to Costa Rica[993] did not relate to Costa Rica's sanitary eligibility, but to updating the information needed to renew the sanitary approvals of the relevant establishments, and implementing the Paso Canoas Bilateral Agreement of 12 February 2021.[994] According to Panama, the parties agreed in Paso Canoas that Panama would carry out "an evaluation of the Costa Rican sanitary system" within 30 working days. If the outcome of this evaluation were "positive", Panama would automatically renew the sanitary approvals of the establishments. Panama emphasizes that a 30-day period is insufficient to complete the country eligibility procedures and that the automatic renewal of the sanitary approvals of the establishments would not be possible if the country's eligibility had been revoked.[995]

7.4.1.2 Assessment by the Panel

7.454. The Panel notes that, in keeping with the standard of proof applied in previous disputes[996], Costa Rica bears the burden of proving the existence of the measure it is challenging. Therefore, the Panel will now examine whether Costa Rica has met its burden of proof in respect of the existence of Measure 2 as described in its panel request.[997] In particular, the Panel will evaluate whether

[987] Panama's second written submission, paras. 57-58. (emphasis original) Panama refers to Costa Rica's response to Panel question No. 68, para. 3.41 (referring to Note AUPSA-AG-395-2020 (Exhibit CRI-51); Note AUPSA-AG-481-2020 (Exhibit CRI-52); Note AUPSA-AG-100-2021 (Exhibit CRI-57); and the Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268)).

[988] Panama's second written submission, para. 59 (referring to AUPSA, Resolution No. 28 (2009) (Exhibit PAN-1); Note AUPSA-AG-0229-2020 (Exhibit CRI-45); and quoting the Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14)). See also Panama's responses to Panel question No. 32, para. 111, and No. 45, para. 139.

[989] Panama's second written submission, para. 59 (referring to AUPSA, Resolution No. 28 (2009) (Exhibit PAN-1); response to Panel question No. 32, paras. 109 and 111.

[990] Panama's second written submission, para 58 (referring to AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217)). Panama states that Note APA-DD-410-2023 (Exhibit CRI-397) demonstrates that Biomar could export at least until 16 May 2025. (Panama's comments on Costa Rica's response to Panel question No. 138, para. 63).

[991] Panama's second written submission, para. 59.

[992] Panama's second written submission, para. 59 (referring to Note AUPSA-AG-0229-2020 (Exhibit CRI-45)). (emphasis original)

[993] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268); Note AUPSA-AG-001-2020 (Exhibit CRI-38).

[994] Panama's response to Panel question No. 140, para. 102.

[995] Panama's second written submission, para. 59 (quoting the Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14)).

[996] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14 (referring to "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof").

[997] In previous disputes in which panels and the Appellate Body assessed whether the complainant had demonstrated the existence of a measure, it was considered that the complainant must demonstrate the

Costa Rica has proved its assertion that Measure 2 consists of an import prohibition on the dairy and meat products at issue[998] maintained by virtue of: (a) the non-renewal of the sanitary approvals of the Costa Rican establishments in question, and (b) the revocation of Costa Rica's sanitary/animal health eligibility for all the products at issue. Regarding the second issue, and in the light of Costa Rica's arguments[999], the Panel will examine whether Panama revoked or annulled Costa Rica's sanitary eligibility or animal health eligibility for all the products at issue.

7.455. The establishments identified by Costa Rica in its panel request are as follows[1000]:

Table 6 - Costa Rican establishments that Costa Rica considers to have been affected by the non-renewal of sanitary approvals

	Establishment number[1001] and company name	Product(s)[1002]
1	12-C (Camsa)	Products of swine[1003]
2	12 (CIISA-El Arreo)	Meat products of bovine animals[1004]
3	5 (Planta Cinta Azul (Pipasa))	Meat products (sausages) of bovine animals, swine, and poultry that undergo a process to ensure the inactivation of significant infectious agents[1005]
4	46-A (Cooperativa de Productores de Leche Dos Pinos) (Dos Pinos)	Dairy products[1006]
5	46-B (Dos Pinos)	Dairy products of bovine animals[1007]
6	46-C (Dos Pinos)	Dairy products of bovine animals[1008]
7	8 (Coopemontecillo)	Meat products of bovine animals[1009]
8	8-C (Coopemontecillo)	Products of swine[1010]

precise content of the measure and its attribution to the respondent. Depending on the characteristics of the measure challenged, the claimant may need to substantiate other elements to prove its existence. These elements will be informed by how such a measure is described or characterized by the complainant. See Appellate Body Report, *Argentina – Import Measures*, para. 5.108; Panel Report, *Indonesia – Chicken*, para. 7.616.

[998] In its panel request, Costa Rica identifies the following dairy and meat products: (i) dairy products; (ii) meat products of bovine animals; (iii) meat products of swine; (iv) meat products (sausages) of bovine animals, swine and poultry; (v) aquatic animal (fish) food; and (vi) pet (dog) food containing protein of ruminant origin, all originating in Costa Rica. (Costa Rica's panel request, pp. 3-4). See also para. 2.2 above. In this section of the report, the Panel refers to these products, taken together, as the products at issue.

[999] In its panel request, Costa Rica refers to "Panama's requirement for a new zoosanitary eligibility procedure to be conducted in order to restore trade in these products, as if Costa Rica were a country that will be exporting for the first time" (Costa Rica's panel request, p. 4). In its submissions, Costa Rica uses different formulations to refer to this aspect of Measure 2: "Panama's sudden decision to revoke Costa Rica's country-level **sanitary eligibility**". (emphasis original) (Costa Rica's first written submission, para. 42. See also, for example, Costa Rica's second written submission, paras. 15 and 23). In its submissions, Costa Rica also refers to: the "loss of sanitary eligibility" (Costa Rica's first written submission, paras. 520-521; second written submission, para. 10); sanitary eligibility having "ceased to be valid" (first written submission, paras. 528 and 531; second written submission, para. 34); the fact that sanitary eligibility "is no longer in effect" or such eligibility having been subject to "cancellation" (Costa Rica's opening statement at the first meeting of the Panel, paras. 25-27); or sanitary eligibility "[having been] withdrawn without justification" (Costa Rica's second written submission, para. 32). (See also Costa Rica's response to Panel question No. 68, para. 3.40, where Costa Rica submits that Panama's position that it has not revoked sanitary eligibility is a semantic issue, and that what matters is that it is indisputable that the sanitary eligibility Panama granted in 2009 is no longer in effect, meaning that Costa Rican companies can no longer export to Panama). In its most recent submission in these proceedings, Costa Rica noted that the evidence demonstrates that Panama revoked or ceased to recognize both its sanitary and animal health eligibility (referred in the English version of the panel request as "zoosanitary eligibility"). (Costa Rica's comments on Panama's responses to Panel question No. 140, paras. 3.134-3.140, and No. 142, para. 3.148).

[1000] Costa Rica's panel request, p. 3, fn 6 and annex – List of Costa Rican establishments affected by the non-renewal of permits by Panama.

[1001] The establishment number is assigned by AUPSA.

[1002] The products correspond to those mentioned in the most recent approval renewal resolution on the record for each establishment.

[1003] AUPSA, Resolution No. 10 (2014) (Exhibit CRI-215).

[1004] AUPSA, Resolution No. 14 (2014) (Exhibit CRI-241).

[1005] AUPSA, Resolution No. 46 (2014) (Exhibit CRI-250).

[1006] AUPSA, Resolution No. 028-2014 (Exhibit CRI-234).

[1007] AUPSA, Resolution No. 029-2014 (Exhibit CRI-236).

[1008] AUPSA, Resolution No. 030-2014 (Exhibit CRI-237).

[1009] AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225).

[1010] AUPSA, Resolution No. 11 (2014) (Exhibit CRI-228).

	Establishment number[1001] and company name	Product(s)[1002]
9	21 (Distribuidora de Carnes Zamora)	Products of swine[1011]
10	40 (El Ángel)	Dairy products for human consumption[1012]
11	9 (Gico)	Meat products of bovine animals[1013]
12	48 (Nutrilac)	Dairy products[1014]
13	30-E (Proceso posterior (Pipasa))	Meat products (sausages) of bovine animals, swine, and poultry[1015]
14	7 (Sigma alimentos)	Meat products (sausages) of bovine animals, swine, and poultry that undergo a process to ensure the inactivation of significant infectious agents[1016]
15	45 (Sigma alimentos de Costa Rica)	Dairy products[1017]
16	47 (Sigma alimentos de Costa Rica)	Cheese and dairy products for human consumption[1018]
17	762 (Biomar Aqua Corporation Products (Biomar))	Aquatic animal (fish) food not containing protein of ruminant origin[1019]
18	158 (Central Veterinaria)	Pet (dog) food containing protein of ruminant origin[1020]

7.456. The Panel will begin its assessment by examining whether Costa Rica has proved that Panama did indeed revoke Costa Rica's sanitary/animal health eligibility for all the products at issue, given that it is this aspect of the measure on which the parties disagree[1021], before continuing with the aspect concerning the renewal requests for the sanitary approvals in question.

7.4.1.2.1 Whether Panama maintains an import prohibition on the products at issue by virtue of the revocation of Costa Rica's sanitary/animal health eligibility

7.457. In its assessment of this issue, the Panel will examine the evidence in the record, which includes the relevant Panamanian regulatory framework, the submissions of the Panamanian and Costa Rican sanitary authorities on the enforcement of these regulations, and the commitments made at the Paso Canoas meeting.

7.4.1.2.1.1 Relevant Panamanian regulatory framework

7.458. As provided for in the relevant regulatory framework, two types of cumulative eligibility are needed to import into Panama products of animal origin that pose both sanitary risks (to human health) and animal health risks (for example, through the transmission of an animal disease).[1022] On the one hand, the party interested in exporting products of animal origin for human and/or animal consumption to Panama must ascertain whether the product of animal origin it wishes to introduce into Panama is subject to import requirements issued by AUPSA. If there are import requirements, the interested party must ascertain whether the sanitary eligibility of countries, regions, zones and districts and/or the approval of the establishment, production chain and/or processing plant is/are required.[1023] On the other hand, the importer must also obtain an animal health import licence, which recognizes the animal health eligibility of the country, area or region and the establishment in question.[1024]

[1011] AUPSA, Resolution No. 12 (2014) (Exhibit CRI-231).
[1012] AUPSA, Resolution No. 10-CTI-16 (Exhibit CRI-238).
[1013] AUPSA, Resolution No. 15 (2014) (Exhibit CRI-244).
[1014] AUPSA, Resolution No. 039-2014 (Exhibit CRI-247).
[1015] AUPSA, Resolution No. 45 (2014) (Exhibit CRI-253).
[1016] AUPSA, Resolution No. 44 (2014) (Exhibit CRI-256).
[1017] AUPSA, Resolution No. 008-CTI-16 (Exhibit CRI-259).
[1018] AUPSA, Resolution No. 007-CTI-16 (Exhibit CRI-262).
[1019] AUPSA, Resolution No. 43 (2014) (Exhibit CRI-206).
[1020] AUPSA, Resolution No. 48 (2014) (Exhibit CRI-219).
[1021] See e.g. Costa Rica's first written submission, para. 42; Panama's second written submission, para. 18.
[1022] Panama's response to Panel question No. 142, para. 111. Panama does not specify whether all the products at issue pose both sanitary and animal health risks, but confirms this is the case for raw milk from Costa Rica. (Ibid.)
[1023] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 7, section VII.
[1024] Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Article 31. This Article provides that "[t]o import animals and animal products and by-products; medicines for veterinary use; and biological, biotech, chemical and food products for animal use and consumption, an animal health import licence issued by, or by order of, the Ministry of Agricultural Development is required beforehand". See also

7.459. Regarding the products of animal origin at issue, Panama has specific sanitary import requirements. These requirements for certain meat and dairy products are in the record.[1025] The resolutions containing these requirements are not the same for all the products. However, they all allude to country-level sanitary eligibility and the sanitary approval of establishments to export food products to Panama. One of the recitals common to these resolutions notes AUPSA's competence to "approve the sanitary and phytosanitary eligibility of countries, regions, zones, production chains and/or plants to export foodstuffs" to Panama.[1026] These resolutions also include the requirements that: (a) the country of origin be "recognized as eligible by [AUPSA]" to export the products in question[1027]; and (b) the products be worked or processed in an establishment authorized for export purposes by the exporting country and approved by AUPSA.[1028] For some products, authorization for the introduction of foodstuffs depends on the status of bovine spongiform encephalopathy (BSE) in the country, zone or district.[1029] Although these resolutions do not refer to obtaining country-level animal health eligibility or to an establishment's animal health licence, the Panel understands that these requirements are applicable for importing the products at issue into Panama.[1030]

7.460. The Panel notes that, pursuant to the aforementioned regulations, in order to export to Panama the products at issue posing both sanitary and animal health risks, Costa Rica's sanitary and animal health eligibility must be recognized and all the Costa Rican establishments must have sanitary and animal health approval for the products at issue. As mentioned previously, the main point of contention between the parties is whether Panama revoked Costa Rica's sanitary/animal health eligibility for all the products at issue when processing the renewal requests for the sanitary approvals of the 18 Costa Rican establishments in question.

Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24), Articles 2, 4, and 13 (regarding the eligibility of a zone, country or region) and 14-19 (regarding establishments, processing plants or other livestock production facilities).

[1025] On the record are the following resolutions containing sanitary requirements for the products in question: Resolution AUPSA-DINAN-007-2010 concerning the importation of dairy products (Exhibit CRI-284); Resolution AUPSA-DINAN-032-2010 concerning the importation of flours, meals and "pellets", of meat or meat offal, greaves, of fish or of crustaceans, molluscs, or other aquatic invertebrates, and other preparations, for animal consumption (Exhibit CRI-285); Resolution AUPSA-DINAN-045-2011 concerning the introduction of feed containing protein of ruminant origin, for consumption by dogs and cats only (Exhibit CRI-286); Resolution AUPSA-DINAN-017-2009 concerning the importation of meat or meat offal of swine for human consumption (Exhibit CRI-287); Resolution AUPSA-DINAN-059-2013 concerning the importation of meat products of bovine animals for human consumption (Exhibit CRI-288); Resolution AUPSA-DINAN-016-2009 concerning the importation of meat or meat offal of bovine animals for human consumption (Exhibit CRI-289); Resolution AUPSA-DINAN-035-2011 concerning the importation of pork products for human consumption (Exhibit CRI-290); Resolution AUPSA-DINAN-022-2011 concerning the importation of poultry products for human consumption (Exhibit CRI-291); and Resolution AUPSA-DINAN-061-2013 concerning the importation of (*Bovidae*) dairy products, for human consumption (Exhibit CRI-292).

[1026] See also, for example, Resolution AUPSA-DINAN-045-2011 concerning the introduction of feed containing protein of ruminant origin, for consumption by dogs and cats only (Exhibit CRI-286), third recital; Resolution AUPSA-DINAN-035-2011 concerning the importation of pork products for human consumption (Exhibit CRI-290), third recital.

[1027] The Panel notes that, by requiring the country of origin to be "recognized as eligible by [AUPSA]", these resolutions refer to obtaining country-level sanitary eligibility. Panama explains that, under Panamanian regulations, sanitary eligibility and animal health eligibility are different concepts, evaluated by different authorities. According to Panama, while sanitary eligibility concerns food-borne risks and is verified by AUPSA, animal health eligibility concerns livestock (animal health) risks and is verified by the National Animal Health Directorate (DINASA) of the Ministry of Agricultural Development. Panama adds that animal health eligibility is not a precondition for obtaining sanitary eligibility under the Panamanian regulatory framework. (Panama's response to Panel question No. 142, para. 111. See also ibid. paras. 106-110).

[1028] See also, for example, Resolution AUPSA-DINAN-007-2010 concerning the importation of dairy products (Exhibit CRI-284), Articles 4.2 and 4.3; Resolution AUPSA-DINAN-032-2010 concerning the importation of flours, meals and "pellets", of meat or meat offal, greaves, of fish or of crustaceans, molluscs, or other aquatic invertebrates, and other preparations, for animal consumption (Exhibit CRI-285), Articles 2-3. See also Resolution AUPSA-DINAN-017-2009 concerning the importation of meat or meat offal of swine for human consumption (Exhibit CRI-287), Article 2; Resolution AUPSA-DINAN-016-2009 concerning the importation of meat or meat offal of bovine animals for human consumption (Exhibit CRI-289), Article 2 ("country, region/zone, district, production chains and/or plants from which meat and edible offal [of swine/cattle] for human consumption originate, have been recognized as eligible by [AUPSA]").

[1029] Resolution AUPSA-DINAN-045-2011 concerning the introduction of feed containing protein of ruminant origin, for consumption by dogs and cats only (Exhibit CRI-286), Articles 5-7; Resolution AUPSA-DINAN-059-2013 concerning the importation of meat products of bovine animals for human consumption (Exhibit CRI-288), Articles 4-5.

[1030] Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Articles 6.4, 6.5, and 31.

7.461. Regarding sanitary and animal health eligibility[1031], the relevant regulations are set out in the following instruments and provisions:

a. Article 6(5) of Law No. 23 of 15 July 1997 "approving the Marrakesh Agreement Establishing the World Trade Organization; Panama's Protocol of Accession to that Agreement, together with its Annexes and Schedules of Commitments; adapting domestic legislation to international norms and introducing other provisions", which appointed the National Animal Health Directorate (DINASA) of the Ministry of Agricultural Development (MIDA) as the competent authority to "[a]pprove the animal health eligibility of zones, countries and regions that export by-products to Panama".[1032]

b. Article 62 of Law No. 23 of 15 July 1997, pursuant to which MIDA "approves regions, countries, zones and/or processing plants or other facilities related to livestock production located therein, as eligible, from an animal health standpoint, to export the goods they produce to Panama".[1033]

c. Article 67 of Law No. 23 of 15 July 1997, which stipulates that animal health approval may be "revoked, or its automatic renewal denied" in the following two cases: (i) when warranted by the epizootic status of the region, country or zone, in accordance with the specific animal health regulation, or (ii) when there are elements that clearly demonstrate non-compliance in the implementation of the regulation, through laboratory tests or inspections, during the validity of the approval.[1034]

d. Executive Decree No. 49 of 16 April 2001 governing the procedure for granting animal health eligibility to regions, countries, zones, processing plants and other facilities related to the production of animals and animal products and by-products, and foodstuffs for use and consumption, with a view to such products entering Panamanian territory; and reaffirming the competence of Panama's MIDA to approve animal health eligibility.[1035]

e. Articles 76 and 77 of Decree-Law No. 11 of 2006, establishing AUPSA and enacting other provisions, indicate that both sanitary import requirements and the acquired rights of individuals in respect of food imports shall remain valid.[1036] Article 76 clarifies that sanitary import requirements may be modified in accordance with the provisions of this Decree-Law.[1037]

f. Resolution AUPSA-DINAN-092-2007, approving the sanitary eligibility of countries, regions, zones, district, supply chains and/or plants to export their products to Panama, previously granted under Article 77 of Decree-Law No. 11 of 2006[1038]; and setting out the cases in which Panama's sanitary authority may revoke or suspend the sanitary eligibility of an exporting country.[1039] This Resolution contains as an annex an official list of countries, regions, zones and district eligible as at 5 May 2009[1040], modified in July 2014.[1041]

[1031] See fn 1027 above. In this regard, Costa Rica considers that the Panamanian authorities processed sanitary and animal health eligibility together and revoked or ceased to recognize both of them unjustifiably. (Costa Rica's comments on Panama's responses to Panel question No. 140, paras. 3.134-3.140, and No. 142, para. 3.148).

[1032] Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Article 6, para. 5. See also ibid. Articles 31 and 62-67; Panama's response to Panel question No. 142, para. 109.

[1033] Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Article 62.

[1034] Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Article 67.

[1035] Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24).

[1036] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Article 77 (establishing that "[t]he acquired rights of individuals in respect of food imports shall remain valid"). The Panel understands that the acquired rights of individuals in respect of food imports include the granting of sanitary eligibility. See Panama's response to Panel question No. 32, paras. 107-111.

[1037] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2).

[1038] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Article 77.

[1039] The Panel notes that these are the same cases for revoking animal health eligibility outlined in point (c) above.

[1040] Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26).

[1041] Annex to Resolution AUPSA-DINAN-092-2007, modified July 2014 (Exhibit CRI-27).

7.462. Regarding the relationship between sanitary eligibility and animal health eligibility, the preliminary questionnaire to determine a country's animal health eligibility that Panama sent to Costa Rica in February 2021, after the Paso Canoas meeting, contains the following clarification in one of its introductory paragraphs:

> If the country interested in exporting animals and products and by-products of animal origin to Panama is declared eligible in terms of animal health, on account of it complying with the level of protection required by Panama's sanitary laws and regulations, only then will it be possible to continue with the process of determining equivalence in respect of the safety of foodstuffs for human consumption, which falls within the competence of the Food Safety Department of the Ministry of Health (MINSA) of Panama and the Panamanian Food Safety Authority (AUPSA).[1042]

7.463. The Panel understands that, in accordance with the aforementioned regulations and the introductory paragraph to the questionnaire, in order to import certain products into Panama, including the dairy and meat products at issue that pose sanitary and animal health risks, the exporting country's animal health eligibility and sanitary eligibility must have been approved for the product concerned.

7.464. The *AUPSA Manual on sanitary eligibility* establishes the procedures to be followed by countries to obtain sanitary eligibility[1043], by product or animal species, in order to export their products to Panama.[1044] The Manual notes that the party interested in exporting products to Panama may proceed to the establishment approval[1045] stage if the country, region, zone or district is authorized; that is, if it has sanitary eligibility.[1046] If sanitary eligibility has not been registered, therein are described the steps to be taken for the Panamanian authorities to perform a risk analysis and decide whether to grant eligibility. Eligibility is declared through a resolution by the Scientific and Technical Food Safety Council, which is approved by AUPSA and subsequently published and included in the database on the AUPSA website.[1047]

7.465. Pursuant to Decree-Law No. 11 of 2006 and in relation to Resolution AUPSA-DINAN-092-2007, Panama issued the following instruments in 2009: (a) AUPSA Resolution No. 28[1048] approving Costa Rica's sanitary eligibility to export bovine meat products for human consumption to Panama; and (b) update to the Annex to Decree-Law No. 11 of 2006[1049] granting sanitary eligibility to Costa Rica to export some of the products at issue to Panama.[1050]

[1042] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268). Panama submits that, under Panamanian regulations, animal health eligibility is not a precondition for sanitary eligibility. (Panama's response to Panel question No. 142, para. 111). For its part, Costa Rica considers that the food safety procedure referred to in the aforementioned questionnaire corresponds to sanitary eligibility. (Costa Rica's comments on Panama's response to Panel question No. 140, para. 3.136).

[1043] The Manual defines "sanitary eligibility" as "the recognition by [AUPSA] of the existence of countries, regions, zones or districts free from the disease under consideration, as defined by the competent official authority of the exporting country, for the importation or transit of foodstuffs". (AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 3).

[1044] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), pp. 7-9.

[1045] The Manual defines "approval" as the "[a]ct whereby the production chain and/or processing plants are recognized as eligible in sanitary and/or phytosanitary terms". (AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 3).

[1046] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 7, para. 2.

[1047] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 9, paras. 18-19.

[1048] AUPSA, Resolution No. 28 (2009) (Exhibit PAN-1).

[1049] Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26), with the updated annex of 5 May 2009. See also annex to Resolution AUPSA-DINAN-092-2007, modified July 2014 (Exhibit CRI-27).

[1050] The record shows the granting of sanitary eligibility to Costa Rica for the following products: fresh meat of bovine animals; meat products of bovine animals; fresh meat of swine and meat products of swine; dairy products of bovine animals; and processed ripened cheese. (Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26), with the updated annex of 5 May 2009; annex to Resolution AUPSA-DINAN-092-2007, modified July 2014 (Exhibit CRI-27); and AUPSA, Resolution No. 28

7.466. Although Costa Rica claims that Panama revoked its sanitary eligibility, there is no evidence in the record that the instruments through which Panama granted sanitary eligibility to Costa Rica to export the products at issue to Panama have been formally modified or revoked. The Panel notes that, according to Panama, the aforementioned instruments remain valid and have not been amended expressly to revoke Costa Rica's sanitary eligibility.[1051]

7.467. The Panel also notes that Panama's regulations provide that AUPSA may only suspend or revoke a country's sanitary eligibility when: (a) there is evidence of substantial changes in its sanitary status, in accordance with the notification mechanisms established by international regulations; or (b) there is scientific or technical evidence conclusively demonstrating non-compliance with Panama's sanitary regulations.[1052]

7.468. The Panel finds nothing in the record showing that Panama notified Costa Rica that the cases provided for in Panama's regulations for the suspension or revocation of sanitary eligibility had arisen. Neither party states that Costa Rica's sanitary status has changed substantially, or that there is evidence demonstrating a failure to comply with Panama's sanitary regulations for the dairy and meat products at issue. In the Panel's view, the foregoing supports the conclusion that Panama has not revoked Costa Rica's sanitary eligibility.

7.469. In respect of animal health eligibility, the Panel notes that the parties have not presented such detailed evidence as that concerning sanitary eligibility. Therefore, the record does not indicate when animal health eligibility was granted to Costa Rica for the products at issue or the Costa Rican establishments in question. However, it seems clear from the aforementioned regulations that, in order to import the products at issue into Panama, Costa Rica and its establishments had to have that eligibility. Therefore, it could be assumed that Panama granted animal health eligibility for these products at least during the period when these establishments were able to export the products at issue to Panama. In line with what the Panel has noted so far in respect of sanitary eligibility, there is nothing in the record to indicate that Panama revoked this animal health eligibility.[1053]

7.470. In addition to the regulatory framework for sanitary and animal health eligibility, the Panel also finds elements relevant to its analysis in the regulatory framework for the sanitary approval of establishments. In particular, the *AUPSA Manual for the approval of establishments* sets out the procedure to be followed by establishments, production chains and/or processing plants to obtain approval to export their products of animal origin for human and/or animal consumption to Panama and, if applicable, subsequent renewals of sanitary approvals.[1054]

(2009) (Exhibit PAN-1)). The record does not contain evidence of the granting of sanitary eligibility to Costa Rica for the following products mentioned by Costa Rica in its first written submission: meat products (sausages) of poultry; aquatic animal (fish) food; and pet (dog) food containing protein of ruminant origin. (Costa Rica's first written submission, para. 41).

However, as noted below, the record contains evidence that the sanitary approval of Biomar and Central Veterinaria was effective until the date of the establishment of the Panel for shrimp and fish food, and pet food, respectively. (AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217)). Similarly, the sanitary approvals of at least three establishments exporting meat products of poultry were effective until 30 June 2020 (see Cinta Azul Pipasa No. 5, Planta proceso posterior (Pipasa) No. 30E and Sigma Alimentos No. 7 in AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217)). It follows that Panama recognized Costa Rica's sanitary eligibility for these products.

[1051] Panama's second written submission, para. 59; response to Panel question No. 152, para. 149.

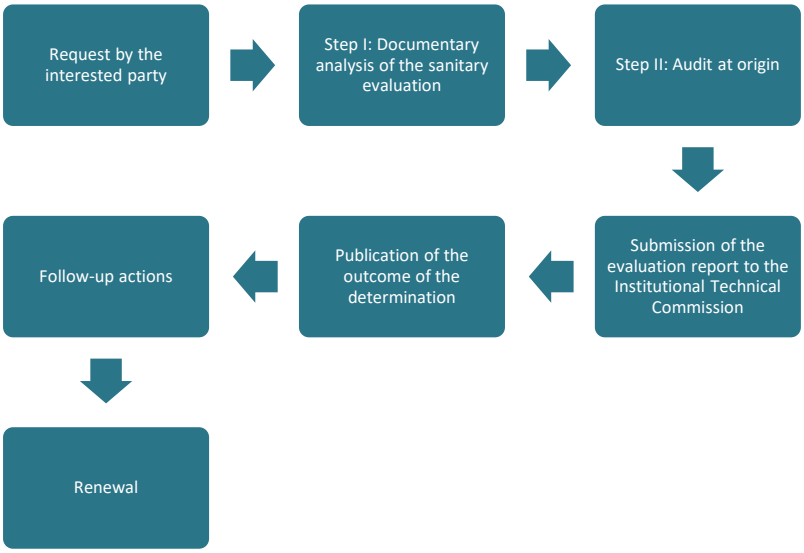
[1052] Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26), Article 4. See also Panama's response to Panel question No. 42, para. 134.

[1053] As noted in paragraph 7.461 above, pursuant to Article 67 of Law No. 23 of 1997, animal health eligibility is revoked or not renewed if there is a change in animal health status or in the event of a failure to comply with the regulations in question. As with sanitary eligibility, the record contains no evidence of Panama having informed Costa Rica that any such situation had occurred with regard to animal health status. Moreover, Costa Rica has not provided any arguments on this matter relating to animal health eligibility. The foregoing indicates that the conditions for revoking or not renewing animal health eligibility have not been met, from which it can be inferred that it remains valid for the products at issue. The Panel also notes that, in its panel request, Costa Rica referred to the note of 24 February 2021 from SENASA to AUPSA, in which it indicated that the new animal health evaluation procedure was neither justifiable nor necessary given that, *inter alia*, neither of the two cases provided for in Panama's regulations for the loss of sanitary approval "apply" in this situation (Costa Rica's panel request, p. 3 and fn 10).

[1054] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 2, sections II and III.

7.471. The *AUPSA Manual for the approval of establishments* provides that the approval procedures in question consist of the following steps[1055]:

Figure 1 Flowchart of the procedure for approving establishments, production chains and/or processing plants so that they can export foodstuffs to Panama[1056]



7.472. According to the *AUPSA Manual for the approval of establishments*, this authority maintains an up-to-date database of establishments, production chains and/or processing plants that export products to Panama, as well as of foodstuffs approved for export. The Manual notes that the database is available in AUPSA offices and on the AUPSA website.[1057]

7.473. Regarding the renewal of the sanitary approvals of establishments, Panama notes that the relevant procedures are set out in paragraph 7 of the Manual.[1058] Paragraph 7 of section VII of the Manual, entitled "Renewals", provides that:

> The interested party shall submit the request in accordance with point 1 of this procedure and before the deadline laid down in the approval resolution of the Institutional Technical Commission.
>
> AUPSA may renew the approval of an establishment, production chain or processing plant, based on the following aspects, for which relevant information may be requested from the competent authority of the exporting country and/or the interested party:
>
> - Sanitary and/or phytosanitary status of the exporting country.
> - Sanitary status of the establishment and characteristics of the products it would like to continue to introduce into the country.
> - Experience with, knowledge of and confidence in the food inspection and certification systems of the exporting country and the establishment, production chain or processing plant in question.
>
> …

[1055] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 6, section VI. See also Panama's response to Panel question No. 40, para. 126.
[1056] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 6, section VI.
[1057] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 7, section VII.
[1058] Panama's response to Panel question No. 22, para. 88.

> AUPSA reserves the right to carry out audits and inspections at origin as part of the renewal process for establishments, production chains or processing plants, basing its decision on the relevant risk analysis.
>
> The sanitary evaluation report for the renewal of an establishment, production chain or processing plant shall be submitted to the Head of Sanitary and Phytosanitary Evaluations of the National Standards for Food Imports Directorate.
>
> This procedure shall be followed once the sanitary evaluation report for the renewal of an establishment, production chain or processing plant has been submitted.[1059]

7.474. As provided for in the *AUPSA Manual for the approval of establishments*, once the Panamanian authorities approve an establishment, the approval resolution is published and the establishment is included in the database on the AUPSA website.[1060]

7.475. The Panel notes Panama's reference to paragraph 7 of section VII quoted above. Panama emphasizes that this provision establishes that, as part of the renewal process for an establishment, AUPSA may request relevant information from the competent authority of the exporting country on the sanitary status of the exporting country, and on confidence in the food inspection and certification systems of the exporting country and the establishment in question. According to Panama, its request for information from Costa Rica to process the renewals for the Costa Rican establishments for the products in question was based on this provision.[1061] Costa Rica disagrees because it considers that the information Panama requested goes far beyond what is necessary for the purposes of paragraph 7 of the aforementioned section VII.[1062]

7.476. The Panel notes that, as indicated by Panama, the *AUPSA Manual for the approval of establishments* provides that, in the process of renewing sanitary approvals, AUPSA may request information on "the sanitary status … of the exporting country", as well as information on the sanitary status of the establishment; the characteristics of the products it would like to continue to introduce into the country; and the experience with, knowledge of and confidence in the food inspection and certification systems of the exporting country and the establishment, production chain or processing plant in question.[1063] In the Panel's view, the scope of Panama's requests for information from Costa Rica in the context of the renewal requests does not, in itself, determine whether Panama revoked Costa Rica's sanitary eligibility for the products in question, given that Panama could request excessive information as part of the renewal process for sanitary approvals without this leading to the revocation of sanitary eligibility.

7.477. In addition to sanitary approval, establishments interested in exporting their products of animal origin to Panama must obtain an animal health licence.[1064] The Panel further notes that, as provided for in Panama's regulations[1065] and according to the evidence in the record, the process for

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[1059] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 14, section VII, para. 7.

[1060] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 13, section VII, para. 5.

[1061] Panama's response to Panel question No. 27, paras. 96-97 (referring to AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 14, section VII, para. 7); second written submission, para. 59; and response to Panel question No. 140, paras. 95-104.

[1062] Costa Rica's response to Panel question No. 170, paras. 3.114-3.126.

[1063] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 14, section VII, para. 7.

[1064] Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24), Articles 14-19 (regarding establishments, processing plants or other livestock production facilities). The Panel notes that the record contains an example of a resolution issued by the National Animal Health Directorate (DINASA) of the Ministry of Agricultural Development (MIDA) of Panama granting animal health eligibility to a Costa Rican establishment. See Resolution No. DINASA-DTIE-A-001-2022 (Exhibit PAN-106).

[1065] Article 21 of Decree-Law No. 11 of 2006 establishes the Scientific and Technical Food Safety Council, which is composed of representatives of a number of authorities, including those in charge of animal health at the Ministry of Health and MIDA. The powers of the Council, provided for in Article 25 of the Decree, include declaring, by resolution, the eligibility of zones, countries, regions and districts to import foodstuffs. (National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Articles 21 and 25). The Panel notes that a number of AUPSA resolutions indicate that it is the "state [authority or entity] responsible for ensuring compliance with and enforcement of laws and regulations on the safe introduction of foodstuffs into

granting sanitary approvals involves the coordination of MIDA and AUPSA authorities. In particular, on at least one occasion, AUPSA informed SENASA that on-site audits[1066] would be scheduled with the participation of AUPSA and MIDA officials, for the purposes of the sanitary and animal health evaluation that falls to each of these Panamanian authorities.[1067] The Panel notes that the record contains no reference to any other actions by MIDA or its departments that would indicate Costa Rica's animal health eligibility was revoked for the products in question.

7.478. In the light of the foregoing, the Panel considers that the information concerning the Panamanian regulatory framework does not support Costa Rica's claim that Panama revoked its sanitary/animal health eligibility for all the products at issue. However, the Panel will continue its assessment of the communications between the parties in respect of Measure 2 and the evidence concerning the commitments made at the bilateral Paso Canoas meeting in order to determine whether, as Costa Rica claims, "AUPSA ceased to recognize the validity of … [its] sanitary[/animal health] eligibility".[1068]

7.4.1.2.1.2 Relevant communications exchanged between the parties and evidence concerning the Paso Canoas commitments

7.479. Regarding the communications exchanged between the parties, the Panel first notes that, on *10 July 2020*, AUPSA responded[1069] to the communication of 12 June 2020 in which SENASA requested an extension[1070] for the sanitary approvals of Costa Rican establishments that were due to expire on 30 June 2020. In its communication, SENASA requested that AUPSA process the extension on the basis of a documentary assessment, indicating that, owing to the sanitary situation in respect of the COVID-19 pandemic, the on-site audits could be performed at another time.[1071] AUPSA rejected SENASA's extension request, noting that, given the circumstances of the COVID-19 pandemic, the Costa Rican establishments could "be subject to a new procedure for their approval".[1072] AUPSA specified that this new procedure required the Panamanian authorities to be in a position to initiate the processes for evaluating and recognizing the Costa Rican sanitary system and to perform audits of these establishments at origin. According to AUPSA, the aim of this procedure would be to guarantee and ensure that the Costa Rican sanitary system meets the sanitary requirements provided for in Panama's sanitary legislation. AUPSA added that a documentary assessment would be insufficient and stated that the establishments and the Costa Rican sanitary system had not "been subject to a thorough evaluation by [its] authorities since 2014".[1073]

7.480. The Panel observes that, among all the elements in the record, this is the first time that AUPSA refers to "a new procedure for [granting] [sanitary] approval" to the Costa Rican establishments, in the context of the renewal request for these establishments. In this communication, AUPSA does not provide details regarding the "new procedure" to which it refers.

national territory". (See, *inter alia*, Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26); AUPSA, Resolution No. 028-2014 (Exhibit CRI-234); and AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2)).

[1066] In the interest of clarity, in the context of Measure 2, the Panel refers to "audits", although in the communications of the parties' authorities or in the submissions presented by the parties to this Panel, words such as "visits" or "inspections" are used.

[1067] Note AUPSA-AG-001-2020 (Exhibit CRI-38).

[1068] Costa Rica's response to Panel question No. 141, para. 3.69. See also Costa Rica's response to Panel question No. 153, para. 3.86.

[1069] Note AUPSA-AG-0229-2020 (Exhibit CRI-45).

[1070] The SENASA and AUPSA communications cited in this paragraph refer to "*extensiones*" ("extensions"). As explained below, in the Spanish version of this report the Panel uses the term "*prórroga*" ("extension") to refer to any lengthening of the validity of the sanitary approvals that does not meet the requirements set out in Panamanian regulations to be considered as a renewal. (See fn 1110 below). Hereinafter, the Panel will use the word "extensions" to refer to all mentions of the Spanish term "*extensiones*" (as opposed to "*prórroga*") found in both the evidence provided by the parties (mainly communications between SENASA and AUPSA) and the written submissions the parties have submitted in these proceedings.

[1071] Memorandum SENASA-DG-721-2020 (Exhibit CRI-43). SENASA sent this memorandum after the many communications requesting the renewal of the sanitary approvals granted to Costa Rican establishments (See Appendix 1, p. 352 below).

[1072] Note AUPSA-AG-0229-2020 (Exhibit CRI-45).

[1073] Note AUPSA-AG-0229-2020 (Exhibit CRI-45). In this note, AUPSA referred to 26 Costa Rican establishments, including the Costa Rican establishments in question, apart from Central Veterinaria, the sanitary approval of which had been extended at the time. (See AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2); AUPSA, Approval of processing plants: Costa Rica (July 2020) (Exhibit CRI-398)).

Prior to sending this communication, AUPSA had made no similar mention in the communications in the record of the requirements for renewing the sanitary approvals of the Costa Rican establishments.[1074]

7.481. About one month later, on *21 August 2020*, AUPSA sent SENASA a communication referring to the renewal requests for the sanitary approvals of a number of Costa Rican establishments interested in exporting dairy and meat products to Panama. AUPSA informed SENASA that "pursuant to the procedure established in Panama's sanitary legislation to process these requests recognition of Costa Rica's animal health eligibility is required beforehand[, for] which reason it is necessary to initiate the animal health evaluation process in order to determine its eligibility to export animals and products and by-products of animal origin to Panama".[1075]

7.482. The Panel notes that, in its communication of 21 August 2020, AUPSA refers for the first time to the necessity of granting Costa Rica recognition of its animal health eligibility before concluding the renewal of the sanitary approvals. As mentioned above, Panama submits that animal health eligibility is different from sanitary eligibility.[1076] The Panel considers that Panama's assertion that sanitary eligibility and animal health eligibility are different concepts finds support in the regulations set out in paragraph 7.461 above. As Panama notes, the granting of animal health eligibility is governed by Executive Decree No. 49 of 16 April 2001, and both this Decree and Law No. 23 of 15 July 1997 authorize MIDA to approve the animal health eligibility of a country that is going to export to Panama. Sanitary eligibility, for its part, is granted pursuant to Resolution AUPSA-DINAN-092-2007, Decree-Law No. 11 of 2006, and the *AUPSA Manual on sanitary eligibility*, which authorize AUPSA to grant sanitary eligibility.[1077] The Panel considers that the foregoing appears to indicate that, despite the institutional cooperation provided for in Decree-Law No. 11 of 2006[1078]F, AUPSA would not, under Panamanian regulatory framework, be competent to grant animal health eligibility. In this regard, AUPSA could be understood to have acted in the exercise of its authority to request up-to-date information on, *inter alia*, the sanitary status of the exporting country, as provided for in paragraph 7 of section VII of the *AUPSA Manual for the approval of establishments*.

7.483. On *9 October 2020*, almost two months after its communication of 21 August 2020, AUPSA sent a communication to SENASA reiterating what it had said in the earlier communication. More specifically, AUPSA stated that it "[was] waiting for your reply to be able to initiate the animal health evaluation process for Costa Rica that would make it possible to determine its eligibility to export animals and products and by-products of animal origin to Panama through the procedures carried out by the competent Panamanian authorities".[1079]

7.484. Four months later, on *12 February 2021*, Panama and Costa Rica held a meeting in Paso Canoas where they discussed, *inter alia*, the renewal of the sanitary approvals of Costa Rican establishments to export dairy and meat products to Panama. The agreements reached at Paso Canoas included two points of relevance to Measure 2: (a) approving the Biomar and Central Veterinaria plants to export products not intended for human consumption before 19 February 2021; and (b) "perform[ing] an evaluation of the Costa Rican sanitary system" in respect of products of trade interest. The agreement states that this evaluation would take place

[1074] In particular, AUPSA did not mention the need to perform a "new procedure" in its responses to the requests submitted by SENASA regarding two Dos Pinos establishments and by the representative of Biomar regarding one of its establishments. Through Note AUPSA-AG-001-2020 (Exhibit CRI-38), AUPSA informed SENASA that, prior to carrying out an on-site inspection of the plants, the information contained in the attached form needed to be updated. AUPSA did not refer to any "new procedure" for processing this renewal. Based on the communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), AUPSA did not request information to process Biomar's renewal, nor did it indicate that a new procedure was going to be initiated.

[1075] Note AUPSA-AG-395-2020 (Exhibit CRI-51).

[1076] Panama states that Costa Rica uses the terms "sanitary eligibility" and "animal health eligibility" interchangeably, even though they are different concepts under Panamanian law, evaluated by different authorities. The Panel recalls that Panama explains that "[s]anitary eligibility concerns food-borne risks, while animal health eligibility concerns livestock (animal health) risks". (Panama's response to Panel question No. 142, paras. 105 and 111).

[1077] Panama's position is further confirmed by it having indicated that MIDA and AUPSA inspectors would participate in the on-site inspection of the Dos Pinos establishments to verify the animal health status and the sanitary status of these establishments. (Panama's response to Panel question No. 142, paras. 112-113).

[1078] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Articles 21 and 25. See fn 1065 above.

[1079] Note AUPSA-AG-481-2020 (Exhibit CRI-52).

within 30 working days of the date it was requested. If the outcome of the evaluation of the Costa Rican sanitary system were positive, Panama would automatically renew the sanitary approvals of the Costa Rican establishments that export products of animal origin for human consumption, for a period of six months.[1080] The parties also established a Bilateral Technical Commission on SPS matters to deal with topics of trade interest to the two countries.[1081]

7.485. Also on 12 February, SENASA sent a communication to AUPSA in which, in accordance with the agreement reached at Paso Canoas, it reiterated "the approval request for the establishments that prepare products of animal origin intended for human consumption".[1082] SENASA further stated that it would be grateful to receive a "communication indicating the date on which the process is to be initiated, in order to prepare the information required".[1083]

7.486. Three days later, on *15 February 2021*, AUPSA requested that SENASA send "as soon as possible the relevant note granting [them] [its] consent to initiate the animal health eligibility process".[1084]

7.487. The following day, on *16 February 2021*, SENASA reiterated its request that AUPSA indicate the date on which Panama intended to initiate the evaluation process for the Costa Rican sanitary system, so that SENASA could prepare the information required.[1085]

7.488. The aide-mémoire of the first session of the Bilateral Technical Commission, held on *18 February 2021*, almost a week after the meeting in Paso Canoas, shows that Costa Rica agreed to Panama carrying out the evaluation of its sanitary system, which would take place within 30 working days. The parties also agreed that Panama would inform Costa Rica, no later than 22 February 2021, of the information it required for "the evaluation of the Costa Rican sanitary system with a view to reauthorizing the plants of interest mentioned at the meeting of 12 February".[1086]

7.489. Four days after the first session of the Bilateral Technical Commission, on *22 February 2021*, AUPSA sent a communication to SENASA stating that, in the light of SENASA's communications of 12 and 16 February, it considered that this Costa Rican authority "g[ave] its consent to the competent Panamanian sanitary authorities to carry out the evaluation of the Costa Rican sanitary system".[1087] AUPSA added that, in line with SENASA's consent, it hereby notified SENASA of "the formal initiation of the animal health evaluation procedure for Costa Rica in order to determine its sanitary eligibility to export products and by-products of animal origin (dairy products) to Panama".[1088] AUPSA also attached a questionnaire regarding imports of dairy products (concerning the Dos Pinos company, an exporter of these products) that SENASA was to respond to in full, providing "specific documentation, evidence and sources" to support its replies.[1089] AUPSA noted that the on-site audits provided for in Panamanian legislation would be performed at a later stage.[1090]

7.490. Two days later, on *24 February 2021*, SENASA informed AUPSA that it had consented to Panama carrying out an evaluation of the Costa Rican sanitary system, but it had never agreed to Panama performing a country-level sanitary eligibility process. SENASA noted that, as the questionnaire sent on 22 February 2021 concerned determining sanitary eligibility, not evaluating the sanitary system, it considered it essential to distinguish between the two concepts. After

[1080] Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14), p. 1. Furthermore, during the six-month extension that Panama would grant if the outcome of its evaluation of Costa Rica's sanitary system were positive, Panama would endeavour to carry out an inspection of all the exporting plants. For the plants that could not be inspected within this time frame, the renewal period would be extended until the inspection were carried out. (Ibid.).

[1081] Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14), p. 2.

[1082] Memorandum SENASA-DG-152-2021 (Exhibit CRI-56).

[1083] Memorandum SENASA-DG-152-2021 (Exhibit CRI-56).

[1084] Note AUPSA-AG-078-2021 (Exhibit CRI-274).

[1085] Memorandum SENASA-DG-168-2021 (Exhibit CRI-275).

[1086] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 1 (18 February 2021) (Exhibit CRI-15), p. 2. In the minutes of this meeting, reference was also made to Note AUPSA-AG-078-2021 (Exhibit CRI-274), through which AUPSA extended the validity of the sanitary approvals of Biomar and Central Veterinaria for six months.

[1087] Note AUPSA-AG-100-2021 (Exhibit CRI-57).

[1088] Note AUPSA-AG-100-2021 (Exhibit CRI-57).

[1089] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

[1090] Note AUPSA-AG-100-2021 (Exhibit CRI-57).

explaining why it considered that Panama was seeking to perform an unsuitable sanitary eligibility process[1091], SENASA indicated that it was prepared to send the information required to carry out an evaluation of the country's sanitary system. Among the information that SENASA considered might be relevant for AUPSA's evaluation of the Costa Rican sanitary system was that sent in February 2020, which it requested be taken into account for the Costa Rican establishments exporting dairy products covered thereby. SENASA also requested that questionnaires similar to the one completed in February 2020 be sent for the establishments that were not covered by those responses, including those exporting products other than dairy products.[1092]

7.491. The following day, on *25 February 2021*, during the second meeting of the Bilateral Technical Commission, the parties registered their disagreement regarding the nature of the sanitary evaluation procedure that Panama was going to initiate. However, it was noted that Costa Rica would send the information requested by Panama before 1 March 2021.[1093]

7.492. The Panel notes that, on 12 February 2021, at the Paso Canoas bilateral meeting, the parties referred to an "evaluation of the Costa Rican sanitary system".[1094] This language differs from the references to the recognition of Costa Rica's animal health eligibility that AUPSA included in its aforementioned communications prior to this date. The Panel also notes that there is nothing in the record that clarifies the use of different language at the Paso Canoas meeting on the one hand, and in AUPSA's previous communications on the other.

7.493. In addition, the Panel notes that the communications following the Paso Canoas meeting[1095] reflect the disagreement between the parties regarding the nature of the procedure that Panama was undertaking as part of the process of renewing the sanitary approvals of the Costa Rican establishments in question. This disagreement concerns whether Panama initiated an animal health evaluation procedure for Costa Rica in respect of dairy products as part of the process of renewing the relevant sanitary approvals, as Panama claims, or whether it revoked country-level sanitary/animal health eligibility for all the products at issue, as Costa Rica caliams.

7.494. Based on the relevant communications examined in this section, the Panel understands that Panama was not consistent in indicating to Costa Rica the information it required to conclude the process of renewing the sanitary approvals of the Costa Rican establishments. When AUPSA contacted SENASA regarding the approval of two Dos Pinos establishments, on 2 January 2020, AUPSA requested that certain information concerning Costa Rica's sanitary system be updated, but did not refer to the necessity of initiating a review of Costa Rica's animal health status, as mentioned in its subsequent communications.[1096]

7.495. Six months later, on 10 July 2020, AUPSA informed SENASA that, owing to the COVID-19 pandemic, in order to extend the sanitary approvals of Costa Rican establishments that had expired on 30 June 2020, these establishments could "be subject to a new procedure for their approval". This new procedure would take place once the Panamanian authorities were in a position to initiate the processes for the "evaluation and recognition of the Costa Rican sanitary system" and audits at origin.[1097] A month later, on 21 August 2020, AUPSA informed SENASA that recognition of

[1091] SENASA referred to the definition of sanitary system evaluation contained in Chapter 3.2 of the OIE Terrestrial Animal Health Code, according to which this evaluation "should demonstrate that the Veterinary Services have the capability for effective control of the sanitary and zoosanitary status of animals and animal products. Key elements to be covered in this process include adequacy of resources, management capability, legislative and administrative infrastructures, independence in the exercise of official duties and history of performance, including disease reporting". According to SENASA, "country eligibility" is only defined in Panamanian legislation as the procedure followed to determine whether a country, zone or region is recognized for the importation or transit of foodstuffs. According to SENASA, given the history of trade in the products at issue between Costa Rica and Panama until June 2020, there was no doubt that Costa Rica had been considered "eligible" by Panama for the export of these products. Moreover, Panama never informed Costa Rica that it was no longer eligible. (Memorandum SENASA-DG-191-2021 (Exhibit CRI-58), p. 2).

[1092] Memorandum SENASA-DG-191-2021 (Exhibit CRI-58).

[1093] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 2 (25 February 2021) (Exhibit CRI-16), p. 2.

[1094] Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14).

[1095] See e.g. Memorandum SENASA-DG-191-2021 (Exhibit CRI-58); Memorandum SENASA-DG-340-2021 (Exhibit CRI-60); Note AUPSA-AG-176-2021 (Exhibit CRI-62); Memorandum SENASA-DG-725-2021 (Exhibit CRI-63); and Note DSA-335-2021 (Exhibit CRI-64).

[1096] Note AUPSA-AG-001-2020 (Exhibit CRI-38).

[1097] Note AUPSA-AG-0229-2020 (Exhibit CRI-45).

Costa Rica's animal health eligibility was required before the renewal requests could be processed.[1098] As of this date, the Panamanian authorities were consistent in indicating that carrying out an animal health evaluation of Costa Rica was necessary in order to renew the sanitary approvals of the Costa Rican establishments. For their part, the Costa Rican authorities were consistent in stating that they accepted an evaluation of Costa Rica's sanitary system, but not a new process to determine country-level sanitary eligibility.

7.496. In its communications to SENASA, AUPSA does not explain what is entailed by the "animal health evaluation of Costa Rica" it intended to carry out. In its communication of 22 February 2021, AUPSA sent SENASA a questionnaire entitled "Preliminary questionnaire to determine a country's animal health eligibility in order to verify whether its measures achieve the same level of protection established by the relevant laws and regulations of the Republic of Panama".[1099] This questionnaire focused on dairy products. There is nothing in the record to show that, as of the date of the establishment of the Panel, Panama had sent questionnaires to Costa Rica about the other products at issue.[1100] In these proceedings, Panama explained to the Panel that sending this questionnaire did not mean that sanitary eligibility had been revoked.[1101] Panama also clarified that it had sent the questionnaire to gather animal health information about milk and dairy products in accordance with what was agreed in Paso Canoas.[1102] Costa Rica, for its part, understood that the questionnaire only applied when a country was interested in exporting to Panama for the first time, which was not the case.[1103]

7.497. The Panel considers that there is no indication in the communications sent by AUPSA or the commitments made at the Paso Canoas meeting that Panama revoked or ceased to recognize Costa Rica's sanitary or animal health eligibility for all the products at issue.[1104] Despite the possible ambiguities arising from the differences in terminology used therein and the title of the questionnaire sent by AUPSA to SENASA in February 2021, it follows from the examination of all the communications and the rest of the evidence in the record that Costa Rica has failed to demonstrate that Panama revoked its sanitary or animal health eligibility for all the products at issue. In fact, the record contains no evidence of the conclusion of the formal animal health evaluation process that AUPSA indicated it should carry out to renew the sanitary approvals of the Costa Rican establishments in question.[1105] In the Panel's view, the fact that such a procedure may be ongoing does not support the conclusion that Costa Rica's country-level sanitary or animal health eligibility has been revoked, and Costa Rica has failed to demonstrate otherwise.

7.498. In addition, the Panel observes that Panama acknowledges that it imports live animals from Costa Rica.[1106] Although under Panamanian regulations country-level sanitary eligibility and animal health eligibility are granted for each product[1107], the fact that Panama imports live animals strongly suggests that it has not revoked Costa Rica's sanitary or animal health eligibility. This is due to the fact that, by importing these animals, Panama accepts the risks related to the diseases that may be transmitted by live animals.[1108] If Panama accepts these risks, and in the absence of any evidence to the contrary, it could be understood that Panama also accepts the risks of importing the products

[1098] Note AUPSA-AG-395-2020 (Exhibit CRI-51).

[1099] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

[1100] In response to Panel question No. 142, Panama provides copies of the questionnaires it normally uses to process the renewal of the sanitary approvals of establishments that export meat products (Exhibit PAN-131), dairy products (Exhibit PAN-132) and aquaculture products (Exhibit PAN-133).

[1101] Panama's response to Panel question No. 140, para. 95.

[1102] Panama's response to Panel question No. 140, para. 102.

[1103] Costa Rica's second written submission, para. 40.

[1104] See fn 998 above.

[1105] Note AUPSA-AG-100-2021 (Exhibit CRI-57), through which AUPSA informed SENASA that, in "accordance with the consent granted by [SENASA], Panama hereby notifies the formal initiation of the animal health evaluation procedure for Costa Rica in order to determine its sanitary eligibility to export products and by-products of animal origin (dairy products) to Panama".

[1106] Panama's response to Panel question No. 33, para. 112.

[1107] See e.g. Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26).

[1108] See Costa Rica's first written submission, para. 88 (where Costa Rica states that "the fact that Panama continues to allow imports of live animals from Costa Rica of species relating to dairy and meat products, higher-risk products requiring stricter measures than those applied to derivative products, means that Panama considers Costa Rica's sanitary status to be adequate. Products of animal origin (such as dairy and meat products) are subject to an industrial process and, therefore, represent a lower risk than live animals").

derived from these animals, thereby implying that it has not revoked country-level sanitary and animal health eligibility for these products.

7.499. In summary, as explained above, in the Panel's view: (a) the formal animal health evaluation process has not concluded in a way that would have implied the revocation of Costa Rica's animal health eligibility or sanitary eligibility; (b) there is no formal act in the record revoking Costa Rica's sanitary or animal health eligibility for all the products at issue; (c) Panama did not notify Costa Rica that it had concerns justifying the suspension or revocation of Costa Rica's sanitary or animal health eligibility, as provided for in Panamanian regulations; and (d) Panama has continued to import live animals, indicating that Panama accepts the risks of importing the inputs to manufacture the products of animal origin at issue. The Panel also notes that, as part of the process of renewing the sanitary approvals of the Costa Rican establishments, Panama requested information on dairy products, not on all the products at issue.

7.500. Accordingly, the Panel finds that Costa Rica has failed to demonstrate that Panama effectively revoked or ceased to recognize Costa Rica's sanitary or animal health eligibility for all the products at issue.[1109] Therefore, Costa Rica has failed to discharge its burden of proving that Measure 2 consists of an import prohibition on the products at issue maintained by virtue of Panama's decision to revoke Costa Rica's sanitary/animal health eligibility for these products.

7.4.1.2.2 Whether Panama maintains an import prohibition on the products at issue by virtue of the non-renewal of the sanitary approvals of 18 Costa Rican establishments

7.501. The Panel will now examine whether Costa Rica has demonstrated that Measure 2 consists of an import prohibition on the products at issue maintained by virtue of the non-renewal[1110] of the sanitary approvals of 18 Costa Rican establishments.

7.502. The Panel notes that the sanitary approvals granted to the 18 Costa Rican establishments in question were issued between 2014 and 2016, for a duration of three or five years.[1111] As shown in the record, SENASA requested the renewal of the sanitary approvals of 16 Costa Rican establishments between 2017 and 2018, and of another two in 2019 and 2020, respectively, and repeatedly reiterated these requests until 2020.[1112] The record also shows that representatives of one of the establishments, Biomar, contacted AUPSA officials to process the extensions of the sanitary approval of this establishment between December 2017 and October 2019.[1113]

7.503. The Panel also notes that AUPSA granted (a) a "two-month extension" for "the expired [sanitary approvals of] Costa Rican establishments that export food products" to Panama, from

[1109] See fn 998 above.

[1110] The Panel understands that, as provided for in the *AUPSA Manual for the approval of establishments*, sanitary approval "renewal" only takes place when the following three conditions are met: (a) AUPSA issues a resolution on the substance of the renewal request; (b) this resolution is published; and (c) the renewed establishment appears on the AUPSA website. (AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 13 and 15, paras. 5 and 7, section VII). In turn, the Panel notes that the record shows that AUPSA sometimes extended the validity of a sanitary approval without these three conditions having been met. The Panel refers to these extensions in Spanish as "*prórrogas*".

[1111] See the table in Appendix 1, p. 352, below.

[1112] The following communications contain the renewal requests: Memorandum SENASA-DG-0139-2017 (Exhibit CRI-216); Memorandum SENASA-DG-046-2017 (Exhibit CRI-226); Memorandum SENASA-DG-047-2017 (Exhibit CRI-229); Memorandum SENASA-DG-512-2017 (Exhibit CRI-232); Memorandum SENASA DG-0159-2017 (Exhibit CRI-37); Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141); Memorandum SENASA-DG-0161-2017 (Exhibit CRI-204); Memorandum SENASA-DG-1587-2018 (Exhibit CRI-239); Memorandum SENASA-DG-140-2017 (Exhibit CRI-242); Memorandum SENASA-DG-170-2017 (Exhibit CRI-245); Memorandum SENASA-DG-246-2017 (Exhibit CRI-248); Memorandum SENASA-DG-983-2017 (Exhibit CRI-251); Memorandum SENASA-DG-704-2017 (Exhibit CRI-254); Memorandum SENASA-DG-963-2017 (Exhibit CRI-257); Memorandum SENASA-DG-1512-2018 (Exhibit CRI-260); and Memorandum SENASA-DG-1511-2018 (Exhibit CRI-263). Concerning the establishments handling dairy and meat products for animal consumption, renewal requests were sent in April 2019, for Biomar, and July 2020, for Central Veterinaria. (Memorandum SENASA-DG-550-2019 (Exhibit CRI-10); Memorandum SENASA-DG-840-2020 (Exhibit CRI-220)). See also the table in Appendix 1, p. 352, below.

The following communications contain examples of the reiterated renewal requests: Memorandum SENASA-DG-721-2020 (Exhibit CRI-43); Memorandum SENASA-DG-946-2020 (Exhibit CRI-50); and Memorandum SENASA-DG-951-2020 (Exhibit CRI-261). See also the table in Appendix 1, p. 352, below.

[1113] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393).

31 October to 31 December 2019, and (b) an "extension of the authorization [of] the establishments for bovine, swine, poultry and aquaculture products" listed in the relevant resolution, including 17 of the 18 Costa Rican establishments in question, until 30 June 2020.[1114] At a later date, Panama extended the validity of the sanitary approvals of two of the 18 establishments (Biomar and Central Veterinaria) until 30 June 2023 and 19 September 2022, respectively.[1115]

7.504. In the Panel's view, the evidence in the record supports the following conclusions regarding the processing of the sanitary approval renewal requests:

a. Although Panama responded to SENASA's renewal requests regarding the approval of two establishments of the Dos Pinos company[1116], the record does not show that it did so in respect of the other establishments for which renewal requests had been submitted. With respect to the other establishments, Panama informed SENASA that it was not possible for it to schedule the on-site audits.[1117]

b. Nor does the record show that the Panamanian authorities have performed on-site audits, either in person or by virtual means, of any of the Costa Rican establishments that requested the renewal of their sanitary approvals.

c. Panama extended the validity of the sanitary approvals of two of the 18 establishments (Biomar and Central Veterinaria) until 30 June 2023 and 19 September 2022, respectively.[1118]

d. Panama has not renewed (or extended) the sanitary approvals of 16 of the 18 Costa Rican establishments in question since their extensions expired on 30 June 2020.[1119] Therefore, with the exception of Biomar and Central Veterinaria, 16 of the 18 Costa Rican establishments in question could not, in the absence of valid sanitary approvals, export the dairy and meat products at issue to Panama at the time of the establishment of the Panel.[1120]

7.505. In the Panel's view, the evidence in support of the above conclusions is sufficient to demonstrate that 16 of the 18 Costa Rican establishments in question have been unable to export their products to Panama because of the non-renewal of their sanitary approvals. Accordingly, the Panel finds that Costa Rica has demonstrated that Measure 2 consists of an import prohibition on

[1114] Note AUPSA-AG-399-2019 (Exhibit CRI-35); AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2). The only establishment not mentioned in Resolution No. 145-AG-2019 is Central Veterinaria. See also AUPSA, Resolution No. 143-AG-2019 (Exhibit PAN-129) of 26 December 2019, extending the validity of Biomar's sanitary approval for the period in question.

[1115] AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217). See also DINASA, Note DSA-212-2022 (Exhibit PAN-107).

[1116] Note AUPSA-AG-001-2020 (Exhibit CRI-38). The Panel also notes that, in their communications with the representatives of Biomar, AUPSA officials did not provide conclusive information about carrying out on-site inspections. (Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393)).

[1117] On 9 August 2017, AUPSA stated that, "given the limited number of auditors and the large volume of requests, the estimated date for the scheduling of the visit will be slightly postponed". (Note AUPSA-DINAN-154 (Exhibit CRI-32)). The record contains no evidence regarding AUPSA's availability to schedule on-site inspections for all the establishments. See Note AUPSA-AG-001-2020 (Exhibit CRI-38); Memorandum AUPSA-AG-025-2020 (Exhibit CRI-176); Note AUPSA-AG-049-2020 (Exhibit CRI-180); Note AUPSA-AG-059-2020 (Exhibit CRI-40); Note AUPSA-AG-078-2020 (Exhibit CRI-41); and Note AUPSA-AG-100-2021 (Exhibit CRI-57), regarding the scheduling and subsequent postponement of the inspections of two Dos Pinos establishments.

[1118] AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217). Panama states that Note APA-DD-410-2023 (Exhibit CRI-397) demonstrates that Biomar could export at least up until 16 May 2025. (Panama's comments on Costa Rica's response to Panel question No. 138, para. 63).

[1119] Costa Rica's first written submission, para. 522 (presenting Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para.1, as evidence of the expiry of the sanitary approvals; AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217)).

[1120] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), para. 3; AUPSA, *Manual for the approval of establishments, production chains and/or processing plant*s (2013) (Exhibit CRI-23), section VII, fourth bullet point. See also Costa Rica's first written submission, para. 46; Panama's response to Panel question No. 31, para. 106.

dairy and meat products from Costa Rica maintained by virtue of the non-renewal of the sanitary approvals of 16 of the 18 Costa Rican establishments in question.

7.4.1.2.3 Conclusion regarding the content of Measure 2

7.506. In the light of the foregoing, the Panel finds that Costa Rica has failed to demonstrate that Panama revoked or ceased to recognize Costa Rica's sanitary/animal health eligibility for the products in question. Therefore, Costa Rica has failed to discharge its burden of proving that Measure 2 consists of an import prohibition maintained by virtue of Panama's decision to revoke this eligibility. In addition, the Panel finds that Costa Rica has demonstrated that Measure 2 consists of an import prohibition on dairy and meat products from Costa Rica maintained by virtue of the non-renewal of the sanitary approvals of 16 of the 18 Costa Rican establishments in question.

7.507. Accordingly, the Panel's analysis below is limited to Measure 2, as indicated in the preceding paragraph.

7.4.2 Claims under the SPS Agreement

7.508. Having determined the content of Measure 2, the Panel will now examine Costa Rica's claims under the SPS Agreement with respect to this measure. The Panel will first assess whether Measure 2 is an SPS measure that falls within the scope of the SPS Agreement.

7.4.2.1 Whether Measure 2 is a sanitary or phytosanitary measure that falls within the scope of the SPS Agreement

7.4.2.1.1 Main arguments of the parties

7.4.2.1.1.1 Costa Rica

7.509. Costa Rica claims that Measure 2 falls within the scope of the SPS Agreement, as it is an SPS measure within the meaning of Annex A(1)(b) and (c) to the Agreement and directly affects international trade within the meaning of Article 1.1.[1121]

7.510. Costa Rica argues that the objective of Measure 2 relates to both: (i) the protection of human or animal life or health from risks arising from foods within the meaning of Annex A(1)(b)[1122]; and (ii) the protection of human life or health from risks arising from diseases carried by animals through animal products within the meaning of Annex A(1)(c).[1123] Costa Rica submits that Measure 2 falls within the scope of Annex A(1)(b) because it is a consequence of Panama's refusal to renew the sanitary approvals of Costa Rican establishments that export foods (meat and dairy products) for human and animal consumption, as a result of the alleged loss of Costa Rica's sanitary eligibility.[1124] Moreover, Costa Rica claims that Measure 2 falls within the scope of Annex A(1)(c) because an animal health evaluation is also required for the sanitary eligibility granted by Panama, the loss of which Costa Rica deems unjustified.[1125]

7.511. Costa Rica claims that Measure 2 directly affects international trade because Panama's non-renewal of the sanitary approvals of the Costa Rican establishments prevents products from those establishments from being imported into Panama.[1126]

[1121] Costa Rica's first written submission, paras. 515, 518 and 522.
[1122] Costa Rica's first written submission, paras. 519 and 520.
[1123] Costa Rica's first written submission, para. 521.
[1124] Costa Rica's first written submission, para. 520.
[1125] Costa Rica's first written submission, para. 521 (referring to Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24), Article 1).
[1126] Costa Rica's first written submission, para. 522 (referring to AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), paras. 2 and 3; AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, fourth bullet point; and World Trade Organization, Trade Policy Review of Panama, 14 October 2014, WT/TPR/S/301/Rev.1, para. 3.135). As evidence that its establishments' extended approvals had expired, Costa Rica also refers to Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para. 1; and AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217).

7.4.2.1.1.2 Panama

7.512. Panama does not dispute that Measure 2 is an SPS measure in accordance with the definition in Annex A(1) and Article 1.1 of the SPS Agreement, to which the SPS Agreement applies.

7.4.2.1.2 Assessment by the Panel

7.4.2.1.2.1 Relevant legal standard

7.513. The Panel will next examine whether, in accordance with the legal standard described in section 7.3.1.1.2.1 above, the SPS Agreement is applicable to Measure 2. In particular, the Panel will consider whether, as established in Articles 1.1 and 1.2 of the Agreement, Measure 2: (a) constitutes an SPS measure in accordance with the definition given in Annex A to the SPS Agreement; and (b) may, directly or indirectly, affect international trade.

7.4.2.1.2.2 Whether Measure 2 constitutes an SPS measure within the meaning of Annex A(1) to the SPS Agreement

7.514. The Panel recalls that Measure 2 consists of an import prohibition on dairy and meat products maintained by virtue of the non-renewal of the sanitary approvals of 16 Costa Rican establishments that export the products at issue.[1127] Bearing in mind the legal standard outlined above, the task of this Panel is to determine whether Measure 2 has been implemented in order to achieve at least one of the objectives listed in Annex A(1)(a)-(d).[1128]

7.515. Given 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.

7.516. As explained in section 7.4.1.2.1.1 above, to be able to export food products of animal origin to Panama, Costa Rican establishments must have a valid *sanitary* approval. In addition, the country of origin must have had its *sanitary eligibility* approved for the products concerned.[1129] Panama notes that two manuals provide the legal basis for the procedures governing a country's sanitary eligibility and the sanitary approval of establishments for the export of foods to Panama: (a) the *AUPSA Manual on sanitary eligibility* and (b) the *AUPSA Manual for the approval of establishments*.[1130] Both manuals make reference to the importation or introduction of *foods* and cite the Codex Guidelines or Principles as relevant regulations.[1131] AUPSA, which is the authority responsible for the relevant import authorization process, is the Panamanian *Food* Safety Authority. Its equivalent in Costa Rica, SENASA, is the authority that provides the responses to two AUPSA questionnaires: one to verify the country's *sanitary* status[1132] and one concerning Costa Rica's

[1127] See para. 7.506 above.
[1128] See para. 7.62 above.
[1129] The Panel recalls that, in addition to country-level sanitary eligibility and sanitary approval, establishments looking to import their products into Panama must have country-level animal health eligibility and animal health approval or an animal health licence for the products that they wish to import. (See para. 7.458 above). Costa Rica's claim concerning the aspect of Measure 2 demonstrated by Costa Rica is that this measure is maintained by virtue of the non-renewal of the sanitary approvals of 16 Costa Rican establishments and not by virtue of the alleged revocation of Costa Rica's sanitary or animal health eligibility. (See para. 7.506 above). Therefore, the Panel's subsequent analysis will be limited to determining the objective of Measure 2 as a prohibition maintained by virtue of the non-renewal of sanitary approvals and the regulatory aspects directly linked to the approval procedure.
[1130] Panama's response to Panel question No. 27 (referring to AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22); and AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013), (Exhibit CRI-23)).
[1131] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), pp. 2 and 3; and AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23). pp. 2 and 8.
[1132] Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39); Costa Rica's responses to Panama's questionnaire verifying the sanitary status of a country (19 February 2020) (Exhibit CRI-6); Memorandum SENASA-DG-946-2020 (Exhibit CRI-50); Memorandum SENASA-DG-340-2021 (Exhibit CRI-60); and Costa Rica's updated responses to Panama's questionnaire verifying the sanitary status of a country (24 March 2021) (Exhibit CRI-61).

sanitary evaluation.[1133] The responses to the two questionnaires provide information on food safety and other aspects.

7.517. The two aforementioned AUPSA manuals and the questionnaires sent by Panama to Costa Rica indicate that the purpose of the sanitary approval renewal procedures is to ensure the safety of food imported into Panama by checking the sanitary conditions in Costa Rica. In this respect, the objective of Measure 2 is in line with the objective of "protect[ing] human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs", set forth in Annex A(1)(b).

7.518. In addition, the two AUPSA manuals make reference to the International Office of Epizootics (OIE)[1134] and its Terrestrial Animal Health Code.[1135] Moreover, the *AUPSA Manual for the approval of establishments* defines "sanitary eligibility" as "the recognition by [AUPSA] of the existence of countries, regions, zones or districts free from the disease under consideration, as defined by the competent official authority of the exporting country, for the importation or transit of foodstuffs", which confirms the animal health dimension of this measure.[1136] Some of the communications between the parties' authorities concerning Measure 2 also make reference to matters of an *animal health* nature. In its communications, SENASA makes reference to the OIE and its Terrestrial Animal Health Code, as well as to diseases such as swine fever and BSE.[1137] For its part, AUPSA refers to the necessity of conducting an animal health evaluation process for Costa Rica to determine its eligibility to export animals and animal products and by-products to Panama[1138] and sent a questionnaire to SENASA for determining a country's *animal health* eligibility.[1139] The questionnaire mentions MIDA's power to approve countries' *animal health* eligibility.[1140] It also makes reference to the aim of protecting human and animal health and life against animal diseases that are transmissible to humans (zoonoses).[1141] With regard to SENASA's responses to the questionnaire, the authorities of Panama expressed public health concerns about zoonoses such as brucellosis and bovine tuberculosis.[1142]

7.519. In view of the foregoing, the Panel considers that Measure 2 also has an animal health objective that is in line with the objective of "protect[ing] human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests", set forth in Annex A(1)(c).

7.520. Therefore, the Panels finds that the objective of Measure 2 corresponds to the objectives set forth in Annex A(1)(b) and (c).

7.521. With regard to the type of measure, as explained in the section on the content of Measure 2[1143], Panama's decision not to renew the sanitary approvals by virtue of which Measure 2 is maintained is related to the procedure established in Panama's regulations for the granting of such approvals. Therefore, it is the Panel's view that Panama's decision not to renew the sanitary approvals by virtue of which the import prohibition on Costa Rican dairy and meat products is maintained could qualify as a procedure for the purposes of Annex A(1). Moreover, as outlined above, even where a measure is not expressly included in the list of measures in Annex A(1), it may be considered an SPS measure if it is applied to achieve one of the objectives listed in that provision.

[1133] Memorandum SENASA-DG-725-2021 (Exhibit CRI-63);and Costa Rica's responses to Panama's questionnaire for the sanitary evaluation of Costa Rica (3 June 2021) (Exhibit CRI-29).

[1134] The International Office of Epizootics became the World Organisation for Animal Health in 2003. See https://www.woah.org/en/who-we-are/mission/history/.

[1135] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 2; AUPSA, *Manual for the approval of establishments, production chains and/or processing plant*s (2013) (Exhibit CRI-23), pp. 3 and 8.

[1136] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 3.

[1137] Memorandum SENASA-DG-1233-2020 (Exhibit CRI-53).

[1138] Note AUPSA-AG-571-2020 (Exhibit CRI-55); Note AUPSA-AG-100-2021 (Exhibit CRI-57).

[1139] Note AUPSA-AG-100-2021 (Exhibit CRI-57); Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

[1140] The Panel recalls that MIDA's animal health powers are governed by: Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-130), Article 6.5; Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24).

[1141] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 1.

[1142] Note DSA-335-2021 (Exhibit CRI-64).

[1143] See section 7.4.1.2.2 above.

Measure 2 meets this requirement and may therefore be considered an SPS measure within the meaning of Annex A(1) to the SPS Agreement.

7.4.2.1.2.3 Whether Measure 2 may, directly or indirectly, affect international trade

7.522. The Panel notes that previous panels have concluded that administrative procedures that can delay or deny entry of products into a Member may affect international trade.[1144] Measure 2, by its very nature, directly affects international trade by preventing the importation into Panama of the dairy and meat products at issue, as a consequence of the non-renewal of the sanitary approvals of 16 Costa Rican establishments.[1145]

7.4.2.1.3 Conclusion on the applicability of the SPS Agreement to Measure 2

7.523. Having determined that Measure 2 constitutes an SPS measure within the meaning of Annex A(1)(b) and (c) to the SPS Agreement and that it directly affects international trade within the meaning of Article 1.1 of the Agreement, the Panel finds that the SPS Agreement is applicable to this measure.

7.524. The Panel will proceed by examining whether, as Panama claims[1146], Measure 2 is exclusively subject to the disciplines under Article 8 and Annex C of the SPS Agreement, or whether, as Costa Rica asserts, it is also subject to other obligations under the Agreement.[1147]

7.4.2.2 Provisions of the SPS Agreement invoked by Costa Rica and applicable to Measure 2

7.4.2.2.1 Main arguments of the parties

7.4.2.2.1.1 Costa Rica

7.525. Costa Rica submits that Measure 2, which consists of an import prohibition on dairy and meats products originating in Costa Rica, is maintained by virtue of: (a) the non-renewal of the sanitary approvals of various Costa Rican establishments that export the products concerned; and (b) Panama's decision to revoke Costa Rica's sanitary/animal health eligibility for the importation of dairy and meat products into Panama.[1148]

7.526. Costa Rica claims that Measure 2 is inconsistent with the following provisions of the SPS Agreement: (i) Articles 5.1, 5.2, and 5.3 and, consequently, Article 2.2; (ii) Article 5.6 and, consequently, Article 2.2; (iii) Article 2.3; (iv) Article 5.5; and (v) Article 8 and Annex C(1)(a) and (c).[1149] Costa Rica notes that, when examining these claims, the Panel should focus its analysis on one or several aspects of Panama's conduct based on the corresponding provision of the SPS Agreement. Costa Rica observes, for example, that, when considering the absence of a risk assessment, the Panel should focus its analysis on the aspect of Measure 2 related to the revocation of sanitary/animal health eligibility. However, when examining the claim regarding undue delays in procedures, the Panel should focus its analysis on the procedural aspect of Measure 2. Nevertheless, Costa Rica submits that it would be an error to rigidly break down the measure at issue into separate

[1144] Panel Report, *Korea – Radionuclides*, para. 7.30 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.435).

[1145] In response to a question from the Panel, Panama confirmed that "if the renewal procedures are not completed when the approval expires, imports from those establishments will be suspended until the renewal procedures are completed". (Panama's response to Panel question No. 31, para. 106). The Panel finds support for Panama's assertion in Panama's regulations (see section 7.4.1.2.1.1 above), as, to import the products concerned, country-level sanitary eligibility for the product in question and sanitary approval of the exporting establishment are necessary. See also fn 1120 above.

[1146] See e.g. Panama's first written submission, para. 85.

[1147] See e.g. Costa Rica's response to Panel question No. 153, paras. 3.84-3.93.

[1148] Costa Rica's second written submission, paras. 9 and 15. See also Costa Rica's panel request, p. 4; response to Panel question No. 153, para. 3.84.

[1149] Costa Rica's second written submission, para. 16.

parts in such a manner as to prevent the Panel from considering the measure in its entirety when examining the various claims.[1150]

7.527. Moreover, Costa Rica submits that Panama's procedure for granting and renewing sanitary approvals for Costa Rican dairy and meat product establishments is covered by Article 8 and Annex C(1), as it constitutes an "approval procedure" within the meaning of Annex C(1).[1151] Costa Rica substantiates its assertion by stating that the ultimate effect of this process is to determine whether imports of the products at issue would be authorized in Panama.[1152] According to Costa Rica, the aim of the procedure for granting and renewing sanitary approvals is to check and ensure the fulfilment of the sanitary requirements applicable to the products in question, which constitute SPS measures.[1153]

7.528. Costa Rica submits that, in accordance with Article 8 of the SPS Agreement, where a procedure covered by this provision and by Annex C contains other aspects covered by other provisions of the SPS Agreement, the other aspects must comply with those other provisions. Costa Rica refers to *US – Poultry (China)*, in which the panel found that the non-discrimination obligation under Article 2.3 of the SPS Agreement is applicable to all SPS measures, irrespective of whether they are substantive or procedural.[1154]

7.4.2.2.1.2 Panama

7.529. Panama submits that it has not introduced a broad prohibition on the importation of all animal products from Costa Rica. Panama adds that the measure challenged by Costa Rica is exclusively the result of Panama's alleged failure to renew the sanitary approvals of 16 Costa Rican establishments. According to Panama, this type of measure consists of the operation of "control, inspection and approval procedures" within the meaning of Article 8 and Annex C of the SPS Agreement.[1155]

7.530. In Panama's view, approval procedures are defined as any procedure to "check and ensure the fulfilment" of a distinct, substantive SPS measure. Therefore, contrary to what is suggested by Costa Rica, Panama submits that the approval procedures contain no "substantive aspect" that is distinct from the underlying substantive measure that they are intended to fulfil.[1156] Panama adds that the approval procedures are exclusively subject to the disciplines set forth in Annex C(1) and Article 8.[1157]

[1150] Costa Rica's response to Panel question No. 153, paras. 3.89 and 3.90. See also Costa Rica's second written submission, paras. 67 (with respect to Article 5.1), 85 (with respect to Article 5.6), 95 (with respect to Articles 2.3 and 5.5), 115 (with respect to Article 8 and Annex C.1(a)), and 164 (with respect to Article 8 and Annex C.1(c)).

[1151] Costa Rica's first written submission, para. 677; second written submission, paras. 116-118; and response to Panel question No. 103, para. 1.16. See also Costa Rica's second written submission, paras. 118 and 166.

[1152] Costa Rica's response to Panel question No. 98, paras. 3.179 and 3.180 (referring to Panel Reports, *Russia – Pigs (EU)*, para. 7.516; *US – Animals*, para. 7.69). See also Costa Rica's first written submission, paras. 674 and 675.

[1153] Costa Rica's first written submission, para. 676; response to Panel question No. 98, para. 3.181. Among the applicable sanitary requirements, Costa Rica makes reference to the verification of the sanitary approval granted to Costa Rica pursuant to Resolution AUPSA-DINAN 092-2007 (Costa Rica's response to Panel question No. 98, para. 3.182 (referring to Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26))) and the sanitary requirements for importation issued by AUPSA, which require, *inter alia*, products to come from plants approved by AUPSA (Costa Rica's response to Panel question No. 98, para. 3.181).

[1154] Costa Rica's response to Panel question No. 153, para. 3.92 (referring to Panel Report, *US – Poultry (China)*, para. 7.147).

[1155] Panama's second written submission, para. 18. See also Panama's first written submission, paras. 79-85; second written submission, paras. 5 and 61-64; and response to Panel question No. 157, para. 150.

[1156] Panama's second written submission, para. 22. See also ibid. paras. 26-54.

[1157] Panama's first written submission, para. 81; second written submission, para. 45.

7.531. For Panama, even if the Panel were to conclude that Costa Rica has demonstrated that Measure 2 contains a substantive aspect, such a conclusion would not imply that any alleged decision to "revoke" Costa Rica's sanitary eligibility would not be covered by Article 8 and Annex C(1).[1158]

7.4.2.2.2 Main arguments of the third parties

7.532. Australia and Canada disagree with Panama's assertion that approval procedures are exclusively subject to Article 8 and Annex C of the SPS Agreement.[1159] In particular, Canada notes that Article 8 does not preclude other provisions of the SPS Agreement from applying to approval procedures. In this regard, Canada states that, in addition to requiring Members to observe the provisions of Annex C in the operation of these procedures, Article 8 requires Members to "ensure that their procedures are not inconsistent with the provisions of this Agreement". Canada adds that there is nothing in the SPS Agreement that precludes the other provisions of the Agreement from applying to an approval procedure that constitutes an SPS measure. Canada refers to *US – Poultry (China)* and *Korea – Radionuclides* as examples of disputes in which obligations other than those established in Annex C have been applied to procedural measures.[1160]

7.533. The United States also notes that the final clause of Article 8 establishes that Members shall "otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement". According to the United States, this clause clarifies that a Member's procedures, which include approval procedures, shall be consistent not only with Annex C, but also "otherwise … with the provisions of this Agreement".[1161]

7.534. The European Union considers that Costa Rica's claim is similar to that submitted by the European Union in *Russia – Pigs (EU)*, in which it challenged a European Union-wide prohibition that Russia described as "provisional compliance" with the bilateral veterinary certificates as a result of the impossibility of complying with the content of the certificates. According to the European Union, the panel in that case agreed with the European Union. The European Union considers that such an import prohibition may fall within the scope of various provisions of the SPS Agreement, in particular those related to risk assessment and non-discrimination.[1162]

7.4.2.2.3 Assessment by the Panel

7.535. As outlined above[1163], Costa Rica submits that all of the provisions in respect of which it submitted claims are applicable to Measure 2.[1164] Panama, for its part, argues that, as Measure 2 is a procedure and not a substantive SPS measure, only Article 8 and Annex C(1) are applicable to it.[1165]

7.536. The parties' arguments concerning the provisions applicable to Measure 2 are closely linked to the matter of whether Measure 2 constitutes a control, inspection and approval procedure within the meaning of Article 8 and Annex C(1). The Panel therefore deems it appropriate to first examine this matter in order to determine which of the provisions of the SPS Agreement invoked by Costa Rica are applicable to Measure 2.

7.4.2.2.3.1 Relevant legal standard

7.537. Article 8 of the SPS Agreement stipulates as follows:

> Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and

[1158] Panama's second written submission, para. 24. See also ibid. paras. 61-64.
[1159] Australia's third-party response to Panel question No. 5, paras. 1 and 2; Canada's third-party statement, paras. 4 and 12; and third-party response to Panel question No. 5, para. 29.
[1160] Canada's third-party statement, paras. 7-9 (referring to Panel Reports, *Korea – Radionuclides*, paras. 7.32 and 7.384; *US – Poultry (China)*, para. 7.140).
[1161] United States' third-party response to Panel question No. 5, paras. 18 and 19.
[1162] European Union's third-party response to Panel question No. 5, paras. 16-18.
[1163] See para. 7.526 above.
[1164] Costa Rica's response to Panel question No. 153, para. 3.88.
[1165] Panama's first written submission, para. 81; second written submission, para. 45.

> otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

7.538. The relevant subparagraphs of Annex C to the SPS Agreement, entitled "Control, Inspection and Approval Procedures", establish the following:

> Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
>
> (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
>
> …
>
> (c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs[.]

7.539. Therefore, Article 8 and Annex C are applicable to "control, inspection and approval procedures".[1166] Annex C(1) identifies the types of procedures to which the obligations contained in subparagraphs (a) to (i) apply, namely, "any procedure to check and ensure the fulfilment of [SPS] measures". The text of Annex C(1) therefore covers any procedure that: (a) is aimed at "checking and ensuring the fulfilment of [SPS] measures"; and (b) is undertaken in the context of "control, inspection, or approval".[1167]

7.540. For a procedure to fall within the scope of Article 8 and Annex C, there must be a link between the procedure and the SPS measure whose fulfilment the Member seeks to check and ensure.[1168] In previous disputes, Annex C(1) has been considered to "cover a broad array of procedures" and "does not specify or exclude any type of procedures from its application".[1169]

7.4.2.2.3.2 Whether Measure 2 constitutes an approval procedure within the meaning of Annex C(1) to the SPS Agreement

7.541. The parties agree that Measure 2 constitutes an approval procedure within the meaning of Annex C(1) of the SPS Agreement.[1170] Nevertheless, the Panel will examine this matter, in accordance with its duty under Article 11 of the DSU to make an objective assessment of the matter before it.

7.542. As Costa Rica is the party claiming that Measure 2 is subject to Annex C(1), it falls on Costa Rica to demonstrate that the procedure to grant and renew the sanitary approvals of Costa Rican establishments is one: (a) that is aimed at "checking and ensuring the fulfilment of [SPS] measures"; and (b) that is undertaken in a context of "control, inspection, or approval".[1171]

7.543. With respect to whether Measure 2 is aimed at checking and ensuring the fulfilment of SPS measures, the Panel recalls that, according to the Panamanian regulations outlined in section 7.4.2.1.1.2 above, the aim of the procedures for renewing sanitary approvals for the importation into Panama of the products at issue is to check that establishments wishing to export those products meet the relevant sanitary requirements. The Panel considers that, as argued by

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[1166] Appellate Body Report, *Australia – Apples*, para. 435.
[1167] Panel Report, *US – Poultry (China)*, para. 7.363.
[1168] Appellate Body Report, *Australia – Apples*, para. 435. See also Panel Report, *Korea – Radionuclides*, para. 7.378.
[1169] Panel Reports, *US – Poultry (China)*, para. 7.372; *Russia – Pigs (EU)*, para. 7.514; *US – Animals*, para. 7.68; and *Korea – Radionuclides*, para. 7.366.
[1170] Costa Rica's first written submission, para. 677; second written submission, paras. 116-118; response to Panel question No. 103, para. 1.16; and Panama's second written submission, para. 18.
[1171] Panel Report, *US – Poultry (China)*, para. 7.363.

Costa Rica[1172], the sanitary requirements for importation[1173] may be considered SPS measures whose fulfilment Measure 2 seeks to check and ensure.

7.544. Furthermore, as the procedures relate to the renewal of the sanitary *approvals* of Costa Rican establishments seeking to export the products at issue to Panama, they are undertaken in a context of "control, inspection and approval" within the meaning of Annex C(1).

7.545. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that Measure 2 constitutes an approval procedure within the meaning of Article 8 and Annex C(1) of the SPS Agreement.

7.4.2.2.3.3 Provisions of the SPS Agreement invoked by Costa Rica and applicable to Measure 2

7.546. The Panel notes that Panama's main argument is that, as Measure 2 is an approval procedure, it is exclusively subject to the disciplines under Annex C(1) and Article 8 of the SPS Agreement. In the Panel's view, and as submitted by Costa Rica and several third parties, the very terms of Article 8 contradict Panama's argument.

7.547. The final clause of Article 8 of the SPS Agreement stipulates that Members shall "otherwise ensure that their [control, inspection and approval] procedures are not inconsistent with the provisions of this Agreement". In the Panel's view, this obligation implies that any approval procedure must be consistent with the obligations set forth in the other provisions of the SPS Agreement. Nevertheless, the Panel considers that the applicability of each provision will depend on the obligations it contains and the nature of the measure concerned.

7.548. The Panel recalls that Measure 2 consists of an import prohibition on dairy and meat products from Costa Rica that is maintained by virtue of the non-renewal of the sanitary approvals of 16 of the 18 Costa Rican establishments in question[1174], which constitutes an approval procedure within the meaning of Article 8 and Annex C(1) of the SPS Agreement.[1175] The Panel will now assess whether the obligations in the provisions invoked by Costa Rica are applicable to Measure 2.

7.549. With respect to the *obligations concerning the scientific basis of SPS measures* set forth in Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement, the Panel recalls Costa Rica's position that the claim in respect of those obligations relates to the revocation of Costa Rica's sanitary/animal health eligibility. Given that the Panel has found that Costa Rica has failed to demonstrate that Panama revoked Costa Rica's sanitary or animal health eligibility for all products concerned, the Panel will not address the claim under Articles 5.1, 5.2, 5.3, and 2.2 with respect to Measure 2. Moreover, the Panel notes that Costa Rica has not developed arguments relating to the absence of a scientific basis for the non-renewal of the sanitary approvals of the 16 Costa Rican establishments.

7.550. With respect to the *non-discrimination obligations* set forth in Articles 2.3 and 5.5 of the SPS Agreement, the Panel agrees with the findings of the panel in *US – Poultry (China)*, which saw no reason to consider that the SPS Agreement prohibits discrimination only in relation to one type of SPS measure.[1176] The Panel therefore considers that it would be appropriate to examine the claims

[1172] Costa Rica's first written submission, para. 676; response to Panel question No. 98, para. 3.181.
[1173] Resolution AUPSA-DINAN-007-2010 concerning the importation of dairy products (Exhibit CRI-284); Resolution AUPSA DINAN-032-2010 concerning the importation of flours, meals and "pellets", of meat or meat offal, greaves, of fish or of crustaceans, molluscs, or other aquatic invertebrates, and other preparations, for animal consumption (Exhibit CRI-285); Resolution AUPSA-DINAN-045-2011 concerning the introduction of feed containing protein of ruminant origin, for consumption by dogs and cats only (Exhibit CRI-286); Resolution AUPSA-DINAN-017-2009 concerning the importation of meat or meat offal of swine for human consumption (Exhibit CRI-287); Resolution AUPSA-DINAN-059-2013 concerning the importation of meat products of bovine animals for human consumption (Exhibit CRI-288); Resolution AUPSA-DINAN-016-2009 concerning the importation of meat or meat offal of bovine animals for human consumption (Exhibit CRI-289); Resolution AUPSA-DINAN-035-2011 concerning the importation of pork products for human consumption (Exhibit CRI-290); Resolution AUPSA-DINAN-022-2011 concerning the importation of poultry products for human consumption (Exhibit CRI-291); and Resolution AUPSA-DINAN-061-2013 concerning the importation of (*Bovidae*) dairy products, for human consumption (Exhibit CRI-292).
[1174] See para. 7.506 above.
[1175] See para. 7.545 above.
[1176] Panel Report, *US – Poultry (China)*, para. 7.147.

submitted by Costa Rica under Articles 2.3 and 5.5 with respect to Measure 2, given that a procedure can be operated in a discriminatory manner.

7.551. With respect to the *obligations concerning the necessity and trade-restrictiveness of the SPS measure* set forth in Articles 5.6 and 2.2, the Panel does not see any reason for those obligations not to be applicable to Measure 2. In this regard, the Panel considers that there might be a procedure that is more trade-restrictive than required to achieve the relevant level of protection, contrary to Article 5.6 of the SPS Agreement. Therefore, the Panel considers that it would be appropriate to examine the claims under Articles 5.6 and 2.2 with respect to Measure 2.

7.552. Lastly, being an approval procedure, the Panel considers that it would be appropriate to first examine the claims submitted by Costa Rica under Article 8 and Annex C(1)(a) and (c) with respect to Measure 2, since these provisions relate specifically to control, inspection and approval procedures.

7.4.2.2.4 Conclusion on the provisions of the SPS Agreement invoked by Costa Rica and applicable to Measure 2

7.553. In view of the foregoing, the Panel concludes that Measure 2 is subject to the obligations set forth in Articles 2.2 (concerning the necessity of the measure), 2.3, 5.5, 5.6, and 8, and Annex C(1)(a) and (c) and, as a result, will proceed by examining Costa Rica's claims under these provisions.

7.4.2.3 Claims under Article 8 and Annex C of the SPS Agreement

7.554. Costa Rica claims that Measure 2 is inconsistent with Annex C(1)(a) and (c) to the SPS Agreement and, therefore, also with Article 8 of the Agreement.[1177]

7.555. With respect to Annex C(1)(a) to the SPS Agreement, Costa Rica argues that Panama failed to complete the renewal of the sanitary approvals for the 18 Costa Rican establishments in question without undue delay, as, from early 2017 to the date the Panel was established (27 September 2021), Panama: (a) did not issue resolutions renewing the sanitary approvals of the establishments[1178]; (b) published extensions to those approvals informally and automatically[1179]; and (c) did not undertake on-site audits of any of the establishments.[1180] Accordingly, Costa Rica submits that Panama failed to complete those procedures.[1181] Moreover, Costa Rica considers that the delays that Panama incurred are not justified.[1182]

7.556. For its part, Panama claims that it did not incur any delay in the renewal of the sanitary approvals of two of the Costa Rican establishments.[1183] Panama also claims that the delays incurred in relation to the establishments whose sanitary approvals were not renewed were caused by Costa Rica's failure to provide it with the relevant information promptly and by the impact of the COVID-19 pandemic, which significantly hindered the Panamanian authorities' ability to complete the procedures.[1184]

7.557. With respect to Annex C(1)(c) to the SPS Agreement, Costa Rica argues that Panama requested more information than necessary to complete the procedure to renew the sanitary approvals of the Costa Rican establishments in question, by requiring excessive information about the sanitary situation in Costa Rica.[1185] Panama considers that the information that it requested from

[1177] Costa Rica's first written submission, paras. 670 and 705.
[1178] Costa Rica's second written submission, para. 132.
[1179] Costa Rica's response to Panel question No. 169, para. 3.109. See also Costa Rica's second written submission, paras. 132-136.
[1180] Costa Rica's second written submission, paras. 127-128.
[1181] Costa Rica's second written submission, para. 161.
[1182] Costa Rica's second written submission, paras. 152-160.
[1183] Panama's first written submission, para. 84.
[1184] Panama's first written submission, para. 132.
[1185] Costa Rica's first written submission, paras. 705 and 714-715; second written submission, para. 170; and response to Panel question No. 170, paras. 3.114-3.126.

Costa Rica is necessary to determine, in accordance with Panama's regulatory framework, whether to renew the sanitary approvals of the Costa Rican establishments in question.[1186]

7.558. The Panel will first assess whether Panama incurred undue delays, contrary to Annex C(1)(a) to the SPS Agreement, when undertaking the procedures to renew the sanitary approvals of the Costa Rican establishments concerned. The Panel will subsequently assess whether Panama requested more information than necessary to complete the procedures to renew the sanitary approvals, in breach of Annex C(1)(c) to the SPS Agreement.

7.559. Before proceeding with its assessment, the Panel notes that its assessment of whether Measure 2 is inconsistent with Annex C(1)(a) and (c) to the SPS Agreement will be limited to the sanitary approval renewal requests of 16 of the 18 Costa Rican establishments in question. This is a result of its finding that Measure 2 consists of an import prohibition on meat and dairy products maintained by virtue of the non-renewal of the sanitary approvals of 16 Costa Rican establishments that export the products at issue[1187], which constitutes an approval procedure within the meaning of Article 8 and Annex C(1) of the SPS Agreement.[1188]

7.4.2.3.2 Whether Measure 2 is inconsistent with Annex C(1)(a) to the SPS Agreement

7.4.2.3.2.1 Main arguments of the parties

Costa Rica

7.560. Costa Rica submits that Panama incurred undue delays in undertaking and completing the procedures to renew the sanitary approvals of 18 Costa Rican establishments. Costa Rica also argues that this constitutes a violation of Annex C(1)(a) to the SPS Agreement and, consequently, of Article 8 of the Agreement.[1189]

7.561. Costa Rica notes that, in previous disputes, an "undue delay" has been considered to exist when the delay lacks justification; the procedures are prolonged over an unwarranted, excessive, disproportionate or unjustifiable period of time; a Member makes unnecessary information requests; or measures other than the procedures impede the completion of those procedures without undue delay.[1190]

7.562. Costa Rica submits that Panama incurred delays of between one and four years, by failing to take any action with respect to the sanitary approval renewal requests for 18 Costa Rican establishments submitted by SENASA between 2017 and 2020.[1191] Costa Rica claims that, with the exception of the requests relating to Dos Pinos, Biomar, and Central Veterinaria, Panama also failed to respond to the follow-ups to the initial requests that Costa Rica sent to Panama in February and May 2019 and August 2020.[1192] Moreover, in June 2020, Costa Rica requested Panama extend the validity of the sanitary approvals, which was rejected by Panama on the grounds that the request could not be processed without acceptance of Costa Rica's animal health eligibility.[1193] Costa Rica adds that, between 2017 and 2019, Panama granted automatic, informal extensions that were not

[1186] Panama's first written submission, para. 158; response to Panel question No. 140, paras. 95-104.
[1187] See para. 7.506 above. The Panel recalls that Panama extended the validity of the sanitary approvals of two of the 18 Costa Rican establishments (Biomar and Central Veterinaria) to 30 June 2023 and 19 September 2022, respectively, which is why those establishments were able to continue exporting their products to Panama. Therefore, the Panel's findings under Annex C(1)(a), Annex C(1)(c), and Article 8 will not include the Biomar and Central Veterinaria establishments. Nevertheless, the Panel notes that, in its analysis, it will make reference to the evidence concerning the sanitary approvals of those establishments as context for analysing how Panama conducts this type of procedure.
[1188] See para. 7.545 above.
[1189] Costa Rica's first written submission, para. 670.
[1190] Costa Rica's first written submission, paras. 273-276 (quoting Appellate Body Report, *Australia – Apples*, para. 438; and Panel Reports, *Russia – Pigs (EU)*, para. 7.583; and *US – Poultry (China),* para. 7.392).
[1191] Costa Rica's first written submission, paras. 680-681 and 691; second written submission, paras. 120-121.
[1192] Costa Rica's first written submission, para. 689.
[1193] Costa Rica's first written submission, paras. 686-688.

notified in writing, but instead were published on the AUPSA web page. In Costa Rica's view, this conduct did not provide predictability or legal certainty.[1194]

7.563. Costa Rica adds the following with respect to certain establishments. In the case of the company Dos Pinos, Costa Rica notes that Panama scheduled the on-site audit for January 2020, two years and 10 months after Costa Rica's renewal request, but eventually abandoned the audit and the procedure.[1195] In the case of the companies Biomar and Central Veterinaria, Costa Rica observes that extensions beyond June 2020 were granted for the establishments of both companies. However, Costa Rica considers that this reflects the inconsistent and informal nature of the actions of the Panamanian authorities.[1196]

7.564. Regarding the period to be examined by the Panel, Costa Rica disagrees with Panama's position that delays could only have been incurred after 30 June 2020, when the extensions to the sanitary approvals of the 16 Costa Rican establishments expired.[1197] Costa Rica bases its position on the following arguments: (a) despite the automatic, informal extensions of the sanitary approvals to 30 June 2020, Panama did not properly process the renewal requests submitted by Costa Rica from 2017 onwards and did not complete the corresponding procedures[1198]; and (b) the delays may affect all stages of the procedure and, as such, all of the delays incurred by Panama from 2017 onwards are relevant to the analysis under Annex C(1)(a).[1199]

7.565. With regard to the undue nature of the delays, Costa Rica notes that the delays described above are undue because there is no legitimate reason or justification for them.[1200] In particular, Costa Rica considers that: (a) the on-site audits were not undertaken for reasons attributable to Panama; (b) the logistical constraints relating to the COVID-19 pandemic did not prevent Panama from undertaking the on-site audits before March 2020 or after October 2020; and (c) requiring Costa Rica to complete a new country sanitary eligibility procedure is not a legitimate justification for the delay.[1201]

7.566. Costa Rica rejects Panama's argument that the delays incurred after 30 June 2020 are justified by the measures adopted by Panama to prevent the spread of the COVID-19 pandemic. Costa Rica considers that Panama could have undertaken a documentary review of the Costa Rican establishments, as it did for establishments in Peru, Mexico, and New Zealand[1202], or that it could have undertaken virtual audits, as it did with other Members.[1203] Costa Rica also submits that the Panamanian inspectors could have conducted the on-site audits in late 2020, as Costa Rica requested Panama on 24 November 2020, given that Costa Rica's borders were open.[1204]

7.567. Costa Rica also disagrees with Panama's argument that the delays are justified because of Costa Rica's alleged refusal to provide information on its animal health system. Costa Rica states that it provided Panama with relevant information on 19 February 2020, and 24 March and 3 June 2021.[1205]

7.568. Costa Rica submits that, in view of the foregoing, Panama has acted inconsistently with Annex C(1)(a) to the SPS Agreement, as it incurred various delays that affect both the undertaking and the completion of the sanitary approval renewal procedures. As a consequence of this

[1194] Costa Rica's first written submission, para. 690.
[1195] Costa Rica's first written submission, paras. 682-685; second written submission, paras. 122-123.
[1196] Costa Rica's first written submission, para. 72, fn 103.
[1197] Costa Rica's second written submission, para. 124.
[1198] Costa Rica's second written submission, paras. 126-135.
[1199] Costa Rica's opening statement at the first meeting of the Panel, para. 2; second written submission, paras. 136-141.
[1200] Costa Rica's first written submission, para. 695. See also Costa Rica's second written submission, para. 162.
[1201] Costa Rica's first written submission, paras. 695-702.
[1202] Costa Rica's second written submission, paras. 147-150.
[1203] Costa Rica's response to Panel question No. 3, paras. 2.6 and 2.9-2.12.
[1204] Memorandum SENASA-DG-1420-2020 (Exhibit CRI-42). See also Costa Rica's second written submission, para. 151.
[1205] Costa Rica's second written submission, paras. 154-159.

inconsistency, Costa Rica claims that Panama also acted inconsistently with Article 8 of the SPS Agreement.[1206]

Panama

7.569. Panama points out that Annex C(1)(a) requires Members to ensure that relevant procedures are undertaken and completed "with appropriate dispatch, that is, that they do not involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable".[1207] Panama submits that Annex C(1)(a) does not prohibit any delay, only an undue delay, that is, "any unjustifiable loss of time".[1208]

7.570. Panama considers that two establishments of the companies Biomar and Central Veterinaria had valid sanitary approvals after June 2020, which is why they were able, and continued, to export to Panama without any difficulty.[1209]

7.571. Concerning the 16 other Costa Rican establishments, Panama argues that Costa Rica has not demonstrated that the delays allegedly incurred by Panama in undertaking and completing the sanitary approval renewal procedures were illegitimate or unjustified.[1210] Panama bases its position on the arguments set out below.

7.572. First, Panama claims that the evidence in the record demonstrates that it completed the sanitary approval renewal procedures of all Costa Rican establishments up to at least 30 June 2020. Therefore, Panama argues that delays could have been incurred only after that date.[1211] Accordingly, Panama asserts that the only period that the Panel should evaluate is that between the expiry of the sanitary approvals (on 30 June 2020) and the establishment of the Panel (on 27 September 2021).[1212]

7.573. Second, Panama claims that the evidence in the record disproves Costa Rica's claim that Panama was inactive prior to 30 June 2020. Panama submits that, in cases where the information was provided, it undertook its initial documentary analysis and took measures to schedule the on-site audits.[1213]

7.574. Third, Panama points out that the length of time between the expiry of the sanitary approvals (30 June 2020) and Costa Rica's panel request (submitted on 20 August 2021) cannot be considered illegitimate or unjustified. In particular, Panama claims that, during that period, two events occurred that significantly hindered its ability to complete the sanitary approval renewal procedures: (a) the COVID-19 pandemic; and (b) Costa Rica's refusal to provide information on its animal health system.[1214]

7.575. Panama adds that Costa Rica appears to recognize that, at least between 16 March 2020 and 16 April 2022, the COVID-19 pandemic adversely affected the sanitary authorities' ability to undertake on-site audits of meat and dairy product establishments.[1215]

7.576. With respect to Costa Rica's refusal to provide information on its animal health system, Panama considers that, in its communications between 8 July 2020 and 3 June 2021[1216], Costa Rica

[1206] Costa Rica's first written submission, paras. 703-704; second written submission, paras. 161 and 163.
[1207] Panama's first written submission, para. 124 (quoting Appellate Body Report, *Australia – Apples*, para. 437).
[1208] Panama's first written submission, para. 125 (quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1496).
[1209] Panama's first written submission, para. 84.
[1210] Panama's first written submission, para. 127.
[1211] Panama's first written submission, para. 128.
[1212] Panama's second written submission, paras. 67-73.
[1213] Panama's first written submission, paras. 129-131.
[1214] Panama's first written submission, para. 132.
[1215] Panama's second written submission, paras. 74-80.
[1216] Panama's first written submission, para. 152 (referring to Memorandum DM-COR-CAE-0349-2020 (Exhibit CRI-34); Memorandum SENASA-DG-1420-2020 (Exhibit CRI-42); Memorandum DM-COR-CAE-0330-2020 (Exhibit CRI-44); Memorandum SENASA-DG-946-2020 (Exhibit CRI-50); Memorandum SENASA-DG-1233-2020 (Exhibit CRI-53); Memorandum SENASA-DG-191-2021

declined to respond to various information requests sent by Panama, including four sent between 10 July and 23 November 2020.[1217] Panama submits that the sanitary approval renewal procedures require Panama to assess Costa Rica's sanitary and animal health system and, for that purpose, it requested relevant information from Costa Rica. Panama argues that Costa Rica's refusal to provide Panama with that information cannot serve as a basis for establishing that Panama incurred an undue delay.[1218]

7.577. Panama adds that Costa Rica admits that it provided the information requested by Panama on 24 March and 3 June 2021, meaning that any alleged delay up to that date would be attributable to Costa Rica.[1219] Panama notes that the only matter before the Panel is whether Panama incurred an "undue delay" in the period from 3 June 2021 (the date of the last communication in which Costa Rica provided information) and 27 September 2021 (the date on which the Panel was established). Panama considers that a period of less than three months, taking into account the circumstances of this case, can hardly be described as a "delay", let alone "undue".[1220]

7.578. Panama concludes that Costa Rica has not demonstrated that Panama acted inconsistently with Annex C(1)(a), as Panama considers that it undertook and completed the sanitary approval renewal procedures "without undue delay".[1221]

7.4.2.3.2.2 Main arguments of the third parties

7.579. Canada, Brazil, and the European Union state that the examination under Annex C(1)(a) to the SPS Agreement should be conducted on a case-by-case basis, focusing on whether there is a justification for the delay, rather than on the length of the delay.[1222]

7.580. In particular, the European Union states that the contentious period between the parties is that after 15 October 2020, when Costa Rica lifted its travel restrictions.[1223] The European Union considers that the Panel, in its analysis, must take into account not only Costa Rica's official travel restrictions but also the actual travel possibilities of Panama's inspectors during the relevant period. In that regard, in the European Union's view, the Panel should assess whether the inspectors were prevented from travelling because of COVID-19-related reasons during the relevant period.[1224] The European Union also invites the Panel to assess whether the information requested by Panama was of a relevant nature for the assessment of the 16 Costa Rican establishments, as, if it was not relevant, it could be concluded that there was an undue delay.[1225]

7.4.2.3.2.3 Assessment by the Panel

Relevant legal standard

7.581. The first clause of Annex C(1)(a) to the SPS Agreement requires Members to ensure that procedures to check and ensure the fulfilment of SPS measures are "undertaken and completed without undue delay". The wording of Annex C(1)(a) has been interpreted as a good faith obligation requiring Members to proceed with their approval procedures as promptly as possible, taking account of the need to check and ensure the fulfilment of their relevant SPS requirements.[1226]

(Exhibit CRI-58); Memorandum SENASA-DG-340-2021 (Exhibit CRI-60); and Memorandum SENASA-DG-725-2021 (Exhibit CRI-63)).

[1217] Panama's first written submission, para. 151 (referring to Note AUPSA-AG-229-2020 (Exhibit CRI-45); Note AUPSA-AG-395-2020 (Exhibit CRI-51); Note AUPSA-AG-481-2020 (Exhibit CRI-52); and Note AUPSA-AG-571-2020 (Exhibit CRI-55)).

[1218] Panama's first written submission, paras. 150-153.

[1219] Panama's second written submission, paras. 81-83.

[1220] Panama's second written submission, para. 83.

[1221] Panama's first written submission, para. 154.

[1222] Canada's third-party response to Panel question No. 12, para. 45; Brazil's third-party response to Panel question No. 12, paras. 18-20; European Union's third-party submission, para. 15; and European Union's third-party response to Panel question No. 12, para. 36.

[1223] European Union's third-party submission, paras. 10-20.

[1224] European Union's third-party submission, para. 20.

[1225] European Union's third-party submission, para. 22.

[1226] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1498.

7.582. The Panel notes that the phrase "without undue delay" has been interpreted as relating to both the undertaking and the completion of the procedure and, therefore, if a Member causes undue delay at any stage in an approval procedure, this would constitute a breach of the first clause of Annex C(1)(a).[1227]

7.583. It follows from the text of the provision that the analysis of a claim under the first clause of Annex C(1)(a) comprises two steps: first, the complainant must establish that there has been a delay in the undertaking or completion of the procedure; and second, the complainant must establish that the delay was undue.[1228]

7.584. The concept of "delay" has been interpreted as "(a period of) time lost by inaction or inability to proceed".[1229] In turn, the concept of "undue" has been interpreted as "going beyond what is warranted" or "unjustifiable".[1230] Thus, it is understood that Annex C(1) requires that approval procedures be undertaken and completed with no unjustifiable loss of time.[1231] In this respect, what matters is whether there is a legitimate reason, or justification, for a given delay, not the length of a delay as such.[1232]

7.585. The determination of whether a procedure has been undertaken or completed "without undue delay" must be made on a case-by-case basis[1233], in light of the nature and complexity of the procedure to be undertaken and completed.[1234] In addition, Members have been deemed not legally responsible for delays which are not attributable to them. Hence, delays attributable to action, or inaction, of a complainant must not be held against a Member when a determination is made regarding whether that Member has undertaken or completed approval procedures "without undue delay".[1235] On the other hand, if the Member did not proceed as expeditiously as could be expected of it in the specific circumstances of the case, the delay caused in this way would be "undue".[1236]

7.586. The Panel shares these assessments of the legal standard applicable under Annex C(1)(a) made in the aforementioned disputes and will proceed with its own assessment on that basis.

Whether Panama incurred an undue delay in undertaking or completing the renewal of the sanitary approvals of 16 of the 18 Costa Rican establishments in question

7.587. The Panel notes that, with regard to Costa Rica's claim under Annex C(1)(a), the parties disagree on three main issues: (a) the time-period that the Panel should examine; (b) whether Panama incurred delays; and (c) whether the alleged delays incurred by Panama were undue. The Panel will analyse each of these three issues in the light of the aforementioned legal standard.

The relevant time-period

7.588. Costa Rica claims that Panama incurred delays between 2017, when it submitted its initial sanitary approval renewal requests, and 27 September 2021, the date on which the Panel was established.[1237] Costa Rica notes that Panama carried out automatic extensions that were not notified at the time, and that were merely posted on the AUPSA web page. According to Costa Rica, the fact that AUPSA had granted automatic, informal extensions of the sanitary approvals, such as that granted until 30 June 2020 for various Costa Rican establishments, does not remedy the delays incurred during those procedures prior to the expiry of the sanitary approvals.[1238] Moreover, Costa Rica submits that the fact that the automatic, informal extensions had enabled trade in meat and dairy products between the countries to continue between 2017 and 2020 does not mean that

[1227] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1502.
[1228] Panel Report, *US – Animals*, para. 7.115.
[1229] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[1230] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[1231] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[1232] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1496. See also Appellate Body Report, *Australia – Apples*, para. 437.
[1233] Appellate Body Report, *Australia – Apples*, para. 437.
[1234] Panel Report, *US – Animals*, para. 7.114.
[1235] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497.
[1236] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1499.
[1237] Costa Rica's first written submission, para. 691.
[1238] Costa Rica's second written submission, paras. 130-135.

AUPSA had correctly processed and completed the procedures to renew the sanitary approvals of the Costa Rican establishments.[1239]

7.589. Panama submits that it completed the procedures relating to the sanitary approval renewal requests submitted by Costa Rica between 2017 and 2020 by extending the validity of those approvals to 30 June 2020 for the Costa Rican establishments in question.[1240] In this respect, Panama also notes that, on the date the Panel was established, the sanitary approvals of the establishments of the companies Central Veterinaria and Biomar were valid, and enabled them to export animal products up to 19 September 2022 and 30 June 2023, respectively.[1241]

7.590. Accordingly, Panama submits that the Panel should only examine the alleged delays that were incurred during the procedure to renew the sanitary approvals of 16 of the 18 Costa Rican establishments in the period between the expiry of those approvals (30 June 2020) and the establishment of the Panel (27 September 2021).[1242]

7.591. The Panel notes that the parties disagree on whether, as a matter of fact, as at 30 June 2020, Panama had completed the procedures concerning the sanitary approval renewal requests that Costa Rica had submitted from 2017 onwards. Contrary to what has been stated by Panama[1243], Costa Rica has not acknowledged that Panama completed the renewal procedures by extending the validity of the sanitary approvals to 30 June 2020.[1244] This matter is central to determining the period to be examined, as, if Panama completed the renewal procedures on 30 June 2020, the only period that the Panel should evaluate is that after that date. Otherwise, the Panel should also examine events prior to 30 June 2020.

7.592. To resolve this issue, the Panel will first examine Panama's regulatory framework to identify when the renewal procedure is considered to have been completed. In this respect, the relevant provisions of the *AUPSA Manual for the approval of establishments* stipulate that, as part of the approval and renewal procedure, an approval resolution is published and the establishment is added to the database on the AUPSA web page.[1245]

7.593. The Panel recalls the stages of the sanitary approval renewal procedure mentioned in paragraph 7.471 . Pursuant to the Manual, this procedure comprises the following stages: (a) the request from the interested party; (b) the documentary analysis of the sanitary evaluation; (c) the audit at origin or on site (where applicable); (d) the evaluation by the Institutional Technical Commission (CTI); (e) the issuance of a resolution approving or refusing the renewal concerned; and, once the renewal has been approved, (f) the publication of the approval resolution; and (g) the inclusion of the establishment on the AUPSA web page.[1246] Accordingly, the renewal process begins with the request from the party interested in exporting, which, in this case, was sent by SENASA to AUPSA.

7.594. Panama's regulations state that on-site audits may form part of the sanitary approval renewal procedure. In this respect, the *AUPSA Manual for the approval of establishments* stipulates that "AUPSA reserves the right to undertake audits and inspections at origin for the renewal of establishments, based on its decision in the relevant risk analysis".[1247] As mentioned in paragraph 7.473 above, the Manual also stipulates that AUPSA may request documentary information from the exporting country on the sanitary conditions of the establishment as part of

[1239] Costa Rica's second written submission, para. 132.
[1240] Panama's first written submission, para. 128.
[1241] Panama's second written submission, para. 58.
[1242] Panama's second written submission, para. 73.
[1243] Panama's second written submission, para. 70.
[1244] Costa Rica's second written submission, para. 133.
[1245] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 13 and 15.
[1246] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 7-15.
[1247] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 15. See also Panama's response to Panel question No. 41, para. 129.

the renewal process, and on the experience and knowledge of, and trust in, the food inspection and certification systems of the exporting country and of the establishment in question.[1248]

7.595. According to the Manual, a resolution requires a prior evaluation by CTI to check compliance with the relevant sanitary requirements. Once approval has been granted (or renewed) for the establishment concerned, Office of the Legal Counsel of AUPSA proceeds to draft the resolution, which is signed by the Directors and Administrator General of AUPSA.[1249] The Panel notes that all the resolutions in the record for the 16 Costa Rican establishments issued between 2014 and 2016 with a validity of between three and five years share the following features described in the AUPSA *Manual for the approval of establishments*: (a) they were issued by AUPSA; (b) they were signed by the Administrator General and Directors of AUPSA; and (c) before they were issued, on-site audits were undertaken when so decided by AUPSA.[1250] In addition, the aforementioned resolutions state that "AUPSA appointed a team of auditors to undertake the official inspection of the plant".[1251] This took place irrespective of whether it concerned resolutions granting or renewing the sanitary approval.[1252]

7.596. In the Panel's view, the aforementioned resolutions are indicative of the form and content that a resolution must have for the purposes of completing the procedure to grant or renew a sanitary approval, based on the *AUPSA Manual for the approval of establishments*. Therefore, the Panel understands that a sanitary approval resolution based on the Manual is one that is issued by AUPSA expressly granting sanitary approval to the establishment in question, irrespective of whether it is a renewal of the approval or an initial approval.

7.597. With regard to the establishment approval procedures initiated by Costa Rica between 2017 and 2020, SENASA sent AUPSA the sanitary approval renewal requests of 16 Costa Rican establishments before the expiry of those approvals. In those communications, it also requested that Panama indicate the dates on which the on-site audits would be undertaken.[1253]

7.598. Panama claimed that the on-site audits were necessary to proceed with the renewal of the sanitary approvals of the 16 Costa Rican establishments, as, in Panama's view, a documentary review of the establishments was insufficient to achieve its ALOP.[1254] For its part, Costa Rica recognizes that, as part of the sanitary approval renewal procedure, Panama usually requires on-

[1248] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 14-15.

[1249] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 13-14.

[1250] AUPSA, Resolution No. 029-2014 (Exhibit CRI-236); AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225); AUPSA, Resolution No. 14 (2014) (Exhibit CRI-241); AUPSA, Resolution No. 15 (2014) (Exhibit CRI-244); AUPSA, Resolution No. 10 (2014) (Exhibit CRI-215); AUPSA, Resolution No. 12 (2014) (Exhibit CRI-231); AUPSA, Resolution No. 11 (2014) (Exhibit CRI-228); AUPSA, Resolution No. 028-2014 (Exhibit CRI-234); AUPSA, Resolution No. 030-2014 (Exhibit CRI-237); AUPSA, Resolution No. 039-2014 (Exhibit CRI-247); AUPSA, Resolution No. 43 (2014) (Exhibit CRI-206); AUPSA, Resolution No. 46 (2014) (Exhibit CRI-250); AUPSA, Resolution No. 45 (2014) (Exhibit CRI-253); AUPSA, Resolution No. 44 (2014) (Exhibit CRI-256); AUPSA, Resolution No. 48 (2014) (Exhibit CRI-219); AUPSA, Resolution No. 10-CTI-16 (Exhibit CRI-238); AUPSA, Resolution No. 008-CTI-16 (Exhibit CRI-259); and AUPSA, Resolution No. 007-CTI-16 (Exhibit CRI-262).

[1251] See fn 1250 above.

[1252] See e.g. AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225) (granting approval to establishment No. 8 of the company Coopemontecillos); Resolution No. 10-CTI-16 (Exhibit CRI-238) (renewing the approval of establishment No. 40 of the company El Ángel).

[1253] Memorandum SENASA-DG-0139-2017 (Exhibit CRI-216); Memorandum SENASA-DG-046-2017 (Exhibit CRI-226); Memorandum SENASA-DG-047-2017 (Exhibit CRI-229); Memorandum SENASA-DG-5122017 (Exhibit CRI-232); Memorandum SENASA-DG-0159-2017 (Exhibit CRI-37); Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141); Memorandum SENASA-DG-0161-2017 (Exhibit CRI-204); Memorandum SENASA-DG-1587-2018 (Exhibit CRI-239); Memorandum SENASA-DG-140-2017 (Exhibit CRI-242); Memorandum SENASA-DG-170-2017 (Exhibit CRI-245); Memorandum SENASA-DG-246-2017 (Exhibit CRI-248); Memorandum SENASA-DG-983-2017 (Exhibit CRI-251); Memorandum SENASA-DG-704-2017 (Exhibit CRI-254); Memorandum SENASA-DG-963-2017 (Exhibit CRI-257); Memorandum SENASA-DG-1512-2018 (Exhibit CRI-260); and Memorandum SENASA-DG-1511-2018 (Exhibit CRI-263). See also Costa Rica's first written submission, annex - Table on authorizations and renewals of Costa Rican establishments; and Appendix 1, p. 352 below.

[1254] Panama's first written submission, paras. 145-147; Note AUPSA-AG-229-2020 (Exhibit CRI-45).

site audits to be undertaken.[1255] Accordingly, while, under Panama's regulations, the on-site audits are not a mandatory part of the procedure to renew the sanitary approvals of establishments, Panama deemed it appropriate to require such audits for the renewal of the sanitary approvals of the 16 Costa Rican establishments.

7.599. The Panel notes that Article 4 of AUPSA Resolution No. 145-AG-2019, extending the validity of the sanitary approvals of various Costa Rican establishments, stipulates the need to draw up a timetable for the on-site audits of the establishments listed therein.[1256] Moreover, AUPSA made reference to the need to conduct audits when it granted extensions to various Costa Rican establishments through Note AUPSA-AG-399-2019 of 15 October 2019.[1257] In the Panel's view, the above demonstrates that AUPSA determined that undertaking on-site audits was part of the procedure in order to complete the sanitary approval renewal requests for the 16 Costa Rican establishments.

7.600. Accordingly, the Panel considers that the following stages must be carried out for the procedure to renew the sanitary approvals of each of the Costa Rican establishments to be deemed to have been completed: (a) AUPSA undertakes a documentary analysis of the sanitary evaluation; (b) AUPSA and other sanitary authorities of Panama undertake on-site audits; (c) the CTI evaluates and approves the renewal request after checking compliance with the relevant requirements; (d) AUPSA issues and publishes a resolution renewing the sanitary approval of the establishment concerned; and (e) AUPSA includes the establishment concerned on its web page.

7.601. With respect to recording the sanitary approval extensions of the establishments awaiting renewal on the AUPSA web page, Costa Rica considers that publishing this information does not signify that AUPSA had processed and completed the sanitary approval renewal procedures for the Costa Rican establishments. Costa Rica adds that, under Panama's regulatory framework, completing the procedure requires an approval resolution to be issued, which did not happen.[1258] In this respect, Panama considers that the renewal procedure in question was completed each time the approval of each of the 16 Costa Rican establishments was extended.[1259]

7.602. The evidence in the record indicates that AUPSA recorded the 2019 and 2020 extensions for the 16 Costa Rican establishments on its web page.[1260] However, the record does not include documents that confirm that the Panamanian authorities completed the other stages[1261] of the procedure. The Panel does not consider the inclusion of the establishments on the AUPSA web page to be sufficient to consider the sanitary approval renewal process to have been completed. In accordance with the Panamanian regulatory framework, the technical evaluation of the substance of the renewal request is a fundamental component of this procedure. Accordingly, simply recording the extensions issued on a web page, without providing an examination of the merits of the request, cannot be considered sufficient to conclude that the procedure in question has been completed. In the light of the foregoing, the Panel concludes that, as at 30 June 2020, Panama had not completed the procedure to renew the sanitary approvals of 16 of the 18 Costa Rican establishments in question.

7.603. Bearing in mind that Panama had not completed the renewal procedures as at 30 June 2020, and given that the obligation under Annex C(1)(a) to the SPS Agreement covers all stages of a procedure[1262], the Panel will now examine the events referred to by Costa Rica from its initial renewal requests in 2017 to the date of the establishment of the Panel on 27 September 2021.

[1255] Costa Rica's first written submission, para. 61.
[1256] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).
[1257] Note AUPSA-AG-399-2019 (Exhibit CRI-35). See also Panama's response to Panel question No. 171, para. 176.
[1258] Costa Rica's response to Panel question No. 169, paras. 3.109-3.113. See also Costa Rica's second written submission, para. 130.
[1259] Panama's comments on Costa Rica's response to Panel question No. 169, para. 87.
[1260] AUPSA, Approval of processing plants: Costa Rica (July 2020) (Exhibit CRI-398). See also the table in Costa Rica's response to Panel question No. 139.
[1261] See para. 7.593 above, which lists the stages of the procedure.
[1262] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.50.

Whether Panama incurred delays in undertaking and completing the renewal of the sanitary approvals of 16 of the 18 Costa Rican establishments in question

7.604. The Panel will now analyse whether, during the aforementioned period, Panama incurred any delay in the procedures to renew the sanitary approvals of the 16 Costa Rican establishments. The Panel recalls that there is deemed to be a delay in the procedure when there is "(a period of) time lost by inaction or inability to proceed".[1263]

7.605. The Panel will examine the time that elapsed between the submission of the sanitary approval renewal requests for the 16 Costa Rican establishments and the establishment of the Panel. The Panel recalls that, in accordance with the provisions of the *AUPSA Manual for the approval of establishments*, the renewal procedure begins with the request from the party interested in exporting.[1264] The table below lists the dates on which SENASA requested the renewal of the sanitary approvals of each of the 16 Costa Rican establishments, marking the start of the renewal procedure, and the time that elapsed between those dates and the establishment of the Panel.

Table 7 - Time that elapsed between the renewal request and the establishment of the Panel on 27 September 2021

Company and establishment	Date of renewal request	Length of time to the establishment of the Panel
Camsa, establishment No. 12C[1265]	9 February 2017	4 years and 7 months
Coopemontecillos, establishment No. 8[1266]	17 January 2017	4 years and 8 months
Coopemontecillos, establishment No. 8C[1267]	13 January 2017	4 years and 8 months
Distribuidora de Carnes Zamora, establishment No. 21[1268]	3 May 2017	4 years and 4 months
Dos Pinos, establishment No. 46A[1269]	14 February 2017	4 years and 7 months
Dos Pinos, establishment No. 46B[1270]	14 February 2017	4 years and 7 months
Dos Pinos, establishment No. 46C[1271]	14 February 2017	4 years and 7 months
El Ángel, establishment No. 40[1272]	4 December 2018	2 years and 9 months
El Arreo, establishment No. 12[1273]	9 February 2017	4 years and 7 months
Gico, establishment No. 9[1274]	16 February 2017	4 years and 7 months
Nutrilac, establishment No. 48[1275]	2 February 2017	4 years and 7 months

[1263] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.
[1264] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 14.
[1265] Memorandum SENASA-DG-0139-2017 (Exhibit CRI-216).
[1266] Memorandum SENASA-DG-046-2017 (Exhibit CRI-226).
[1267] Memorandum SENASA-DG-047-2017 (Exhibit CRI-229).
[1268] Memorandum SENASA-DG-512-2017 (Exhibit CRI-232).
[1269] Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141).
[1270] Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141).
[1271] Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141).
[1272] Memorandum SENASA-DG-1587-2018 (Exhibit CRI-239).
[1273] Memorandum SENASA-DG-0140-2017 (Exhibit CRI-242).
[1274] Memorandum SENASA-DG-170-2017 (Exhibit CRI-245).
[1275] Memorandum SENASA-DG-246-2017 (Exhibit CRI-248).

Company and establishment	Date of renewal request	Length of time to the establishment of the Panel
Planta Cinta Azul (Pipasa), establishment No. 5[1276]	9 August 2017	4 years and 1 month
Proceso Posterior (Pipasa), establishment No. 30E[1277]	21 June 2017	4 years and 3 months
Sigma Alimentos, establishment No. 7[1278]	4 August 2017	4 years and 1 month
Sigma Alimentos, establishment No. 45[1279]	12 November 2018	2 years and 10 months
Sigma Alimentos, establishment No. 47[1280]	12 November 2018	2 years and 10 months

7.606. As can be observed, between two years and nine months and four years and eight months elapsed between the sanitary approval renewal requests of the Costa Rican establishments, which marked the start of the renewal procedure, and the establishment of the Panel. The evidence in the record indicates that, during that time, Panama: (a) did not undertake on-site audits of these 16 Costa Rican establishments; and (b) did not issue and publish resolutions renewing the sanitary approvals of each of those Costa Rican establishments.[1281]

7.607. Regarding the scheduling of the on-site audits, AUPSA sent two types of communications to SENASA. On the one hand, on 9 August 2017, AUPSA sent SENASA a general communication concerning the scheduling of the on-site audits for the sanitary approval renewal for establishment No. 7 of the company Sigma Alimentos and the other establishments for which SENASA had requested the renewal of their sanitary approvals. Therein, AUPSA indicated that "given the limited number of auditors and the large volume of requests, the planned date of the visit will be slightly postponed".[1282]

7.608. On the other hand, there were communications concerning the audits of three establishments of the company Dos Pinos between January and February 2020.[1283] On 9 March 2020, AUPSA informed SENASA that it was postponing the on-site audits of those three establishments, which had been scheduled for the week of 9 to 13 March 2020, as a result of the COVID-19 pandemic.[1284] The record does not indicate that AUPSA rescheduled the on-site audits for a later date or eventually carried out the audits of the three establishments of the company Dos Pinos. There is no evidence in the record relating to the scheduling of on-site audits by AUPSA other than those mentioned here.

7.609. Regarding the issuance and publication of the resolutions renewing the sanitary approvals of the 16 Costa Rican establishments, the Panel refers to AUPSA Resolution No. 145-AG-2019.[1285] Panama submits that, pursuant to that Resolution, the procedure to renew all of the requested sanitary approvals was completed on that date by extending their validity.[1286] The Panel disagrees and considers that this Resolution did not complete the renewal procedures initiated by SENASA for the 16 Costa Rican establishments, as indicated in Table 7 above. In the Panel's view, this Resolution extended the validity of the sanitary approvals of 17 Costa Rican establishments (including the 16 establishments under assessment) for a period of six months, from 1 January to 30 June 2020,

[1276] Memorandum SENASA-DG-983-2017 (Exhibit CRI-251).
[1277] Memorandum SENASA-DG-704-2017 (Exhibit CRI-254).
[1278] Memorandum SENASA-DG-963-2017 (Exhibit CRI-257).
[1279] Memorandum SENASA-DG-1512-2018 (Exhibit CRI-260).
[1280] Memorandum SENASA-DG-1511-2018 (Exhibit CRI-263).
[1281] For more details on the communications between the parties and the dates on which Panama indicated that it had no availability to schedule the on-site audits, see Appendix 1, p. 352 below.
[1282] Note AUPSA-DINAN-154 (Exhibit CRI-32).
[1283] Between 2 January and 27 February 2020, AUPSA proposed three dates to SENASA for the on-site audits, which were rescheduled for various reasons given by AUPSA. (See Note AUPSA-AG-001-2020 (Exhibit CRI-38); Memorandum AUPSA-AG-025-2020 (Exhibit CRI-176); Memorandum SENASA-DG-132-2020 (Exhibit CRI-181); Note AUPSA-AG-049-2020 (Exhibit CRI-180); and Note AUPSA-AG-059-2020 (Exhibit CRI-40)).
[1284] Note AUPSA-078-2020, (Exhibit CRI-41).
[1285] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).
[1286] See Panama's first written submission, para. 128; second written submission, para. 67.

but did not renew the approvals. Article 1 of AUPSA Resolution No. 145-AG-2019 states that an "extension of the authorization" is granted to the relevant establishments, which is different from the language used in: (a) the *AUPSA Manual for the approval of establishments*, which sets out the procedure for "renewing the approval of an establishment"[1287]; and (b) the resolutions renewing the approvals of establishments prior to 2017, as was the case for establishment No. 40 of the company El Ángel and establishments Nos. 45 and 47 of the company Sigma Alimentos, which state that it has been decided to "[approve] the [r]enewal of the [e]stablishment".[1288]

7.610. Moreover, the fourth recital of AUPSA Resolution No. 145-AG-2019 mentions the need, once the documentary formalities are completed, for audits of the establishments to be undertaken by the Panamanian authorities. Article 4 of that same Resolution indicates that a timetable for on-site audits will be drawn up for establishments whose sanitary approval has been extended.[1289] This, in the Panel's view, supports its conclusion that, as at the date on which the Resolution was issued, the procedure to renew the sanitary approvals of the 16 Costa Rican establishments had not been completed, as the on-site audits of the establishments mentioned in the Resolution were still pending.[1290] The failure to schedule or undertake on-site audits was confirmed by Panama itself with respect to 12 of these establishments, and there is no evidence in the record that indicates that on-site audits were carried out for the other establishments.[1291]

7.611. As mentioned above, for the sanitary approval renewal procedure to be deemed to have been completed, on-site audits must be undertaken and a resolution confirming the renewal must be issued, events that did not occur with respect to any of the 16 Costa Rican establishments. In the light of the foregoing, the Panel considers that the time that elapsed between the request to renew the sanitary approvals of each of the establishments and the establishment of the Panel is sufficiently long to conclude that Panama failed to proceed in the review of the merits of the sanitary approval renewal requests or in scheduling or undertaking on-site audits. Accordingly, the Panel considers that Panama incurred delays within the meaning of Annex C(1)(a) to the SPS Agreement with respect to the procedures to renew the sanitary approvals of 16 of the 18 Costa Rican establishments in question.

Whether the delays were "undue"

7.612. The second issue that the Panel will assess in order to determine the consistency of Measure 2 with Annex C(1)(a) is whether the delays identified in the previous section were undue, in the sense that there was no justification for them. The Panel recalls that a delay is undue when it is unjustifiable[1292], and that what matters is whether there is a legitimate reason, or justification, for a given delay, not the length of a delay as such.[1293]

7.613. Costa Rica identifies three reasons why the delays incurred by Panama are unjustifiable: (a) the on-site audits were not undertaken for reasons attributable to Panama; (b) the logistical constraints relating to the COVID-19 pandemic did not prevent Panama from undertaking the on-site audits before March 2020 or after October 2020; and (c) requiring Costa Rica to complete a new country sanitary eligibility procedure is not a legitimate justification for the delay.[1294]

[1287] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 15.

[1288] AUPSA, Resolution No. 10-CTI-16 (Exhibit CRI-238), p. 2; AUPSA, Resolution No. 008-CTI-16 (Exhibit CRI-259), p. 2; and AUPSA, Resolution No. 007-CTI-16 (Exhibit CRI-262), p. 2.

[1289] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).

[1290] AUPSA, Approval of processing plants: Costa Rica (July 2020) (Exhibit CRI-398). See also the table in Costa Rica's response to Panel question No. 139, which shows that the requests to renew the sanitary approvals of the 16 Costa Rican establishments were sent before 30 June 2020. The Panel notes that the Resolution in question refers to 17 establishments, one of which is Biomar. There is no evidence in the record that on-site audits were undertaken prior to the extensions granted to Biomar.

[1291] Panama's response to Panel question No. 29, para. 100. Panama makes this claim with respect to 13 establishments, one of which is Central Veterinaria. (Ibid.) There is no evidence in the record that on-site audits were undertaken prior to the extensions granted to Central Veterinaria.

[1292] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

[1293] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1496. See also Appellate Body Report, *Australia – Apples*, para. 437.

[1294] Costa Rica's first written submission, paras. 695-702.

7.614. For its part, Panama considers that the evidence in the record shows that it was not inactive prior to 30 June 2020.[1295] Panama also claims that the alleged delays prior to that date are justified by the COVID-19 pandemic and Costa Rica's refusal to provide information on its animal health system.[1296] In particular, Panama adds that Costa Rica admits that it provided the information requested by Panama on 24 March and 3 June 2021, which means, according to Panama, that any alleged delay up to that date would be attributable to Costa Rica.[1297]

7.615. The Panel will now analyse the delays during the period prior to the onset of the COVID-19 pandemic in Costa Rica in March 2020, followed by the events that occurred after the start of the pandemic up to the establishment of the Panel.

Delays prior to the onset of the COVID-19 pandemic in Panama and Costa Rica in March 2020

7.616. The Panel recalls that the main reason why the procedures to renew the sanitary approvals did not proceed during this period was the failure to conduct the on-site audits. Costa Rica claims that these audits were not undertaken for reasons attributable to Panama.[1298] For its part, Panama asserts that it had completed the procedures by 30 June 2020, and that the evidence in the record shows that, in the cases where Costa Rica provided information, it carried out its initial documentary analysis and took measures to schedule the on-site audits.[1299]

7.617. The Panel considers that the evidence in the record confirms Costa Rica's position. First, as mentioned above, AUPSA sent a series of communications concerning the scheduling of the on-site audits for the establishments with respect to which SENASA had requested the renewal of their sanitary approvals.[1300] In those communications, AUPSA indicates that it is impossible to schedule or undertake the on-site audits for reasons that, in the Panel's view, do not seem legitimate to justify AUPSA's inaction between the date of its communications, in August 2017 and February 2020, and the date of the establishment of the Panel.[1301]

7.618. In particular, on 9 August 2017, AUPSA indicated that "given the limited number of auditors and the large volume of requests, the planned date of the visit will be slightly postponed" for the Costa Rican establishments that had, by that date, requested the renewal of their respective sanitary approvals.[1302] While the Panel understands that the national authorities acted within the means of their available resources, especially where their human resources specialized in certain tasks are limited, it does not seem justifiable that the scheduling and subsequent undertaking of the on-site audits of the 16 Costa Rican establishments was delayed for a period of more than two and a half years, between August 2017 and March 2020.

7.619. In the case of establishments Nos. 46A, 46B and 46C of the company Dos Pinos, AUPSA indicated in three communications that the on-site audits would be undertaken on various dates, between January and March 2020.[1303] In the most recent of those communications, dated 27 February 2020, AUPSA changed the date of the on-site audits to the week of 9 to 13 March 2020 as a result of "delays in the administrative process of issuing the passport of one of our auditors".[1304] This last-minute change, after giving different dates for the audits on three occasions, is attributable to Panama and contrasts with the interest that the company Dos Pinos showed in the on-site audits being undertaken. In its renewal request, SENASA asked, on behalf of that company, for the on-site

[1295] Panama's first written submission, paras. 129-131.
[1296] Panama's first written submission, para. 132.
[1297] Panama's second written submission, para. 81.
[1298] Costa Rica's first written submission, para. 696; Note AUPSA-DINAN-154 (Exhibit CRI-32).
[1299] Panama's first written submission, paras. 129-131; second written submission, paras. 67-73.
[1300] See paras. 7.607 -7.608 above; Appendix 1, p. 352 below.
[1301] See Table 7 - Time that elapsed between the renewal request and the establishment of the Panel on 27 September 2021 above, which shows that the first renewal request was submitted on 13 January 2017 and the last on 4 December 2018.
[1302] Note AUPSA-DINAN-154 (Exhibit CRI-32).
[1303] Note AUPSA-AG-001-2020 (Exhibit CRI-38). Although reference is made to establishments Nos. "41A" and "41C" of the company Dos Pinos, the Panel understands that this is a typographical error and that, in fact, it is referring to establishments Nos. 46A and 46C of that company. See Memorandum AUPSA-AG-025-2020 (Exhibit CRI-176); Note AUPSA-AG-059-2020 (Exhibit CRI-40).
[1304] Note AUPSA-AG-059-2020 (Exhibit CRI-40).

audits to be undertaken[1305] and showed that it stood ready to cooperate with the Panamanian authorities during the scheduling of the three on-site audits that, in the end, were not carried out. In addition, SENASA provided responses to the questionnaire sent by AUPSA in January 2020.[1306] The fact that AUPSA did not react in any way to these responses also points to AUPSA's inaction regarding the on-site audits.

7.620. With regard to the other Costa Rican establishments, Panama did not take any action to effectively undertake the on-site audits requested, even though Costa Rica requested them for all of the establishments in question. As mentioned above, Panama merely announced a timetable for the on-site audits in Article 4 of AUPSA Resolution No. 145-AG-2019 of 26 December 2019. Moreover, in the case of establishments Nos. 8 and 8C of the company Coopemontecillos, Panama stated that "while the renewal audit of the two establishments listed is still pending ... those establishments may continue to export to Panama".[1307] The Panel notes that merely stating that the on-site audits would be undertaken, without scheduling them, equates to inaction on the part of the Panamanian authorities in terms of proceeding with the sanitary approval renewal procedure for the establishments.

7.621. Accordingly, the Panel concurs with Costa Rica[1308] in that the delays in undertaking the on-site audits prior to the onset of the COVID-19 pandemic, around March 2020, are not justified. Panama has not demonstrated that AUPSA's efforts to coordinate the audits justified the time that elapsed between the submission of the renewal requests and the introduction of measures related to the COVID-19 pandemic that prevented Panama's inspectors from undertaking the audits.

7.622. Therefore, the Panel finds that the delays incurred by Panama prior to the onset of the COVID-19 pandemic in Panama and Costa Rica in March 2020 are undue delays within the meaning of Annex C(1)(a) to the SPS Agreement. Although this finding is sufficient to find a violation of Annex C(1)(a) with respect to the 16 Costa Rican establishments, the Panel will continue with its assessment of the subsequent events in order to cover the entire time-period identified by Costa Rica and, thus, help to secure a positive solution to this dispute.

7.623. The Panel recalls that Panama argues that, with respect to the period after the onset of the COVID-19 pandemic, the delays in undertaking the on-site audits and in completing the sanitary approval renewal procedures are justified for two reasons: (a) the measures related to the COVID-19 pandemic; and (b) Costa Rica's refusal to provide the information necessary to complete those procedures.[1309]

Delays brought about by the onset of the COVID-19 pandemic in Panama and Costa Rica before the establishment of the Panel

7.624. Panama argues that the measures it adopted in connection with the COVID-19 pandemic prevented the scheduling of on-site audits of the Costa Rican establishments, and that these measures, as well as the COVID-19 infections of their staff, substantially hampered their ability to complete all administrative procedures.[1310] Panama considers that even after the lifting of restrictions on travel to Costa Rica, the situation of uncertainty arising from the COVID-19 pandemic made it quite difficult to conduct on-site audits after October 2020.[1311] Panama adds that a documentary review did not allow it to achieve its ALOP.[1312]

7.625. Costa Rica, for its part, argues that, between March and June 2020, Panama could have replaced on-site audits with a documentary review of the relevant information such as that accepted for establishments in Peru, New Zealand, and Mexico.[1313] Costa Rica also claims that Panamanian

[1305] Memorandum SENASA DG-0159-2017 (Exhibit CRI-37); Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141); and Memorandum SENASA DG-0161-2017 (Exhibit CRI-204).
[1306] Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39) (responding to the questionnaire sent by AUPSA in January 2020).
[1307] Memorandum AUPSA-DINAN-009-2017 (Exhibit CRI-31).
[1308] Costa Rica's first written submission, para. 697.
[1309] Panama's first written submission, para. 132.
[1310] Panama's first written submission, paras. 133-149.
[1311] Panama's first written submission, para. 143.
[1312] Panama's first written submission, paras. 145-147.
[1313] Costa Rica's first written submission, paras. 698-700. See also Costa Rica's response to Panel question No. 97, paras. 3.169-3.170 (where Costa Rica indicates that Panama has not demonstrated why the

auditors could have travelled after 15 October 2020, the date on which Costa Rica lifted border restrictions related to the COVID-19 pandemic.[1314]

7.626. The Panel will examine the evidence in the record concerning the measures taken by both Costa Rica and Panama to address the COVID-19 pandemic, in order to determine whether such measures could justify the delays incurred by AUPSA in the processing of renewals of sanitary approvals. The table below summarizes the most relevant facts concerning the COVID-19 pandemic in the record.

Table 8 - Key events related to the COVID-19 pandemic

Date	Events related to the COVID-19 pandemic
23 January 2020	The Ministry of Health of Panama orders the activation of the Health Emergency Operations Centre to monitor, recommend actions, and initiate preparations to address the "Novel Coronavirus Outbreak (nCOV 2019)".[1315]
30 January 2020	The World Health Organization (WHO) declares the COVID-19 pandemic a public health emergency of international concern.[1316]
9 March 2020	AUPSA informs SENASA of its decision to postpone the on-site audit at establishments Nos. 46A, 46B, and 46C of the Dos Pinos company due to the yellow alert issued by Costa Rica on account of the COVID-19 cases in that country.[1317]
13 March 2020	Panama declares a state of national emergency due to the COVID-19 pandemic.[1318]
16 March 2020	All administrative, judicial, and security authorities in Panama are urged to assist health personnel in the implementation of surveillance mechanisms.[1319]
17 March 2020	Imposition of a nationwide curfew in Panama (from 9 p.m. to 5 a.m.)[1320] and special measures for public servants, including *trabajo a disponibilidad* (at the service of the employing institution during working hours but without physical presence).[1321]
19 March 2020	Panama suspends all international flights.[1322]
23 March 2020	Adoption of isolation and quarantine measures in Panama[1323] and extension of the nationwide curfew, now from 5 p.m. to 5 a.m.[1324]
24 March 2020	Extension of the nationwide curfew to 24 hours a day (including information on persons exempt from the curfew, which does not include sanitary and phytosanitary officials) and adoption of other measures covering the movement of persons.[1325] Suspension of the deadlines in administrative procedures undertaken by the various bodies of the Panamanian Government.[1326]

documentary review would not allow it to achieve its ALOP for products from Costa Rica, whereas it would for products from Peru, Mexico and New Zealand).

[1314] Costa Rica's first written submission, para. 700.

[1315] Panama's response to Panel question No. 11, para. 54; Ministry of Health of Panama, Resolution No. 75 (2020) (Exhibit PAN-3).

[1316] Panama's response to Panel question No. 11, para. 54; *UN News* (30 January 2020) (Exhibit PAN-76).

[1317] Note AUPSA-AG-078-2020 (Exhibit CRI-41).

[1318] Cabinet Council of Panama, Cabinet Resolution No. 11 (2020) (Exhibit PAN-5); President of the Republic of Costa Rica, Acting Minister of the Presidency and Minister of Health, Executive Decree No. 42227-MP-S (2020) (Exhibit CRI-271).

[1319] Panama's first written submission, para. 136; Ministry of Health of Panama, Executive Decree No. 489 (2020) (Exhibit PAN-7).

[1320] Panama's first written submission, para. 136; Ministry of Health of Panama, Executive Decree No. 490 (2020) (Exhibit PAN-8).

[1321] Panama's first written submission, para. 136; Ministry of the Presidency of Panama, Executive Decree No. 378 (2020) (Exhibit PAN-9).

[1322] Ministry of the Interior of Panama, Executive Decree No. 244 (2020) (Exhibit PAN-86).

[1323] Panama's first written submission, para. 136; Ministry of Health of Panama, Executive Decree No. 504 (2020) (Exhibit PAN-12).

[1324] Panama's first written submission, para. 136; Ministry of Health of Panama, Executive Decree No. 505 (2020) (Exhibit PAN-13).

[1325] Panama's first written submission, para. 136; Ministry of Health of Panama, Executive Decree No. 507 (2020) (Exhibit PAN-14).

[1326] Ministry of Health of Panama, Executive Decree No. 507 (2020) (Exhibit PAN-14), Article 9. Exceptions to the suspension of completion times for procurement processes for hospital materials were included on 27 March 2020. (Ministry of Health of Panama, Executive Decree No. 513 (2020)

Date	Events related to the COVID-19 pandemic
30 March 2020	Imposition of movement restrictions in Panama.[1327]
16 May 2020	Imposition in Panama of measures concerning preventive isolation and *trabajo a disponibilidad* for all workers.[1328]
5 June 2020	Panama decrees a gradual return to work for central government offices, with a maximum of 30% of officials from each entity present. Adoption of the "Protocol on preserving hygiene and health in the workplace for the prevention of COVID-19 in the public sector".[1329]
21 June 2020	Administrative processes in Panama "partially resumed".[1330]
8 July 2020	Given the difficulty of carrying out verification audits owing to the COVID-19 pandemic, Costa Rica's Ministry of Foreign Affairs requests Panama to proceed with the renewal of sanitary approvals without a verification visit.[1331]
11 September 2020	Curfews are modified and restrictions on movement are lifted in Panama.[1332]
16 September 2020	Teleworking in Panama is regulated (with further development of the parameters for *trabajo a disposición* introduced on 17 March 2020) and certain restrictions are relaxed.[1333]
28 September 2020	Resumption in Panama of various economic activities, including administrative services.[1334]
11 October 2020	Expiry of Panama's last suspension of international flights.[1335]
15 October 2020	Costa Rica authorizes flights from Central America and Panama.[1336]
25 October 2020	Shortening of the nationwide curfew in Panama to the hours between 11 p.m. and 5 a.m.[1337] Vaccine roll-out (October 2020).[1338]

(Exhibit PAN-15)). Panama notes that the suspension was revoked on 29 May 2020 through Executive Decree No. 644 (2020) (Exhibit PAN-16) and then reintroduced on 8 June 2020 through Executive Decree No. 693 (2020) (Exhibit PAN-17). See also Panama's first written submission, para. 136.

[1327] Ministry of Health of Panama, Resolution No. 360 (2020) (Exhibit PAN-18). See Panama's first written submission, paragraph 136.

[1328] Ministry of the Presidency of Panama, Executive Decree No. 378 (2020) (Exhibit PAN-9); Ministry of Health of Panama, Executive Decree No. 472 (2020) (Exhibit PAN-6). See also Panama's response to Panel question No. 3, para. 9.

[1329] Ministry of Health of Panama, Resolution No. 491 (2020) (Exhibit PAN-20). See also Panama's first written submission, para. 136.

[1330] Panama's response to Panel question No. 108, para. 29.

[1331] Memorandum DM-COR-CAE-0330-2020 (Exhibit CRI-44).

[1332] Ministry of Health of Panama, Executive Decree No. 1078 (2020) (Exhibit PAN-84). See also Panama's response to Panel question No. 3, para. 9.

[1333] Ministry of Labour and Work Development of Panama, Executive Decree No. 133 (2020) (Exhibit PAN-22). See also Panama's first written submission, para. 137.

[1334] Panama's first written submission, para. 137. See also Ministry of Health of Panama, Executive Decree No. 1222 (2020) (Exhibit PAN-23).

[1335] Civil Aviation Authority of Panama, Resolution No. 150-DG-DJ-AAC (2020) (Exhibit PAN-92).

[1336] Office of the President of the Republic of Costa Rica, "Extended opening hours for beaches and additional flights from Central America and Panama will create more jobs" (October 2020) (Exhibit CRI-273).

[1337] Ministry of Health of Panama, Executive Decree No. 1222 (2020) (Exhibit PAN-23). See also Panama's first written submission, para. 137.

[1338] Panama's first written submission, para. 139.

Date	Events related to the COVID-19 pandemic
December 2020	In Panama, a new curfew period is introduced (7 p.m. to 5 a.m.), with restrictions on movement (nationwide lockdown during the hours of curfew), and other preventive measures to address the COVID-19 pandemic.[1339]
4 June 2021	Reintroduction in Panama of "measures such as curfews, total lockdowns, closure of establishments and restrictions on movement".[1340]
13 August 2021	Curfews are lifted within certain territorial entities in Panama.[1341]

7.627. From the foregoing, the Panel first notes that Panama, in its communication of 9 March 2020, informed SENASA of its decision to postpone for the fourth time the on-site audit of the establishments of the Dos Pinos company due to the yellow alert issued by Costa Rica on account of the COVID-19 cases in the country.[1342] This postponement was clearly justified by a global health emergency without precedent in recent history. The Panel therefore considers that the sanitary situation in connection with the COVID-19 pandemic and the response measures taken in March 2020 did not allow Panama to conduct on-site audits.

7.628. The events described above, related to the impact of the COVID-19 pandemic on Panama's administrative capacity, show that at least between March and October 2020, the time at which the last suspension of international flights in Panama expired and Costa Rica authorized flights from Central America and Panama, it was impossible for the Panamanian authorities to carry out on-site audits of the 16 Costa Rican establishments.[1343] Accordingly, during the period March-October 2020, the delays incurred by Panama in conducting on-site audits at the 16 Costa Rican establishments would be justified for legitimate reasons and would therefore not be undue.

7.629. Nonetheless, the Panel considers that Panamanian inspectors would have been able to travel to Costa Rica to conduct on-site audits as of October 2020, when Costa Rica lifted travel restrictions. As indicated in the table above, the evidence in the record shows that flights between Panama and Costa Rica resumed in October 2020.[1344] In this regard, Panama asserts that, even if they could travel, its auditors did not wish to do so, given the ongoing uncertainty generated by the COVID-19 pandemic.[1345] The Panel understands that the resumption of flights may not have been sufficient to enable on-site audits to take place, given that willingness to travel in the context of the pandemic is a difficult matter to test and evaluate. However, Panama made no attempt to coordinate on-site audits for almost a year between October 2020 and September 2021. In the Panel's view, this delay of more than a year would be unjustifiable in the absence of legitimate reasons justifying it in the record.

7.630. With regard to the suspension of administrative procedures and other restrictive measures related to the COVID-19 pandemic, the Panel notes that as of June 2020, the Panamanian authorities began relaxing certain restrictions on movement that limited access to the workplace, and rules on labour flexibility were introduced. In the Panel's view, the above, together with the events described below, indicates that administrative activity was resuming, allowing AUPSA to progress with the

[1339] Ministry of Health of Panama, Executive Decree No. 1683 (2020) (Exhibit PAN-24); Ministry of Health of Panama, Executive Decree No. 1684 (2020) (Exhibit PAN-85). See also Panama's first written submission, para. 138; response to Panel question No. 3, para. 9. The Panel notes that these measures were taken to address the "upturn in the effective reproduction number (Rt) of the COVID-19 disease throughout the national territory" and that, despite the new measures, the "movement of persons throughout national territory, except during the hours of curfew and lockdown", was allowed. (See Ministry of Health of Panama, Executive Decree No. 1684 (2020) (Exhibit PAN-85), seventh recital and Article 2).

[1340] Ministry of Health of Panama, Executive Decree No. 780 (2021) (Exhibit PAN-25). See also Panama's first written submission, para. 139.

[1341] Ministry of Health of Panama, Executive Decree No. 826 (2021) (Exhibit PAN-26). See also Panama's first written submission, para. 139.

[1342] Note AUPSA-AG-078-2020 (Exhibit CRI-41).

[1343] Ministry of the Interior of Panama, Executive Decree No. 244 (2020) (Exhibit PAN-86). See also Office of the President of the Republic of Costa Rica, "Extended opening hours for beaches and additional flights from Central America and Panama will create more jobs" (October 2020) (Exhibit CRI-273).

[1344] Office of the President of the Republic of Costa Rica, "Extended opening hours for beaches and additional flights from Central America and Panama will create more jobs" (October 2020) (Exhibit CRI-273).

[1345] Panama's first written submission, para. 143.

documentary assessment that forms part of the procedure for the renewal of sanitary approvals, while waiting to conduct on-site audits.

7.631. First, in the "Protocol on preserving hygiene and health in the workplace for the prevention of COVID-19 in the public sector" of 5 June 2020, Panama indicated that (a) video-conferencing would be encouraged, in order not to hold up the operational follow-up and decision-making work of the Directorate or Section; and (b) international travel or trips would be avoided, provided that this did not affect the operation of the institution.[1346] In addition, Panama established procedures for *trabajo a disponibilidad* (work without physical presence).[1347] The foregoing, in the Panel's view, indicates that Panama had the flexibility to carry out institutional work as of June 2020, including via videoconference. Accordingly, it can be said that, at least as of June 2020, Panamanian government officials gradually resumed their functions.[1348]

7.632. Second, the Panel notes that Executive Decree No. 507 of 24 March 2020, issued by the Ministry of Health of Panama, ordered the "suspension of all completion times for [the] administrative processes followed by the various government bodies".[1349] Subsequently, on 27 March 2020, exceptions to this suspension were adopted concerning procurement processes for hospital materials; medicines; and "other goods, services or articles".[1350] The record also shows that the above-mentioned suspension was revoked on 20 May 2020[1351] and reintroduced between 8 and 21 June 2020.[1352] In this connection, the Panel recalls that Panama stated that "[t]he administrative processes were resumed in part after 21 June 2020".[1353]

7.633. The Panel notes that the fact that, as of June 2020, Panamanian administrative officials resumed their functions, albeit partially, and the fact that the resumption of deadlines in administrative procedures undertaken by the Panamanian authorities was decreed, attest to Panama's capacity to carry out the procedures relating to the renewal of sanitary approvals for the 16 Costa Rican establishments. In this regard, the "partial" scope of the resumption of the administrative procedures referred to by Panama is not shown in the record. The Panel considers that, while at the onset of the COVID-19 pandemic, the capacity of the Panamanian authorities to implement and complete procedures for the renewal of the outstanding sanitary approvals was significantly affected, this capacity improved as of June 2020. Accordingly, Panama's inaction in the processing of the documentary review in the procedures for renewing the sanitary approvals of the 16 Costa Rican establishments would not be justified as of June 2020.

7.634. The resumption of administrative activity by Panama is also reflected in the events relating to the Paso Canoas meeting of 12 February 2021. In particular, the evidence shows that Panamanian officials participated in that meeting and concluded agreements on that occasion.[1354] In addition, follow-up commitments were included in these agreements that could only have been concluded if the corresponding authorities were operational. These commitments included sessions of the Bilateral Technical Commission, which were conducted virtually on 18 February 2021[1355],

[1346] Ministry of Health of Panama, Executive Decree No. 466 (2020) (Exhibit PAN-19), p. 24 of the protocol attached as an annex to the Decree.

[1347] Ministry of Health of Panama, Executive Decree No. 466 (2020) (Exhibit PAN-19), pp. 25-31 of the protocol attached as an annex to the Decree.

[1348] See e.g. Ministry of Health of Panama, Executive Decree No. 489 (2020) (Exhibit PAN-7), Article 10; Ministry of Labour and Work Development of Panama, Executive Decree No. 78 (2020) (Exhibit PAN-83); Ministry of Health of Panama, Executive Decree No. 466 (2020) (Exhibit PAN-19); and Ministry of Labour and Work Development of Panama, Executive Decree No. 133 (2020) (Exhibit PAN-22).

[1349] Ministry of Health of Panama, Executive Decree No. 507 (2020) (Exhibit PAN-14), Article 9.

[1350] Ministry of Health of Panama, Executive Decree No. 513 (2020) (Exhibit PAN-15).

[1351] Executive Decree No. 644 (2020) (Exhibit PAN-16), Article 3. See also Panama's first written submission, paragraph 136.

[1352] Executive Decree No. 693 (2020) (Exhibit PAN-17), Article 2. See also Panama's first written submission, paragraph 136.

[1353] Panama's response to Panel question No. 108, para. 29.

[1354] Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14).

[1355] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 1 (18 February 2021) (Exhibit CRI-15).

25 February 2021[1356], and 11 March 2021[1357], confirming that the administrative authorities in Panama were active after June 2020.

7.635. In the light of the foregoing, the Panel concludes that the measures identified by Panama in relation to the COVID-19 pandemic demonstrate that between March 2020 and October 2020, the capacity of Panamanian government officials to conduct the relevant administrative procedures was significantly affected by the pandemic. However, this does not justify the total lack of activity in the operation of such administrative procedures, at least as of June 2020 and until September 2021, when this Panel was established.

Costa Rica's alleged failure to provide necessary information

7.636. As noted above, Panama claims that, between the expiry of the sanitary approvals of the Costa Rican establishments on 30 June 2020 and Costa Rica's request for the establishment of a panel on 20 August 2021, its ability to complete the procedures for the renewal of sanitary approvals was severely affected not only by the COVID-19 pandemic, but also by Costa Rica's failure to provide information on its animal health system.[1358] Costa Rica rejects this argument.[1359]

7.637. The record shows that Panama requested information from Costa Rica through communications that it sent on 2 January 2020[1360], 22 February 2021[1361], and 1 April 2021.[1362] In response to these communications, Costa Rica sent information to Panama on three occasions: 19 February 2020[1363], 24 March 2021[1364], and 3 June 2021.[1365]

7.638. According to Panama, the information provided by Costa Rica was insufficient to enable completion of the procedures for renewing the sanitary approvals.[1366] Costa Rica responds that the information requested was excessive.[1367] As explained in detail in section 7.4.2.3.3 below, the Panel considers that Panama requested more information from Costa Rica than it needed in order to be able to complete the procedures for renewing the sanitary approvals of the 16 Costa Rican establishments. In this regard, the Panel recalls that any request for excessive information entails an undue delay.[1368]

7.639. Accordingly, the Panel considers that Panama incurred delays by taking more than a year to inform Costa Rica that further information was required in order to complete the procedure for renewing the sanitary approvals of the Costa Rican establishments in question. The Panel finds no legitimate reasons in the record to justify such a delay beyond the period from March to June 2020, during which measures relating to the COVID-19 pandemic significantly limited the operational capacity of the Panamanian authorities.

[1356] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 2 (25 February 2021) (Exhibit CRI-16).
[1357] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 4 (11 March 2021) (Exhibit CRI-20).
[1358] Panama's first written submission, para. 132.
[1359] Costa Rica's second written submission, paras. 147-151 and 154-159.
[1360] Note AUPSA-AG-001-2020 (Exhibit CRI-38). AUPSA attached a questionnaire to this communication.
[1361] Note AUPSA-AG-100-2021 (Exhibit CRI-57). The questionnaire attached by AUPSA to this communication was different to the one it had sent in January 2020. See Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).
[1362] Note AUPSA-AG-176-2021 (Exhibit CRI-62), through which AUPSA reiterates its request to SENASA to complete the questionnaire sent on 22 February 2021.
[1363] Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39); Costa Rica's responses to Panama's questionnaire verifying the sanitary status of a country (19 February 2020) (Exhibit CRI-6).
[1364] Memorandum SENASA-DG-340-2021 (Exhibit CRI-60); Costa Rica's updated responses to Panama's questionnaire verifying the sanitary status of a country (24 March 2021) (Exhibit CRI-61).
[1365] Memorandum SENASA-DG-725-2021 (Exhibit CRI-63); Costa Rica's responses to Panama's questionnaire for the sanitary evaluation of Costa Rica (3 June 2021) (Exhibit CRI-29).
[1366] Panama's response to Panel question No. 5.
[1367] Costa Rica's second written submission, para. 167.
[1368] Panel Report, *Russia – Pigs (EU),* paras 7.696 and 7.698.

7.4.2.3.2.4 Conclusion on Annex C(1)(a) of the SPS Agreement

7.640. In the light of the foregoing, the Panel concludes that the evidence in the record demonstrates that Panama incurred delays in the process of renewing the sanitary approvals of the 16 Costa Rican establishments between 2017 and September 2021, when the Panel was established.

7.641. These delays arise from three main aspects: (a) delays in clarifying the information that Panama required in order to process the renewals, and in conducting the corresponding documentary review, (b) the failure to conduct on-site audits, which in the case at hand form part of the sanitary approval renewal procedure, and (c) the failure to issue rulings on the substance of the applications to renew the sanitary approvals of the 16 Costa Rican establishments.

7.642. With respect to the delays in clarifying the information that Panama required and in conducting the corresponding documentary review, the Panel considers that these delays were undue within the meaning of Annex C(1)(a) of the SPS Agreement during the periods January 2020-March 2020 and June 2020-February 2021, as there is no reason why Panama should not have informed Costa Rica of the missing information it needed. The Panel further considers that there are no reasons to justify, during the above periods, the failure to undertake a documentary review of the information Costa Rica sent to Panama in February 2020.

7.643. With respect to the failure to conduct on-site audits, the Panel considers that these delays were undue within the meaning of Annex C(1)(a) of the SPS Agreement during the periods January 2017-March 2020 and October 2020-September 2021, as there is no legitimate justification for not having carried out the respective audits. The Panel, however, considers that Panama's delays between March and October 2020 are not undue, as these delays are justified by the measures taken to address the COVID-19 pandemic.

7.644. With regard to AUPSA's failure to issue rulings, the Panel considers that these delays were undue within the meaning of Annex C(1)(a) of the SPS Agreement during the periods January 2017-March 2020 and June 2020-September 2021, taking into account that deadlines in administrative procedures were partially resumed as of June 2020, following a temporary suspension between March and June 2020 due to the COVID-19 pandemic.

7.645. In the light of the foregoing, the Panel finds that Measure 2 is inconsistent with Annex C(1)(a) of the SPS Agreement, because Panama incurred undue delays in the course of the procedures for renewing the sanitary approvals of 16 Costa Rican establishments.

7.4.2.3.3 Panama's invocation of Article 23 of the draft articles of the International Law Commission (ILC) on responsibility of States for internationally wrongful acts in relation to Annex C(1)(a)

7.4.2.3.3.1 Main arguments of the parties

Panama

7.646. Panama submits that if the Panel finds that Panama has not completed the approval procedures relating to Measure 2 without undue delay, in a manner inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement, the wrongfulness of such action would be excluded on grounds of *force majeure* pursuant to Article 23 of the draft ILC articles on responsibility of States for internationally wrongful acts (draft articles on State responsibility).[1369] In particular, Panama submits that the COVID-19 pandemic is a circumstance that meets the three requirements of Article 23 of the draft articles on State responsibility in order to be considered a situation of *force majeure*, namely: (i) it is an act caused by an irresistible force or an unforeseen event; (ii) it is beyond Panama's control; and (iii) it made it materially impossible, in the circumstances, to perform the obligation to complete the approval procedures contained in Annex C(1)(a). Panama submits that such justification applies to any violation of an obligation arising from a rule of international law, such as a treaty, and that it constitutes "a relevant form of international law" that

[1369] Panama's second written submission, paras 11-14.

the Panel is required to apply pursuant to Article 3.2 of the DSU and Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[1370]

Costa Rica

7.647. Costa Rica submits that Article 23 of the draft articles on State responsibility is not a covered agreement and thus not part of the WTO's body of rules, and that Panama has no legal basis to require the Panel to apply it. Costa Rica adds that, even assuming that Article 23 was applicable, the concept of *force majeure* would not provide any additional element to the interpretation and application of the term "undue delay" in Annex C(1)(a) of the SPS Agreement. According to the meaning of that term, a panel could consider any circumstances beyond the control of the importing country, such as the COVID-19 pandemic. For this reason, Costa Rica views it as a pointless exercise to examine in addition whether, under Article 23 of the draft articles on State responsibility, the effect of a situation of *force majeure* such as the COVID-19 pandemic would be considered.[1371]

7.4.2.3.3.2 Assessment by the Panel

7.648. The Panel notes that Panama's arguments under Article 23 of the draft articles on State responsibility[1372] focus on events relating to the COVID-19 pandemic. The Panel recalls that in its assessment of Costa Rica's claim under Annex C(1)(a), it has already thoroughly examined how the events of the COVID-19 pandemic affected the performance of Panama's obligations under that provision. In this regard, the Panel concluded that the measures identified by Panama in relation to the COVID-19 pandemic demonstrate that, between March 2020 and October 2020, the capacity of Panamanian government officials to conduct the relevant administrative procedures was significantly affected by the pandemic.[1373]

7.649. In the light of the foregoing, the Panel considers that its findings under Annex C(1)(a) are sufficient to assist the DSB in making recommendations and rulings that achieve a satisfactory settlement of the matter.[1374] Accordingly, the Panel will not examine Panama's invocation of Article 23 of the draft articles on State responsibility in this dispute.

7.4.2.3.4 Whether Measure 2 is inconsistent with Annex C(1)(c) of the SPS Agreement

7.4.2.3.4.1 Main arguments of the parties

Costa Rica

7.650. Costa Rica submits that it is being required by Panama to provide more information than necessary for the renewal of the sanitary approvals of the 16 Costa Rican establishments, in breach of Annex C(1)(c) of the SPS Agreement.[1375] As a result of this inconsistency, Costa Rica submits that Panama also acted inconsistently with Article 8 of the Agreement.[1376]

7.651. Costa Rica submits that AUPSA's powers to request information on the sanitary status of the exporting country, as well as on experience with, knowledge of and confidence in the food inspection and certification systems of the exporting country, as provided for in section VII, paragraph 7, of the *AUPSA Manual for the approval of establishments*, allow AUPSA to request an update of this information. According to Costa Rica, under the Panamanian regulatory framework, sanitary

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[1370] Panama's response to Panel question No. 107, paras. 24-28. See also Panama's second written submission, paras. 11-13.

[1371] Costa Rica's comments on Panama's response to Panel question No. 107, paras 2.37-2.49.

[1372] Article 23 of the draft articles, entitled "Force majeure", provides the following in paragraph 1:
> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

[1373] See para. 7.635 above.

[1374] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[1375] Costa Rica's first written submission, paras. 705 and 714-715; second written submission, para. 170. See also Costa Rica's first written submission, para. 707 (quoting Annex C(1)(a)); second written submission, para. 165.

[1376] Costa Rica's first written submission, paras. 714-715; Costa Rica's second written submission, para. 170.

eligibility is renewed automatically unless updated information shows a change in animal disease status or a breach of sanitary regulations.[1377]

7.652. Costa Rica considers that, pursuant to the powers described above, Panama sent it a questionnaire on 2 January 2020.[1378] Costa Rica argues that Panama made it clear in August 2020 that the procedure for renewing sanitary approvals would not proceed until a process for conducting Costa Rica's animal health evaluation had been initiated. In Costa Rica's view, this position indicates that Panama had revoked Costa Rica's sanitary eligibility. In this context, on 22 February 2021, Panama sent a second questionnaire.[1379] In Costa Rica's view, in sending this second questionnaire concerning Costa Rica's sanitary eligibility, Panama requested more information than necessary in order to renew the sanitary approvals of the Costa Rican establishments. In particular, Costa Rica considers that, in the present case, the appropriate approval procedure does not require a new sanitary eligibility process in view of: (a) the history of trade in these products, (b) the fact that this is not an initial evaluation of sanitary eligibility, and (c) the absence of changes in Costa Rica's sanitary status.[1380] Costa Rica adds that Panama's conduct is unjustified because neither of the two reasons provided for under the Panamanian regulatory framework for invalidating Costa Rica's sanitary eligibility have arisen, namely: (a) Costa Rica's sanitary status has not changed, and (b) a failure to comply with Panama's sanitary regulations has not been "compellingly" demonstrated.[1381] Costa Rica also submits that despite disagreeing with Panama's requests, it sent the updated information that Panama requested in January 2020 and subsequently replied to the questionnaire sent on 22 February 2021.[1382]

7.653. Costa Rica adds that the information required by Panama is excessive given that Costa Rica is recognized by the OIE as being free from classical swine fever and that, with respect to BSE, Panama and Costa Rica both have the same sanitary status, being considered negligible risk countries.[1383]

Panama

7.654. Panama submits that the information it requested from Costa Rica was necessary in order to evaluate its sanitary system because this is required for Panamanian sanitary approval renewal procedures.[1384]

7.655. Panama notes that Costa Rica does not dispute that the questionnaire sent on 2 January 2020 was necessary for the renewal of the sanitary approvals of the 16 Costa Rican establishments.[1385]

7.656. Panama considers that the questionnaire sent on 22 February 2021 was necessary for the type of products concerned.[1386] Panama recalls that the questionnaire was sent within the context of the agreement reached at Paso Canoas whereby Panama would evaluate the Costa Rican sanitary system. According to Panama, this questionnaire sought information that would enable an evaluation of the production of milk and dairy products in Costa Rica from an animal health standpoint. Panama explains that an animal health evaluation is necessary for these products in view of the animal health

[1377] Costa Rica's response to Panel question No. 170, paras. 3.116-3.118 (referring to Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-105), Article 67).
[1378] Costa Rica's response to Panel question No. 170, para. 3.119.
[1379] Costa Rica's response to Panel question No. 170, paras. 3.120-3.123.
[1380] Costa Rica's first written submission, para. 711; second written submission, paras. 168-169. See also Costa Rica's first written submission, paras. 708-710.
[1381] Costa Rica's second written submission, para. 167.
[1382] Costa Rica's response to Panel question No. 170, paras. 3.124-3.125.
[1383] Costa Rica's first written submission, para. 713.
[1384] Panama's first written submission, para. 158. See also ibid. paras. 155-157 (where Panama expresses concern about Costa Rica's argument that the exporting Member can substitute the standard of the authorities of the importing Member when it comes to determining the information that is or is not necessary to undertake and complete that Member's approval procedures).
[1385] Panama's comments on Costa Rica's response to Panel question No. 170, para 89. See also Panama's response to Panel question No. 140, paras. 96-101 (where Panama explains why the questionnaire sent on 2 January 2020 was necessary for conducting the sanitary approval renewal procedure for the Costa Rican establishments in question).
[1386] Panama's comments on Costa Rica's response to Panel question No. 170, para. 90.

risks they pose, such as the transmission of foot-and-mouth disease. Panama adds that in 2014 it had already requested the Costa Rican animal health authorities to evaluate this type of risk.[1387]

7.657. Accordingly, Panama concludes that, regardless of Costa Rica's understanding of the scope and meaning of Panamanian legislation, the information was necessary for the purpose of renewing the sanitary approvals of the 16 Costa Rican establishments within the meaning of Annex C(1)(c) of the SPS Agreement.[1388]

7.4.2.3.4.2 Assessment by the Panel

Relevant legal standard

7.658. According to Annex C(1)(c) of the SPS Agreement, Members shall ensure that "information requirements are limited to what is necessary for appropriate control, inspection and approval procedures". This obligation, which applies with respect to any procedure to check and ensure the fulfilment of SPS measures, entails determining the objective of the procedure in question and the type of information necessary for that procedure.[1389] If the evidence in the record demonstrates that the respondent's requests for information are excessive for the purposes of the procedure in question, the respondent could be found to have acted inconsistently with Annex C(1)(c).[1390]

7.659. In the light of the legal standard described above, the Panel will proceed to examine whether Panama requested more information from Costa Rica than was necessary for the purposes of the procedure to renew the sanitary approvals of the 16 Costa Rican establishments.

Whether Panama requested more information than was necessary for the relevant procedure

7.660. Costa Rica claims that Panama's request for information was excessive because a review of Costa Rica's sanitary eligibility is not necessary in order to process the sanitary approval renewal applications for its establishments.[1391] Panama, for its part, submits that its regulations require the sanitary authority to evaluate the sanitary system of the exporting country when processing an application for the renewal of sanitary approvals.[1392]

7.661. In accordance with the legal standard described above, the Panel begins its assessment by determining the objective of the renewal procedure and the information necessary for the purposes of that procedure, in accordance with the applicable Panamanian regulations. The Panel recalls that the process for renewing sanitary approvals is governed by section VII, paragraph 7, of the *AUPSA Manual for the approval of establishments.* This paragraph provides the following:

> AUPSA may renew the approval of an establishment, production chain or processing plant, based on the following aspects, for which relevant information may be requested from the competent authority of the exporting country and/or the interested party:
>
> - Sanitary and/or phytosanitary status of the exporting country.
> - Sanitary status of the establishment and characteristics of the products it would like to continue to introduce into the country.
> - Experience with, knowledge of and confidence in the food inspection and certification systems of the exporting country and the establishment, production chain or processing plant in question.

[1387] Panama's response to Panel question No. 140, para. 103 (referring to AUPSA, Resolution No. 028-2014 (Exhibit CRI-234); AUPSA, Resolution No. 030-2014 (Exhibit CRI-237)).
[1388] Panama's first written submission, para. 158.
[1389] Panel Report, *Russia-Pigs (EU)*, para 7.564.
[1390] Panel Report, *Russia-Pigs (EU)*, para 7.571.
[1391] Costa Rica's first written submission, para. 711; second written submission, paras. 168-169. See also Costa Rica's first written submission, paras. 708-710.
[1392] Panama's second written submission, fn 49. See also Panama's responses to Panel question No. 30, paras. 101-102, and No. 31, para. 103(a).

- Reference to the standards and recommendations of organizations such as the World Organisation for Animal Health …, the [IPPC] and the Codex ..., which address matters pertaining to the safety of the foods under consideration. The record of compliance with previous conformity assessments (e.g. analysis results obtained).

- Equivalence recognition agreements, memorandums of understanding, mutual recognition agreements or other appropriate means acceptable among countries.

AUPSA reserves the right to carry out audits and inspections at origin as part of the renewal process for establishments, production chains or processing plants, basing its decision on the relevant risk analysis.[1393]

7.662. In addition, the Panel recalls that the purpose of the establishment approval procedure is to ensure the safety of the food imported into Panama by checking the sanitary conditions in Costa Rica and to protect human and animal life and health from animal diseases that are transmissible to humans (zoonoses).[1394]

7.663. Accordingly, in the case of sanitary approval renewals, the procedure in question provides that AUPSA shall base its decision to renew the sanitary approval of an establishment on up-to-date information concerning: (a) the sanitary status of the exporting country; (b) experience with, knowledge of and confidence in the food inspection and certification systems of the exporting country and of the establishment, production chain, or processing plant in question; and (c) the record of compliance of previous conformity assessments. As part of the renewal process, AUPSA may also request relevant information from the competent authority of the exporting country or conduct audits and inspections at origin.[1395] It follows from the text of section VII, paragraph 7, of the *Manual for the approval of establishments* itself that, as claimed by Panama[1396], AUPSA has the authority to request updated information from Costa Rica on its sanitary and safety conditions for the purpose of processing sanitary approval renewal applications.

7.664. The parties agree[1397] that AUPSA acted in accordance with its powers to request updated information when, on 2 January 2020, it sent Costa Rica the "Questionnaire verifying the sanitary status of a country requesting the renewal of eligibility or recognition of an area, place or site of production free from a quarantine disease or with a low prevalence thereof, for the export of dairy products to the Republic of Panama".[1398] This questionnaire was sent in the context of the scheduling of on-site audits for two establishments of the Dos Pinos company exporting milk to Panama. In this questionnaire, Panama requests updated information covering the period 2014-2018 on the subject matter described below.[1399]

7.665. Costa Rica replied to this questionnaire on 19 February 2020.[1400] The record does not show that Panama commented on Costa Rica's replies. However, almost 14 months later, on 22 February 2021, Panama sent Costa Rica the "preliminary questionnaire to determine a country's animal health eligibility in order to verify whether its measures achieve the same level of protection established by the relevant laws and regulations of the Republic of Panama".[1401] In the

[1393] *Manual for the approval of establishments, production chains and/or processing* plants (2013) (Exhibit CRI-23), pp. 14-15.

[1394] See paras. 7.517 and 7.519 above.

[1395] *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, para. 7, pp. 14-15. See also Panama's response to Panel question No. 41, paras. 128-130 (where Panama explains the operation of the audits).

[1396] Panama's second written submission, fn 49 to para. 83. See also Panama's responses to Panel question No. 30, paras. 101-102, and No. 31, para. 103(a).

[1397] Costa Rica's response to Panel question No. 170, para. 3.119; and Panama's comments on Costa Rica's response to Panel question No. 170, para 89. See also Panama's response to Panel question No. 31, para. 104.

[1398] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex.

[1399] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex. See para. 7.667 below.

[1400] Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39). See also Costa Rica's responses to Panama's questionnaire verifying the sanitary status of a country (19 February 2020) (Exhibit CRI-6).

[1401] Note AUPSA-AG-100-2021 (Exhibit CRI-57); Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

communication through which it sent the questionnaire, AUPSA notified SENASA of the formal initiation of Costa Rica's animal health evaluation procedure which, according to Panama, had been agreed to in Paso Canoas, in order to determine Costa Rica's sanitary eligibility to export products and by-products of animal origin (dairy products) to Panama.[1402]

7.666. Comparing the January 2020 questionnaire with that of February 2021, the Panel notes first that the February 2021 questionnaire tends to request information for the previous 10 years[1403], while the January 2020 questionnaire generally requests information for the previous five years.[1404] It should also be noted that the time-frame and the drafting of several of the questions in the February 2021 questionnaire are formulated on the basis that AUPSA does not have any information on these matters[1405], indicating that these are questions that go beyond a mere updating of information.

7.667. The Panel also notes the following in terms of structure, topics common to both questionnaires, and topics specific to each questionnaire:

a. *Structure*

The *January 2020 questionnaire* is divided into three sections covering the following thematic areas: (a) information for the review of the sanitary and safety conditions of the exporting country in relation to dairy products; (b) information on the organization and operation of sanitary services in relation to the dairy products wished to be exported; and (c) information on good animal production practices (GAPP) in relation to the dairy products wished to be exported.

The first section (a) contains two questions on general country information (name and geography).

The second section (b) contains five subsections on: (i) location of sanitary service offices, points of entry, among others (one question); (ii) organization, structure, and level of training of the country's official sanitary services (six questions); (iii) sanitary legislation (six questions); (iv) monitoring systems (51 questions); and (v) laboratory services (nine questions).

The last section (c) contains 10 questions on different topics concerning the implementation of GAPP in relation to dairy products.[1406]

The *February 2021 questionnaire*, on the other hand, is divided into the following five thematic areas: (a) general country information; (b) assessment of the competent authority and technical capacity of the country's veterinary services; (c) the country's

[1402] Note AUPSA-AG-100-2021 (Exhibit CRI-57).

[1403] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 2-3 (questions 2.1-2.3, 3.1-3.2 and 4.1-4.2), 6 (questions 3.1-3.2), 10-14 (questions 4.9(c)-(e), 4.11(i)-(j), 5.8, 5.9(f), 5.10(f), 6.4 and 6.15) and 17 (question 10.8). This period is reduced to the previous five years only with regard to the holding of simulation exercises for the prevention of transboundary diseases that pose a risk to the country, the list of disease outbreaks and/or hotspots, and the list of declared animal health emergencies. (See ibid. pp. 5 (question 2.8), 7 (question 1.11) and 15 (question 8.4)).

[1404] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 7-9. The Panel notes that the five-year period (2014-2018) corresponds to the period between the granting of the sanitary approvals, in 2014, and the date on which Panama requested the information, in January 2020 (assuming that the 2019 information was still being consolidated at January 2020).

[1405] Since the sanitary approvals of the Costa Rican establishments in question were granted between 2014 and 2016, it can be assumed that Panama had information dating from before 2014 on the preparation and processing conditions for the products at issue and that this information served as the basis for the decision on the granting of approvals. Hence, a request for information for a period of 10 years suggests that the information being requested was not already available. (See fn 1403 above). As for the drafting, unlike other questionnaires, the February 2021 questionnaire includes general questions on the processing of raw materials and on imports and exports. (See Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp 3-4).

[1406] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex.

sanitary status; (d) information and documentation relating to animal welfare and GAPP; and (e) registration of medicines, biologicals, and vaccines.

The first section (a) is divided into five subsections: (i) general country information (two questions); (ii) characterization and distribution of the animal population (four questions); (iii) information on production (five questions); (iv) information on the processing of livestock raw materials (three questions); and (v) imports and exports (seven questions).

The second section (b) is divided into four subsections: (i) description of the competent authority (eight questions); (ii) organization, structure, and level of training for official veterinary services in the country (eight questions); (iii) budgetary resources (three questions); and (iv) sanitary legislation (three questions).

The third section (c) is divided into 10 subsections: (i) epidemiological surveillance system (12 questions); (ii) quarantine system (six questions); (iii) disease prevention, control, and eradication (six questions); (iv) brucellosis sanitary status (11 questions); (v) bovine tuberculosis sanitary status (11 questions); (vi) BSE sanitary status (15 questions); (vii) livestock traceability (five questions); (viii) animal health emergency system (four questions); (ix) field veterinary activities (five questions); and (x) laboratory services (eight questions).

The fourth section (d) contains 10 questions on animal welfare and GAPP.

Finally, the fifth section (e) contains 11 questions concerning the registration of medicines, biological elements, and vaccines.[1407]

b. *Thematic areas common to both questionnaires and level of detail requested in each*

i. *General information on the country's geography*

Both questionnaires request information on the name of the country, its borders, internal administrative division at the regional and local levels, division of recognized disease-free areas, location of production areas, major cities and towns, main communication routes (land, air and maritime), and salient geographical features.[1408] Information is also sought concerning the nature and distribution of the country's animal population.[1409]

The February 2021 questionnaire also requests information on the location of exporters to Panama and the country's animal health zoning[1410] and requests much more detailed information on the country's animal population.[1411]

ii. *Information on the organization and operation of sanitary services (competent authority and technical capacity of the country's veterinary services)*

Both questionnaires request information on the location of: (a) the offices of the competent authority (sanitary and animal health); (b) local and regional offices of veterinary services; (c) central and regional official laboratories; (d) the organizational chart and structure of official sanitary services at the national and local levels; (e) the

[1407] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

[1408] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 2, question 1; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 2, questions 1.1-1.2.

[1409] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 2, question 2 (requesting information for the past three years); Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 2, questions 2.1-2.4.

[1410] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 2, questions 1.2(c) and (d).

[1411] It includes four questions requesting detailed information on the distribution of the animal population by species and location over the past 10 years. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 2, questions 2.1-2.4).

functions and competencies of veterinary services at the national and local levels; and (f) other agencies with competence in the field of animal health.[1412]

The February 2021 questionnaire also requests information on: (a) regional agencies from which veterinary services operate; (b) the activities of veterinary services delegated to accredited private practitioners; (c) accredited non-official laboratories for diagnosis of animal diseases; (d) sectors and institutions with competence and responsibilities within the country's veterinary services, official or otherwise; (e) the ratio of veterinarians to animal population; (f) legislation establishing the competent authority and other institutions comprising the veterinary services; (g) the amount and level of training within veterinary service structures; (h) the administrative and operational competence of each public institution comprising the veterinary services; (i) authorization and accreditation of veterinarians; (j) training and refresher programmes for technical personnel; and (k) transboundary disease-prevention simulation exercises over the past five years.[1413]

iii. *Information on sanitary legislation*

Both questionnaires request information on: (a) current sanitary and animal health legislation in relation to the production of dairy products; and (b) cases where penalties for breaches of sanitary regulations have been applied.[1414]

The January 2020 questionnaire also contains questions on the regulations governing the application of quality systems at plants wishing to export milk and dairy products, and the certification and re-certification requirements for such plants.[1415]

The February 2021 questionnaire seeks information on assessments undergone by the veterinary service.[1416]

iv. *Information on surveillance systems (sanitary status of the country)*

Both questionnaires include questions on the following: (a) sanitary and animal health surveillance system; (b) official listing of notifiable diseases and surveillance and control measures for these diseases; (c) reporting system used in the event of the emergence of a notifiable disease outbreak or hotspot; (d) control measures in the event of the occurrence of a notifiable disease of quarantine concern; and (e) active or specific surveillance programmes for the monitoring of diseases with greatest impact.[1417] Also common to both questionnaires are questions on the sanitary status of bovine brucellosis[1418] and bovine tuberculosis.[1419]

The January 2020 questionnaire contains some questions on the following areas: (a) explanation of the increase in the number of disease hotspots in recent years, according to reports by the OIE; (b) explanation of the absence of surveillance records

[1412] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 3, questions 1, 2.1-2.6; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 4-5, questions 1.1, 1.2, 1.4, 2.2, 2.4, and 2.6.

[1413] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 4-5, questions 1.3, 1.5-1.8, 2.1, 2.3, 2.5, and 2.7-2.8.

[1414] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 3-4, questions 3.1-3.4; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 6, questions 4.1-4.2

[1415]Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 4, questions 3.5 and 3.6.

[1416] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 6, question 4.3.

[1417] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 4, questions 4.1-4.4, and 4.48; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 6-7, questions 1.1, 1.2, 1.4-1.5, and 1.8.

[1418] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 4-7, questions 4.5-4.15, and 4.18-4.24; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 9-11, questions 4.1-4.11. The Panel notes that the questions on bovine brucellosis in the January 2020 questionnaire are much more detailed than those in the February 2021 questionnaire.

[1419] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 7-10, questions 4.25-4.45; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 11-13, questions 5.1-5.11. The Panel notes that the questions on bovine tuberculosis in the January 2020 questionnaire are much more detailed than those in the February 2021 questionnaire.

for zoonoses in humans (brucellosis and tuberculosis) in 2017 and 2018; (c) actions taken in the event of failure to report the occurrence of a notifiable disease; (d) list of disease outbreaks or hotspots in the past three years for the various species of animal; and (e) cases or outbreaks of food-borne diseases related to the consumption of milk and dairy products in the past three years.[1420]

The February 2021 questionnaire seeks more detailed information on: (a) the model and scope of the epidemiological surveillance system (active and passive) for diseases of mandatory declaration and notification; (b) the statistical design used in epidemiological surveillance of certain bovine diseases[1421]; and (c) the list of disease outbreaks and hotspots in the past five years.[1422]

v. *Information on livestock traceability*

The January 2020 questionnaire has no section on this subject but does contain a question on the methodology for recording data on compliance with GAPP, data which would also allow an animal's history to be traced from livestock farms to immediate recipient.[1423]

The February 2021 questionnaire requests much more detailed information on this topic, including questions on the regulatory framework for livestock traceability; the existence of a traceability system that has been or is being implemented; the registration system for products, farms, establishments, carriers and vehicles engaged in the transport of animals; and the individual official identification system for each animal species.[1424]

vi. *Information on the quarantine system*

Although the January 2020 questionnaire has no section on this subject, it does contain a question on approved entry points for inspection (air, maritime and land) and internal quarantine movement checkpoints.[1425]

The February 2021 questionnaire asks much more detailed questions on the quarantine system. In particular, it covers the following thematic area (including references to legal basis and organizational structure): (a) a description of the quarantine system for the prevention and control of animal diseases; (b) quarantine controls applied to surveillance for transboundary diseases in seaports, airports, and border zones; (c) treatment at entry points and responsibility for carrying it out; (d) demarcation of the country's animal health zones; (e) control within animal health zones; and (f) sanitary requirements for internal control of the movement of animals between animal health zones, and of diseases subject to mandatory control.[1426]

vii. *Information on laboratory services*

Both questionnaires include questions on the following thematic areas: (a) the organizational structure and diagnostic capacities of laboratory services (including their relationship with the central laboratory); (b) the number and location of official, accredited, and private laboratories; (c) the obligations of the central, regional and local laboratory with regard to veterinary matters and food safety; (d) whether there has been international certification of diagnostic laboratories and of validation systems for

[1420] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 10-11, questions 4.46-4.51.

[1421] The listed diseases are foot and mouth disease (FMD), bovine spongiform encephalopathy (BSE), bovine tuberculosis, bovine brucellosis, enzootic bovine leukosis, and New World screwworm (*Cochliomyia hominivorax*).

[1422] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 6-7, questions 1.1, 1.3, and 1.11.

[1423] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 12, question 10.

[1424] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 14-15, questions 7.1-7.5.

[1425] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 3, question 1.

[1426] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 7, questions 2.1-2.6.

trial testing and calibration; and (e) the relationship with international or reference laboratories.[1427]

The January 2020 questionnaire contains additional questions on the following thematic areas: (a) the national programme on toxic residues in dairy products and the design of analysis samples and parameters; (b) the history of non-compliance in recent years and corrective actions in relation to the toxic residue programme; and (c) the official programme for the monitoring of pathogens and corrective actions in the event of unsatisfactory results.[1428]

The February 2021 questionnaire contains more detailed questions on the following thematic areas: (a) diagnostic techniques used by the laboratory network; (b) whether laboratories operate under an international quality management system; and (c) aetiological agents of animal diseases present in the country, as diagnosed in the past 10 years.[1429]

viii. *Information on animal welfare and GAPP*

Both questionnaires include questions on the following thematic areas: (a) hygiene and biosecurity measures and regulations concerning the location and construction of livestock production plants; (b) measures to measure and ensure water quality at livestock production plants; (c) measures relating to the supply and quality of feed on livestock farms; (d) animal welfare standards; (e) good practices in the use of veterinary drugs; (f) good practices in the use of pesticides and chemical substances; (g) transport of live animals; and (h) registration of GAPP compliance activities and animal history.[1430]

The February 2021 questionnaire contains questions on the following thematic areas: (a) list of pesticides and agrochemicals authorized for use on livestock farms; and (b) good practices for the treatment of waste water and other waste.[1431]

ix. *Budgetary information*

Although the January 2020 questionnaire has no section on this subject, it does contain one question on the government budget allocated to the control of bovine brucellosis and another question on the same topic in relation to bovine tuberculosis for the period 2014-2018.[1432]

The February 2021 questionnaire contains detailed questions on the resources allocated to the country's veterinary systems and the use of those resources.[1433]

x. *Information on disease prevention, control, and eradication*

[1427] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 11, questions 5.1-5.6; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 16-17, questions 10.1, 10.3, and 10.5-10.7.

[1428] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 11, questions 5.7-5.9.

[1429] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 16-17, questions 10.2, 10.4, and 10.8.

[1430] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 12, questions 1-3 and 5-10; Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 17-18, questions 1-6 and 9-10.

[1431] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 17, questions 7-8.

[1432] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 4, question 4.6 and p. 7, question 4.26.

[1433] Three questions are included on the budget: (a) total budget allocated and implemented for the purpose of the country's official veterinary services (in USD); (b) budget implemented over the past 10 years, by department, programme, and project; and (c) budget assigned to other institutions providing veterinary services over the past 10 years. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 5-6, questions 3.1-3.3).

Although the January 2020 questionnaire has no section on this subject, it does contain a question on the sanitary management plan for disease prevention, control, and eradication.[1434]

The February 2021 questionnaire contains detailed questions on: sanitary regulation for the prevention, control, and eradication of animal diseases; the surveillance programme for transboundary diseases and its results; the programme for the surveillance, control, and eradication of endemic diseases; official programmes to address emergency situations related to animal diseases; specific programmes for the prevention, control, and eradication of certain bovine diseases[1435]; and the role of producers in the surveillance of animal diseases and coordination mechanisms.[1436]

c. *Subject matter included in the February 2021 questionnaire but not addressed in the January 2020 questionnaire*

i. *General country information: on livestock production*[1437]; processing of livestock raw materials[1438]; and imports and exports of livestock products.[1439]

ii. *Information on the country's sanitary status:* frequency of notification to international reference bodies; data collection system; active disease surveillance programmes; description and relevant information concerning the state of preparedness and response plans for an emergency animal disease situation; penalties for non-compliance; and the epidemiological information system.[1440]

iii. *Information on the sanitary status in respect of BSE*.[1441]

iv. *Information on the animal health emergency system*: the institutionalization of the national animal health emergency system; applicable safety measures in the event that a transmissible or transboundary infectious disease is diagnosed; the process for reporting sick animals and veterinary service response mechanisms; and the list of animal health emergencies declared in the past five years.[1442]

[1434] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 12, question 4.

[1435] Question 3.5 refers to "Bovine paralytic rabies, vesicular diseases, brucella infection, bovine tuberculosis, bovine spongiform encephalopathy, etc.". (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 8).

[1436] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 8, questions 3.1-3.6.

[1437] There are five questions requesting detailed information on: (a) the domestic production of a number of products over the past 10 years; (b) the geographical location of the milk-producing area, including details of the type of livestock, the volume of production and milk quality; and (c) information on enterprises that receive raw milk for processing. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 3, questions 3.1-3.5).

[1438] There are three questions on establishments: (a) establishments that have slaughtered animals in the last 10 years, by species and slaughter or animal production volume, including information on the origin of the animals; (b) establishments engaged in the processing of meat and meat products, by species and production volume over the last 10 years, including information on the raw material used and its origin; and (c) establishments processing raw milk, by volume processed and milk quality grade. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 3, questions 4.1-4.3).

[1439] There are seven questions on: (a) imports of live animals, by species (quantity, country of origin, and value in USD); (b) exports of live animals, by species (quantity, country of destination, and value in USD); (c) imports of meat, and meat products and by-products, by animal species (country of origin, volume, and value in USD); (d) exports of meat, and meat products and by-products, by animal species (country of destination, volume, and value in USD); (e) exports of milk and dairy products (form, metric tonnes and liquid milk equivalent, country of destination, and value in USD); (f) imports of milk and dairy products (form, metric tonnes and liquid milk equivalent, country of origin, and value in USD); and (g) enterprises approved for the export of meat and meat products and milk and dairy products, with information on the country of destination. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 3-4, questions 5.1-5.7).

[1440] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 6-7, questions 1.6-1.10 and 1.12.

[1441] There are 15 questions requesting detailed information on the surveillance and control of BSE. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 13-14, questions 6.1-6.15).

[1442] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 15, questions 8.1-8.4.

v. *Information on the activities of the field veterinarian*: the work plan for 2019, including percentage completion at the national and local levels, disaggregated by official and accredited veterinarians; the results of field epidemiological surveillance (emphasis on brucellosis, tuberculosis, and BSE); the supervisory and audit mechanism applicable to the competent authority, official and private laboratories, and other entities; the evaluation of the performance of veterinarians; and the sanitary education department.[1443]

vi. *Information on the registration of medicines, biological elements, and vaccines*: the sanitary registration procedure for veterinary products; the duration of the registration procedure; the procedure for authorizing the import of raw materials for the preparation of veterinary drugs and related products; the requirements in force for registration applications from Europe and South America; stability studies; the procedure in the event of labelling errors; checks on labelling and inspection in free or fiscal zones; procedures for dual-use products; the procedure in the event of an application to import a product with an expired registration; and the procedures for the import of veterinary products for non-commercial purposes.[1444]

7.668. The comparison demonstrates that, in the questionnaire sent in February 2021, Panama requested information that was much more detailed than the information it had requested in January 2020. In particular, there are six thematic areas on which Panama requests additional information that had not been requested in January 2020[1445], as well as some common thematic areas in respect of which more details are requested.[1446] These differences are reflected in the structure of the questionnaires.

7.669. The Panel will now assess whether AUPSA needed the additional information requested from Costa Rica in February 2021 in order to rule on the substance of the renewal applications for the sanitary approvals of the 16 Costa Rican establishments.

7.670. At an early stage of these proceedings, Panama stated that the applicable questionnaire for evaluating Costa Rica's sanitary system, in the context of renewing the sanitary approvals of Costa Rica's meat and dairy establishments, was the questionnaire sent on 2 January 2020.[1447] Subsequently, Panama explained that the questionnaire sent on 22 February 2021 sought information that would allow for an evaluation of the production of milk and dairy products in Costa Rica from an animal health standpoint.[1448] Panama also submitted three model questionnaires, which it claims it uses during the renewal procedures for sanitary approvals[1449] for meat[1450], dairy[1451], and aquaculture products.[1452] The record contains no evidence that Panama sent these questionnaires to Costa Rica as part of the process of renewing the sanitary approvals for its establishments.

7.671. Regarding the questionnaire sent in January 2020, the Panel recalls that both parties agree that this questionnaire refers to the information required to process the renewal of the sanitary approvals.[1453] The fact that Panama indicated that this was the applicable questionnaire in this context, suggests that AUPSA did not need any additional information beyond what was specified in the questionnaire. The Panel will assess the other relevant evidence in order to confirm whether the

[1443] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 16, questions 9.1-9.5.

[1444] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 18-19, questions 1-11.

[1445] See para. 7.667 c. above.

[1446] See para. 7.667 b. above.

[1447] Panama's response to Panel question No. 31, para. 104 (referring to the questionnaire in the annex to Note AUPSA-AG-001-2020 (Exhibit CRI-38)).

[1448] Panama's response to Panel question No. 140, para. 103.

[1449] Panama's response to Panel question No. 144, para. 118.

[1450] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131).

[1451] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132).

[1452] AUPSA, Questionnaire for the introduction of aquaculture products (Exhibit PAN-133).

[1453] Costa Rica's response to Panel question No. 170, para. 3.119; Panama's comments on Costa Rica's response to Panel question No. 170, para. 89. See also Panama's response to Panel question No. 31, para. 104.

information that AUPSA requested from Costa Rica in January 2020 was indeed sufficient to process the renewal of the sanitary approvals of its establishments or whether, on the contrary, Panama needed the additional information referred to in the questionnaire sent in February 2021. To do so, the Panel considers it appropriate to compare the information requested in the model questionnaires submitted by Panama for dairy and meat products (Exhibits PAN-132 and PAN-131, respectively), on the one hand, and the information requested in the questionnaires sent in January 2020 (Exhibit CRI-38) and in February 2021 (Exhibit CRI-268), on the other.[1454]

7.672. When comparing the content of the model questionnaires on dairy and meat products with the questionnaire sent to Costa Rica on 2 January 2020[1455], the first observation is that the three questionnaires share the same thematic structure, which is divided into three main sections: (a) information to review the sanitary conditions of the exporting country (Section I); (b) information to review the organization and operation of the sanitary services in relation to the product in question (Section II); and (c) information to review the application of GAPP (Section III). The title of Section III in the model questionnaires also mentions GMP, hygiene procedures, and safety. The second observation is that, for most questions involving a time-frame, the model questionnaires ask for information for the previous three years. As mentioned above, most of the January 2020 questionnaire requests updated information for the 2014-2018 period.

7.673. Regarding Section I, which pertains to information needed to *review the sanitary conditions of the exporting country*, the Panel notes the following:

a. The two sets of questionnaires contain two questions regarding general information on the country (name and geography of the country).[1456]

b. The model questionnaires contain additional questions regarding whether the country is a member of the OIE and, if so, since when; and regarding production (over the previous three years), the proportion of production carried out in establishments for export and under veterinary supervision, a list of exporting establishments, and the number of establishments overseen by the competent authority for the inspection of the products.[1457]

7.674. Regarding Section II, which pertains to information needed to *review the organization and operation of the sanitary services*, the Panel notes that most of the subsections are the same across all three questionnaires. These subsections cover the following: (a) a description of the location of offices, laboratories, entry points and control posts; (b) the organization, structure, and level of efficiency/training of the exporting country's official sanitary services; (c) sanitary legislation relating to the product in question that is wished to be introduced; (d) surveillance systems; and (e) laboratory services.[1458] The only subsection under Section II that is found in the model questionnaires but not in the questionnaire sent in January 2020 pertains to relations with independent scientific experts.[1459] Regarding this Section, the Panel notes the following:

a. In the subsection pertaining to the location of offices, laboratories, entry points and control posts, the two sets of questionnaires contain the same question.[1460]

[1454] The Panel notes that the questionnaire sent in February 2021 (Exhibit CRI-268) contains questions on dairy and meat products. Accordingly, the Panel considers it appropriate to compare the two model questionnaires on these products (Exhibits PAN-131 and PAN-132).

[1455] Note AUPSA-AG-001-2020 (Exhibit CRI-38).

[1456] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 3, question 1; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 2, questions 1.1-1.2; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 2, questions 1.1-1.2.

[1457] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 2-3, questions 1.3 and 2-8; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 2-3, questions 1.3 and 2-8.

[1458] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 3-11; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 3-10; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 3-10.

[1459] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 10, question 6.1; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 10, question 6.1.

[1460] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 3, question 1; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 3, question 1; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 3, question 1.

b. In the subsection pertaining to the organization, structure, and level of efficiency/training of the exporting country's official sanitary services, the two sets of questionnaires contain the same questions regarding the organizational chart and responsibilities of sanitary services at the national and local levels, and whether there are other services responsible for public health and safety in respect of milk and dairy products.[1461] The model questionnaires contain more detailed questions on the human resources available to the competent animal health authority (four questions) and safety (four questions), and request details concerning the number of inspectors, technical assistants and core staff members. These questionnaires also request further information on the financial management of official sanitary services (five additional questions), administrative data (three additional questions), financial data regarding means of transport (one additional question), and details of veterinary training (one additional question).[1462]

c. In the subsection pertaining to sanitary legislation, the two sets of questionnaires contain the same questions on: legislation in force on sanitary matters; and the enforcement of laws and penalties in cases of non-compliance.[1463] The January 2020 questionnaire contains questions on the following topics that were not included in the model questionnaires: judicial actions and results of actions taken by the veterinary services regarding food safety in the previous three years; and information on regulations on the implementation of quality systems in plants wishing to export milk and dairy products, and certification and recertification requirements for these plants.[1464] Lastly, the model questionnaires contain additional questions that ask for further details on existing sanitary regulations and other related issues.[1465]

d. In the subsection pertaining to surveillance systems, the questionnaire sent in January 2020 requests more information than the model questionnaires. The questionnaire sent in 2020 contained 51 questions, seven of which were of a general nature, while the rest focused on the surveillance and control programmes for bovine brucellosis and bovine tuberculosis. In contrast, the model questionnaires contain 13 general questions on diseases and there are no requests for details of the two bovine diseases mentioned in the questionnaire sent in January 2020.[1466]

e. In the subsection pertaining to laboratory services, the model questionnaires expand on two questions contained in the January 2020 questionnaire regarding information on diagnostic and research laboratories. They do not contain certain questions on the national programme on toxic residues in dairy products, compliance history, and the existence of an official pathogen monitoring programme.[1467]

7.675. Regarding Section III, which pertains to information on the application of GAPP, GMP, and hygiene and safety procedures, the Panel notes that:

[1461] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 3, questions 2.1-2.6; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 3, questions 2.1-2.6; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 3-4, questions 2.1-2.6.

[1462] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 4-6, questions 2.7-2.11; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 4-7, questions 2.7-2.11.

[1463] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 3-4, questions 3.1-3.3; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 7, questions 3.1-3.2; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 7-8, questions 3.1-3.2. The Panel notes that question 3.1 in the model questionnaires contains nine sub-questions aimed at collecting more detailed information.

[1464] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 4, questions 3.4-3.6.

[1465] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 7-8, questions 3.3-3.5; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 8, questions 3.3-3.4.

[1466] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, pp. 4-11, questions 4.1-4.51; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 8-9, questions 4.1-4.13; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 8-9, questions 4.1-4.13.

[1467] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 11, questions 5.1-5.9; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 9-10, questions 5.1-5.5; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 9-10, questions 5.1-5.5.

a. Both sets of questionnaires contain similar questions on the following thematic areas: hygiene and biosecurity measures in respect of the location and construction of livestock production plants; measures to assess and ensure water quality in livestock production plants; measures relating to the supply and quality of feed in livestock establishments; animal welfare standards in livestock production; good practices in respect of the use of veterinary drugs; good practices in respect of the use of pesticides and chemical substances; the transport of live animals; and the recording of activities to comply with good practices.[1468]

b. The model questionnaires contain three additional questions on: the humane treatment of animals during transportation; good livestock practices regarding the hygienic production of fresh milk; and any legal actions and sanctions in respect of food safety in the previous three years.[1469]

7.676. A comparison of these questionnaires reveals that, according to the model questionnaires submitted by Panama to the Panel, Panama usually asks for more detailed information on certain aspects relating to the processing of the products concerned and on the resources allocated to sanitary services (including laboratories). The model questionnaires contain some questions on the application of GAPP and GMP in relation to hygiene and safety. It should also be recalled that the information requested in the model questionnaires usually covers a time-frame comprising the previous three years.

7.677. The questionnaire that Panama sent to Costa Rica in January 2020, for its part, contained many more questions on the status of bovine tuberculosis and bovine brucellosis, along with requests for information spanning a broader time-frame (the previous five years), which appears to align with the dates when Costa Rica last underwent a sanitary evaluation, in 2014. Although the January 2020 questionnaire asks for less detail than the model questionnaires, except in respect of the two diseases already mentioned, it addresses the same thematic areas as these questionnaires and contains many of the same questions.

7.678. In the light of this comparison, the Panel considers that the information that Panama requested in January 2020 corresponds to what it usually requests in its model questionnaires. Accordingly, the information that AUPSA requested from SENASA in January 2020 was sufficient for Panama to evaluate Costa Rica's sanitary status in order to complete the sanitary approval renewal process for the establishments seeking to export dairy products to Panama.

7.679. The Panel will now proceed, nevertheless, to compare the content of the model questionnaires with that of the questionnaire sent to Costa Rica on 22 February 2021[1470] in order to confirm whether the information requested by Panama in the latter questionnaire was excessive.

7.680. The Panel notes that, unlike the January 2020 questionnaire, the February 2021 questionnaire does not follow the same structure as the model questionnaires.[1471] The February 2021 questionnaire is more extensive than the model questionnaires, in terms of both topics covered and the number of questions posed, as described below.

7.681. The Panel notes that both sets of questionnaires include questions on the following common themes:

a. *General information on the country's geography*

[1468] Note AUPSA-AG-001-2020 (Exhibit CRI-38), annex, p. 12, questions 1-3 and 5-10; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 11, questions 1-8; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 11, questions 1-8.

[1469] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 11-12, questions 9-12; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 11-12, questions 9-13.

[1470] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

[1471] See para. 7.667a above.

i. Both questionnaires ask for general information: the name of the country and relevant geographical characteristics[1472]; the characteristics and distribution of the animal population[1473]; and details concerning the production of the relevant products.[1474]

ii. The model questionnaires contain a question on OIE membership that does not appear in the February 2021 questionnaire.[1475]

iii. The February 2021 questionnaire asks for more detailed information on the country's animal population[1476] and the production of dairy and meat products.[1477] Some of the questions on these two topics request information covering the previous 10 years and various additional details, which contrasts with the three-year time-frame that usually applies for the questions in the model questionnaires and the more general type of information requested therein.

b. *Information on the organization and operation of the sanitary services (competent authority and technical capacity of the country's veterinary services)*

i. Both questionnaires ask for information on: the location of certain sanitary service entities[1478]; the structure and functions of official sanitary services[1479]; other bodies with authority in animal health matters[1480]; the human resources available to the competent authority (including details regarding training)[1481]; and the budget and financial management of official sanitary services.[1482]

[1472] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 2, questions 2.1-2.4; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 2, questions 1.1-1.2; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 2, questions 1.1-1.2.

[1473] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 2-4, questions 2.1-2.4; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 2, question 2; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 2, question 2.

[1474] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 3, questions 3.1-3.5; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 2, questions 3-8; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 2, questions 3-8 (referring to slaughter numbers and the facilities where slaughter took place).

[1475] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 2, question 1.3; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 2, question 1.3.

[1476] There are four questions that ask for detailed information on the distribution of the animal population by species and location over the previous 10 years. (Animal health evaluation questionnaire (22 February 2021), (Exhibit CRI-268), p. 2, questions 2.1-2.4).

[1477] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 3, questions 3.1-3.5.

[1478] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 4-5, questions 1.1-1.8; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 3, question 1; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 3, question 1.

[1479] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 5, questions 2.1-2.5; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 3, questions 2.1-2.2; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 3, questions 2.1-2.2.

[1480] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 5, question 2.6; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 3, questions 2.3-2.6; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 3, questions 2.3-2.6.

[1481] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 5, question 2.7; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 4-5, question 2.7; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 4-5, question 2.7.

[1482] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 5-6, questions 3.1-3.3; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 5-6, questions 2.8 and 2.11; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 6-7, questions 2.8 and 2.11.

ii. The model questionnaires also ask for administrative data to be considered in the evaluation and information on the transport methods used by the veterinary services.[1483] This information is not requested in the February 2021 questionnaire.

iii. The February 2021 questionnaire asks for more detailed information on the budget allocated and implemented at the project level over the previous 10 years, compared to the more general nature of the information requested for the previous two years in the model questionnaires.[1484] The February 2021 questionnaire also asks for information on transboundary disease-prevention simulation exercises conducted over the past five years.[1485]

c. *Information on sanitary legislation*

i. Both sets of questionnaires include questions on the following: (a) sanitary and animal health legislation in force governing the production of the relevant products; and (b) cases where penalties have been applied for breaches of sanitary regulations.[1486]

ii. The model questionnaires contain additional questions requesting further details about existing sanitary regulations and other related topics.[1487]

iii. The February 2021 questionnaire contains a question regarding the evaluations that the veterinary service has undergone.[1488]

d. *Information on surveillance systems (sanitary status of the country)*

i. Both sets of questionnaires include questions on the following thematic areas: (a) sanitary and animal health surveillance system; (b) official listing of notifiable diseases and surveillance and control measures for these diseases; (c) reporting system used in the event of the emergence of a notifiable disease outbreak or hotspot; (d) actions or penalties that may apply in the event of failure to report the occurrence of zoonoses or diseases affecting animals subject to mandatory declaration; (e) control measures in the event of the occurrence of a disease of quarantine concern subject to mandatory declaration; (f) listing of disease outbreaks and hotspots in the previous three years (model questionnaire) and five years (February 2021 questionnaire); (g) frequency of notification to international reference bodies; and (h) active disease surveillance programmes.[1489]

ii. The model questionnaires include questions on the following areas that do not appear in the February 2021 questionnaire: the role of other official agencies in the surveillance and control of foodborne diseases, zoonoses, and diseases affecting animals; requirements and procedures that apply for the certification and approval of processing establishments; how a system that ensures food safety is approved and

[1483] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p 6, questions 2.9-2.10; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 6-7, questions 2.9-2.10.

[1484] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 6, questions 3.1-3.2; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 5-6, question 2.8; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 6, question 2.8.

[1485] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 5, question 2.8.

[1486] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 6, questions 4.1-4.2; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 7, questions 3.1-3.2; and AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 7-8, questions 3.1-3.2.

[1487] AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 7-8, questions 3.3-3.5; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 8, questions 3.3-3.4.

[1488] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 6, question 4.3.

[1489] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 6-7, questions 1.1, 1.2, 1.4-1.6, 1.8 and 1.10-1.11; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 8-9, questions 4.1-4.6, and 4.8-4.9; and AUPSA, Questionnaire for the introduction dairy products (Exhibit PAN-132), pp. 8-9, questions 4.1-4.6, and 4.8-4.9.

verified; and national programmes for the surveillance and monitoring of biological, chemical or physical contaminants in food products for export.[1490]

iii. The February 2021 questionnaire asks for information on the sanitary status in respect of diseases such as, *inter alia*, bovine brucellosis, bovine tuberculosis, and BSE. In contrast, the model questionnaires do not refer to any specific diseases. The February 2021 questionnaire also asks for detailed information on the list of animal health emergencies declared in the previous five years.[1491]

e. *Information on livestock traceability*

i. The model questionnaires have no section on this subject, but do contain a question on the methodology for recording data on compliance with GAPP, and data that would allow an animal's history to be traced from livestock farms to immediate recipient (traceability).[1492]

ii. The February 2021 questionnaire requests much more detailed information on this topic by including questions on the regulatory framework for livestock traceability; the existence of a traceability system that has been or is being implemented; the registration system for products, farms, establishments, carriers and vehicles engaged in the transport of animals; and the individual official identification system for each animal species.[1493]

f. *Information on the quarantine system*

i. The model questionnaires have no section on this subject, but do contain a question on approved points of entry for inspection (air, maritime, and land) and internal quarantine movement checkpoints.[1494]

ii. The February 2021 questionnaire seeks to obtain much more detailed information on the quarantine system. In particular, it covers the following subject matter (including references to legal basis and organizational structure): (a) a description of the quarantine system for the prevention and control of animal diseases; (b) quarantine controls applied for the surveillance of transboundary diseases in seaports, airports, and border zones; (c) treatment at points of entry and responsibility for carrying it out; (d) demarcation of the country's animal health zones; (e) control within animal health zones; and (f) sanitary requirements for internal control of the movement of animals between animal health zones, and of diseases subject to mandatory control.[1495]

g. *Information* on laboratory services

i. Both sets of questionnaires include questions on the following thematic areas: (a) the organizational structure and diagnostic capacities of laboratory services (including their relationship with the central laboratory); (b) the number and location of official, accredited and private laboratories; (c) the diagnostic techniques or methods used for animal diseases; (d) the existence of international certification for

[1490] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 8-9, questions 4.7 and 4.10-4.12; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 8-9, questions 4.7 and 4.10-4.12.

[1491] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 6, question 1.3; p. 8, question 3.5; pp. 9-14, questions 4-6 on bovine brucellosis, bovine tuberculosis, and BSE; and p. 15, question 8.4.

[1492] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 11, question 8; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 11, question 8.

[1493] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 14-15, questions 7.1-7.5.

[1494] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 3, questions 1.4-1.5; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 3, questions 1.4-1.5.

[1495] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 7-8, questions 2.1-2.6.

diagnostic laboratories and validation systems for trial testing and calibration; (e) the relationship with international or reference laboratories; and (f) the aetiological agents of animal diseases present in the country.[1496]

ii. The model questionnaires include questions on: (a) recent reports on laboratories, with data on samples and investigations concerning exotic animal diseases; (b) internal and external audits of the laboratories; (c) reports on future research programmes in the field; (d) annual reports from public sector research laboratories; and (e) relations with independent scientific experts.[1497]

iii. The February 2021 questionnaire contains additional questions on the following issues: (a) the obligations of the central, regional, and local laboratory regarding veterinary matters and food safety; and (b) whether the laboratories operate under an international quality management system.[1498]

h. *Information on animal welfare and GAPP*

i. Both sets of questionnaires include questions on the following topics: (a) application of hygiene and biosecurity measures in respect of the location of farms and the construction of livestock production establishments; (b) measures to assess and ensure water quality in livestock production plants; (c) measures relating to the supply and quality of feed on livestock farms; (d) animal welfare standards; (e) good practices in respect of the use of veterinary drugs; (f) good practices in respect of the use of pesticides and chemical substances; (g) transport of live animals; and (h) recording of GAPP compliance activities and animal history.[1499]

ii. The model questionnaires include questions on: (a) the application of GMP regulations; and (b) judicial actions taken by the official sanitary services and food safety sectors (in the previous three years).[1500] The model questionnaire for meat products also includes a question on animal welfare standards in processing plants.[1501]

iii. The February 2021 questionnaire contains questions on the following thematic areas: (a) the list of pesticides and agrochemicals authorized for use on livestock farms; and (b) good practices for the treatment of waste water and other waste.[1502]

i. *Information on disease prevention, control, and eradication*

i. The model questionnaires have no section on this subject, but do contain a question on regulations concerning food-borne diseases, zoonoses, and diseases affecting animals, and the control, eradication, and surveillance thereof.[1503]

[1496] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 16-17, questions 10.1-10.3, and 10.5-10.8; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 9-10, questions 4.13, 5.1.1-5.1.2, 5.1.4-5.1.6, 5.2.1-5.2.2, and 5.3-5.5; and AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 9-10, questions 4.13, 5.1.1-5.1.2, 5.1.4-5.1.6, 5.2.1-5.2.2, and 5.3-5.5.

[1497] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), pp. 9-10, questions 5.1.7-5.1.9, 5.2.3-5.2.4, and 6; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 9-10, questions 5.1.7-5.1.9, 5.2.3-5.2.4, and 6.

[1498] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 16, questions 10.4-10.5.

[1499] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 17-18, questions 1-6 and 9-10; AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 11, questions 1-10; and AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 11, questions 1-10.

[1500] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 12, questions 11 and 13; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), pp. 11-12, questions 11-12.

[1501] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 12, question 12.

[1502] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 17, questions 7 and 8.

[1503] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131), p. 7, question 3.1.4; AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132), p. 7, question 3.1.4.

i. The February 2021 questionnaire contains detailed questions on: the surveillance programme for transboundary diseases and its results; the programme for the surveillance, control, and eradication of endemic diseases; official programmes to address emergency situations relating to animal diseases; specific programmes for the prevention, control, and eradication of certain bovine diseases[1504]; and the role of producers in animal disease surveillance and coordination mechanisms.[1505]

7.682. As well as the similarities and differences in each of the areas mentioned above, the Panel notes other significant differences between the February 2021 questionnaire and the model questionnaires. As already noted, while the February 2021 questionnaire primarily requests information for the previous 10 years, the model questionnaires tend to request information for the previous three years.[1506] The February 2021 questionnaire also asks for information on the following aspects that are not covered by the model questionnaires:

a. *General country information*: on the processing of livestock raw materials[1507]; and imports and exports of livestock products.[1508]

b. *Information on the country's sanitary status*: description and relevant data concerning the state of preparedness and response plans for animal disease emergencies; and the epidemiological information system.[1509]

c. *Information on the sanitary status of the following diseases*: bovine brucellosis[1510], bovine tuberculosis[1511], and BSE.[1512]

d. *Information on the animal health emergency system*: institutionalization of the national animal health emergency system; safety measures that apply when a transmissible or transboundary infectious disease is diagnosed; and process for reporting sick animals and veterinary service response mechanisms.[1513]

e. *Information on the activities of the field veterinarian*: work plan for 2019, including percentage of completion at the national and local levels, disaggregated by official and accredited veterinarians; results of field epidemiological surveillance (emphasis on

[1504] Question 3.5 refers to "bovine paralytic rabies, vesicular diseases, brucella infection, bovine tuberculosis, bovine spongiform encephalopathy, and others". (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 8).

[1505] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 8, questions 3.2-3.6.

[1506] See also paras. 7.666 and 7.672 above.

[1507] There are three questions on establishments: (a) establishments engaged in the slaughter and processing of animals over the previous 10 years, by species and annual slaughter or production volumes, including information on the origin of the animals; (b) establishments engaged in the processing of meat and meat products, by species and production volumes, over the previous 10 years, including information on the raw material used and its origin; and (c) establishments processing raw milk, by volume processed and milk quality grade. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 3, questions 4.1-4.3).

[1508] There are seven questions on: (a) imports of live animals, by species (quantity, country of origin, and value in USD); (b) exports of live animals, by species (quantity, destination country, and value in USD); (c) imports of meat, and meat products and by-products, by animal species (country of origin, volume, and value in USD); (d) exports of meat, and meat products and by-products, by animal species (destination country, volume, and value in USD); (e) exports of milk and dairy products (form, metric tonnes, and liquid milk equivalent, destination country and value in USD); (f) imports of milk and dairy products (form, metric tonnes and liquid milk equivalent, country of origin, and value in USD); and (g) enterprises approved for the export of meat and meat products, and milk and dairy products, with information on the destination country. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 3-4, questions 5.1-5.7).

[1509] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 6-7, questions 1.9 and 1.12.

[1510] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 9-11, questions 4.1-4.11.

[1511] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 11-13, questions 5.1-5.11.

[1512] There are 15 questions requesting detailed information on the surveillance and control of BSE. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 13-14, questions 6.1-6.15).

[1513] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 15, questions 8.1-8.3.

brucellosis, tuberculosis, and BSE); supervisory and audit mechanism applicable to the competent authority; evaluation of the performance of veterinarians; and sanitary education department.[1514]

f. *Information on the registration of medicines, biological elements, and vaccines*: sanitary registration procedure for veterinary products; duration of the registration procedure; procedure for authorizing the import of raw materials for the preparation of veterinary drugs and related products; requirements in force for registration applications from Europe and South America; stability studies; procedure in the event of labelling errors; checks on labelling and inspection in free or fiscal zones; procedures for dual-use products; procedure in the event of an application to import a product whose registration has expired; and procedures for importing veterinary products for non-commercial purposes.[1515]

7.683. The Panel draws two main conclusions from the above comparison. The first is that the model questionnaires include, in some areas, more detailed questions on topics that are also referred to in the February 2021 questionnaire. The second is that, in the February 2021 questionnaire, AUPSA requested information that was much more detailed than the information it usually requests in the model questionnaires for certain areas, while for others, it requested additional information not included in the model questionnaires. In the Panel's view, the fact that much of the additional information requested does not appear in the model questionnaires typically used by Panama, suggests that this information was not necessary for the purpose of renewing the sanitary approvals.

7.684. The Panel further notes that, in its communications to Costa Rica, AUPSA did not explain why it needed this information. However, during the current proceedings, Panama stated that the information requested in February 2021 was necessary owing to the animal health risks posed by dairy products, such as the transmission of foot and mouth disease. Panama also stated that in 2014 it had requested the Costa Rican authorities responsible for animal health to evaluate these types of risks, so it should not have come as a surprise to those authorities that animal health information was requested during a renewal procedure.[1516]

7.685. The Panel does not consider that Panama's explanations justify the need to request such detailed information on general aspects of the sanitary system such as those referred to in paragraph 7.679 above. It is the Panel's understanding that this would be information that was not clearly related to the animal health concerns raised by Panama in a context where it had a history of trade with Costa Rica in multiple products and was familiar with the sanitary and veterinary authorities of its trading partner. Furthermore, as mentioned above, the questionnaire sent on 2 January 2020 contained 51 specific questions on two bovine diseases, and other more general questions regarding the management of zoonoses and the animal health situation in Costa Rica.

7.686. As explained above[1517], the Panel considers that Panamanian law authorizes AUPSA to request updated information on the sanitary situation of the exporting country, which may include information about the animal health situation.

7.687. Furthermore, it should be recalled that there is nothing in the record to show that AUPSA commented on the information that SENASA sent it on 19 February 2020 in response to the questionnaire of 2 January 2020. If AUPSA believed that the information it requested more than a year later, in February 2021, was necessary for its evaluation, it could have notified SENASA much more promptly.[1518] AUPSA's lack of action in this respect would tend to confirm that the additional information requested in February 2021 was not necessary.

[1514] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), p. 16, questions 9.1-9.5.

[1515] Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268), pp. 18-19, questions 1-11.

[1516] Panama's response to Panel question No. 140, para. 103 (referring to AUPSA, Resolution No. 028-2014 (Exhibit CRI-234); AUPSA, Resolution No. 030-2014 (Exhibit CRI-237)).

[1517] See e.g. para. 7.633 above.

[1518] The Panel notes that, on 12 July 2021, Panama commented on the insufficiency of the information that Costa Rica had sent it a little over a month earlier, on 3 June 2021 (See Memorandum SENASA-DG-725-2021 (Exhibit CRI-63); Note DSA-335-2021 (Exhibit CRI-64)). In the Panel's view, this indicates that AUPSA could have informed SENASA much earlier that it required additional information beyond

7.688. Lastly, there is no evidence in the record that, at the time of the Panel's establishment, or afterwards, Panama had requested specific updated information on the products at issue other than dairy products, such as meat products. Although the questionnaires for other products, such as meat or aquaculture products, have information in common on general aspects of Costa Rica's sanitary situation[1519], Panama did not appear to require more detailed information on the other products at issue. Panama also does not explain why this information on dairy products was necessary to complete the renewal procedure for the sanitary approvals of the establishments exporting non-dairy products, considering that AUPSA did not request information on those products.[1520] In the Panel's view, this suggests that the information that Panama had requested in January 2020 was sufficient to complete the renewal procedures for the sanitary approvals of the 16 Costa Rican establishments.

7.689. Accordingly, the Panel considers that the additional information that AUPSA requested from SENASA in February 2021 was not necessary to complete the renewal procedure for the sanitary approvals of the 16 Costa Rican establishments.

7.4.2.3.4.3 Conclusion on Annex C(1)(c) to the SPS Agreement

7.690. In the light of the foregoing, the Panel finds that Measure 2 is inconsistent with Annex C(1)(c) to the SPS Agreement, because Panama required more information from Costa Rica than was necessary for the purpose of completing the procedure for renewing the sanitary approvals of the 16 Costa Rican establishments.

7.4.2.3.5 Whether Measure 2 is inconsistent with Article 8 of the SPS Agreement

7.691. Costa Rica requests the Panel to find a violation of Article 8 of the SPS Agreement because Panama has incurred undue delay and has required more information than is necessary for the procedures at issue, in breach of Annex C(1)(a) and Annex C(1)(c) to the SPS Agreement.[1521] Panama, for its part, contends that Costa Rica has failed to demonstrate that Measure 2 violates Article 8 of the SPS Agreement.[1522]

7.692. The Panel notes that Annex C(1) to the SPS Agreement gives meaning and content to Article 8 of the Agreement.[1523] Article 8 establishes the obligation to observe the provisions of Annex C in the operation of control, inspection and approval procedures. Thus, a failure to observe the provisions of Annex C implies a breach of Article 8.[1524]

7.693. The Panel has found that Measure 2 is inconsistent with Annex C(1)(a) to the SPS Agreement because Panama incurred undue delays in the course of the procedures for renewing the sanitary approvals of 16 Costa Rican establishments.[1525] The Panel has also found that Measure 2 is inconsistent with Annex C(1)(c) to the SPS Agreement because Panama required more information from Costa Rica than was necessary for the purpose of completing these procedures.[1526]

7.694. Consequently, the Panel finds that Measure 2 is inconsistent with Article 8 of the SPS Agreement, because Panama failed to comply with the provisions of Annex C(1)(a) and Annex C(1)(c) to the Agreement.

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that sent by SENASA on 19 February 2020. (Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39); Costa Rica's responses to Panama's questionnaire verifying the sanitary status of a country (19 February 2020) (Exhibit CRI-6)).

[1519] AUPSA, Questionnaire for the introduction of meat products (Exhibit PAN-131); AUPSA, Questionnaire for the introduction of dairy products (Exhibit PAN-132).

[1520] The Panel recalls that, in January 2020, AUPSA only requested information from SENASA in response to the application for the renewal of the sanitary approvals of the Dos Pinos dairy establishment. See para. 7.664 above.

[1521] Costa Rica's second written submission, paras. 163 and 170.

[1522] Panama's second written submission, para. 86.

[1523] Appellate Body Report, *Australia – Apples*, para. 434.

[1524] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1569. See also Panel Report, *US – Poultry (China)*, paras. 7.394-7.395; Appellate Body Report, *Australia – Apples*, para 434.

[1525] See para. 7.645 above.

[1526] See para. 7.690 above.

7.4.2.3.6 Conclusion on Article 8 of the SPS Agreement

7.695. In the light of the foregoing, the Panel finds that Measure 2 is inconsistent with Annex C(1)(a) to the SPS Agreement, because Panama incurred undue delays in the course of the procedures for renewing the sanitary approvals of 16 Costa Rican establishments[1527]; and with Annex C(1)(c) to the SPS Agreement, because Panama required more information from Costa Rica than was necessary for the purpose of completing these procedures.[1528] Consequently, Measure 2 is also inconsistent with Article 8 of the SPS Agreement.

7.4.2.4 Claims under Articles 2.3 and 5.5 of the SPS Agreement

7.4.2.4.1 Order of analysis

7.696. In its panel request, Costa Rica submits a claim that all of the measures at issue are inconsistent with Article 5.5 of the SPS Agreement, together with a consequential violation of Article 2.3 of the SPS Agreement.[1529] Subsequently, Costa Rica proposes that the Panel first address its claims under Article 2.3 "because of the broader nature of the non-discrimination obligations" contained therein, "as opposed to the focus of Article 5.5 on discrimination that may arise in respect of distinctions in levels of protection".[1530] Furthermore, Costa Rica considers that the Panel could exercise judicial economy with respect to the claims under Article 5.5 if it were to find that Measures 2 and 3 were inconsistent with Article 2.3.[1531] For its part, Panama does not object to Costa Rica's suggestion, and asserts that the claims under Articles 2.3 and 5.5 are only relevant in the context of Measure 3, as Measure 2 is exclusively concerned with establishment approval procedures.[1532]

7.697. The Panel recalls that Article 5 of the SPS Agreement elaborates on the basic obligations under Article 2 of the Agreement.[1533] Previous panels have considered that Article 5.5, which requires Members to avoid arbitrary or unjustifiable distinctions in the ALOPs they consider to be appropriate in different situations, when such distinctions result in discrimination or a disguised restriction on international trade, elaborates on the non-discrimination obligation under Article 2.3.[1534] It follows that in previous disputes where claims were made under both provisions, panels have sometimes considered Article 5.5 first and concluded that their findings applied to the claim under Article 2.3.[1535] In those disputes where the claim under Article 5.5 was presented as an alternative claim, or where arguments under Article 2.3 were made first, because of the broader nature of its obligations, the panels chose to start their assessments with Article 2.3 and exercised judicial economy with respect to Article 5.5 by finding a violation of Article 2.3.[1536]

7.698. Given the parties' positions on the order of analysis as stated above[1537] and the possibility of exercising judicial economy, the Panel considers it appropriate to begin its analysis with Costa Rica's claims under Article 2.3 of the SPS Agreement.

[1527] See para. 7.645 above.
[1528] See para. 7.690 above.
[1529] Costa Rica's panel request, p. 7.
[1530] Costa Rica's response to Panel question No. 65, para. 3.13 (referring to Panel Report, *Russia – Pigs (EU)*, para. 7.1261).
[1531] Costa Rica's response to Panel question No. 65, para. 3.14 (referring to Panel Reports, *India – Agricultural Products*, para. 7.481; *Russia – Pigs (EU)*, para. 7.1406).
[1532] Panama's response to Panel question No. 65, paras. 197-198.
[1533] See para. 7.80 above. See also Appellate Body Reports, *EC – Hormones*, para. 180 (referring to Panel Report, *EC – Hormones (US)*, para. 8.93); *US/Canada – Continued Suspension*, para. 674; and *Australia – Apples*, paras. 339 and 341.
[1534] Appellate Body Report, *EC – Hormones*, para. 212.
[1535] Panel Reports, *US – Poultry (China)*, paras. 7.160 and 7.318-7.319; *Australia – Apples*, para. 7.1095.
[1536] Panel Reports, *India – Agricultural Products*, paras. 7.480-7.481 and 8.2; *Russia – Pigs (EU)*, paras. 7.1261, 7.1406, and 8.2.
[1537] See para. 7.696 above.

7.4.2.4.2 Claims under Article 2.3 of the SPS Agreement

7.4.2.4.2.1 Main arguments of the parties

Costa Rica

7.699. Costa Rica claims that Panama arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, contrary to the provisions of the first sentence of Article 2.3. In particular, Costa Rica submits that Panama refused to extend the sanitary authorizations of its establishments based on a documentary review without a prior on-site audit, while it granted an extension in the same conditions to similar establishments in Peru, Mexico, and New Zealand.[1538]

7.700. Costa Rica also states that Panama revoked its sanitary eligibility, even though its sanitary status had not changed, while it did not revoke the sanitary eligibilities of Peru, Mexico, and New Zealand, whose sanitary status, like that of Costa Rica, had remained unchanged. Costa Rica asserts that, consequently, it is obliged to go through a new sanitary eligibility process in order to resume trade.[1539]

7.701. Costa Rica submits that the conditions in Peru, Mexico, and New Zealand are identical or similar to those in Costa Rica[1540] because:

a. they have sanitary eligibility approved by Panama, and their sanitary status remains unchanged;

b. they have establishments that export products of animal original to Panama for human or animal consumption; and

c. they took steps to renew the sanitary approvals of their respective establishments.[1541]

7.702. Costa Rica further submits that the similarity between the conditions prevailing in Peru, Mexico, and New Zealand, on the one hand, and Costa Rica, on the other, is based on the fact that Panama should have granted the same type of extension to the establishments in these countries at the same time (July 2020). At that time, there were ongoing logistical challenges and border restrictions related to the COVID-19 pandemic.[1542]

7.703. Costa Rica contends that the treatment accorded to its establishments is discriminatory compared to that accorded to establishments in Peru, Mexico, and New Zealand.[1543] For Costa Rica, the discrimination stems from Panama's refusal to extend the sanitary approvals of Costa Rica's establishments, while Panama granted this type of extension to establishments in Peru, Mexico, and New Zealand which were in identical or similar circumstances.[1544] Moreover, unlike these other Members, Panama prevented Costa Rica from undertaking the process to renew the sanitary approvals of its establishments on the basis of documentary review and without disrupting trade.[1545] Costa Rica adds that, in the case of Peru, the discrimination is especially clear[1546], as Panama used the health crisis caused by the COVID-19 pandemic as a reason to grant the extension of the approvals to the Peruvian establishments on a purely documentary basis, while that same reason was used by Panama to reject Costa Rica's request to extend the approvals of its establishments in

[1538] Costa Rica's first written submission, paras. 604-605; second written submission, para. 95.
[1539] Costa Rica's first written submission, paras. 604-605.
[1540] Costa Rica's first written submission, paras. 618 and 620.
[1541] Costa Rica's first written submission, para. 618; second written submission, para. 96(a). See also Costa Rica's response to Panel question No. 22, paras. 2.92-2.101.
[1542] Costa Rica's first written submission, para. 619; second written submission, para. 96(a). See also Costa Rica's response to Panel question No. 22, paras. 2.102-2.108.
[1543] Costa Rica's first written submission, para. 622.
[1544] Costa Rica's first written submission, paras. 624 and 628; second written submission, para. 96(b).
[1545] Costa Rica's first written submission, paras. 624 and 628. See also ibid. para. 627. According to Costa Rica, in the case of these other Members, Panama allowed the renewal process to begin with a documentary review, postponing the audit of the establishments to a later date, which could take place even after these extensions have expired.
[1546] Costa Rica's first written submission, para. 629.

the same conditions.[1547] Costa Rica submits that Measure 2 alters the conditions of competition to the detriment of Costa Rica because it does not allow its establishments to export to Panama, while it allows establishments in Peru, Mexico, and New Zealand to do so.[1548]

7.704. Costa Rica submits that this discrimination is arbitrary and unjustifiable[1549] because there is no valid cause or basis to explain it.[1550] In its view, this discrimination has no rational connection to AUPSA's objective of ensuring the safety of the products in question when approving or refusing the sanitary approval extension of a foreign establishment.[1551] Costa Rica adds that using the same circumstance (the COVID-19 pandemic) to issue two diametrically opposed decisions in the similar cases of Costa Rica and Peru also constitutes arbitrary discrimination.[1552] Furthermore, Costa Rica contends that there is no justification (be it related to the timing, logistics, or sanitary risk) for denying it the opportunity to renew the sanitary approval of its establishments without disrupting trade and with the flexibility to do so through a documentary review that does not involve on-site audits.[1553]

Panama

7.705. Panama, for its part, submits that Measure 2 is not covered by the disciplines of Article 2.3 because it is a purely procedural measure, as it is an approval procedure that falls exclusively within the scope of Article 8 and Annex C(1) of the SPS Agreement.[1554]

7.706. Nevertheless, Panama takes a position on (a) the prevalence of identical or similar conditions in the Members compared, and (b) whether or not there is discriminatory treatment.

7.707. In relation to the first issue, Panama asserts that it is wrong to assume that all countries with sanitary eligibility to export meat and dairy products to Panama, and whose establishment approval decisions were issued in July 2020, find themselves in a similar situation with respect to the relevant sanitary risk.[1555]

7.708. In relation to the second issue, Panama submits that the procedure for renewing sanitary approvals is the same, irrespective of the origin of the product.[1556] Panama also asserts that "it extended the same treatment to the establishments in Peru, Mexico, and New Zealand as that accorded to the Costa Rican establishments"[1557] because they were all granted sanitary approval extensions. In the case of Costa Rica, Panama indicates that it granted an extension of two and a half months on 15 October 2019 (which expired on 31 December 2019) and an extension of six months on 26 December 2019 (which expired on 30 June 2020). For the Costa Rican establishments producing products of animal origin for animal consumption, the extensions ended on 19 September 2022 and 20 June 2023.[1558] Panama asserts that this "same opportunity" was provided to the establishments in Peru, Mexico, and New Zealand.[1559]

[1547] Costa Rica's first written submission, para. 632. See also ibid. paras. 629-631 (referring to Note AUPSA-AG-0229-2020 (Exhibit CRI-45); and quoting Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46)).

[1548] Costa Rica's first written submission, paras. 633-634. Costa Rica refers to the rationale of the panel in *US – Animals* that the adoption of an import prohibition affecting only certain countries is a "warning signal" pointing to the existence of discrimination. See ibid. para. 635 (quoting Panel Report, *US – Animals*, paras. 7.585 and 7.590).

[1549] Costa Rica's first written submission, para. 644.

[1550] Costa Rica's first written submission, para. 638; second written submission, para. 96(c).

[1551] Costa Rica's first written submission, para. 638.

[1552] Costa Rica's first written submission, para. 641-642 (quoting Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.124); second written submission, para. 96(c).

[1553] Costa Rica's first written submission, para. 643.

[1554] Panama's second written communication, para. 244. See also Panama's first written submission, para. 18; response to Panel question No. 157, para. 150.

[1555] Panama's response to Panel question No. 74, para. 209.

[1556] Panama's response to Panel question No. 22, para. 88. The procedure is set out in section VII of AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23).

[1557] Panama's response to Panel question No. 22, para. 90.

[1558] Panama's response to Panel question No. 22, para. 91 (referring to Panama's first written submission, para. 98, in turn referring to Note AUPSA-AG-399-2019 (Exhibit CRI-35); AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2)).

[1559] Panama's response to Panel question No. 22, para. 91.

7.4.2.4.2.2 Assessment by the Panel

Relevant legal standard

7.709. Article 2.3 of the SPS Agreement reads as follows:

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

7.710. It is clear from the wording of the provision that Article 2.3 contains two obligations, each of which corresponds to one of the sentences of Article 2.3:

a. Under the first sentence, Members must ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members.

b. Under to the second sentence, Members must ensure that their SPS measures are not applied in a manner which would constitute a disguised restriction on international trade.[1560]

First sentence of Article 2.3 of the SPS Agreement

7.711. In the light of the first sentence of Article 2.3, the complainant is required to demonstrate three cumulative elements to establish a violation of this obligation:

a. that the SPS measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;

b. that the discrimination is arbitrary or unjustifiable; and

c. that identical or similar conditions prevail in the territory of the Members compared.[1561]

7.712. These three elements inform each other. While it has not been deemed that the analysis of these elements should follow a particular order[1562], in previous disputes, panels have begun their analysis by identifying the relevant conditions, and assessing whether they are identical or similar, as this is considered to provide a good starting point for an analysis under the first sentence of Article 2.3.[1563]

7.713. With respect to the *prevalence of identical or similar conditions in the Members compared*, it should be noted that the relevant conditions must be identified, taking into account the specific nature of the measure at issue and the specific circumstances of the case. This may require consideration of the SPS measure's stated Annex A(1) "protected interest"[1564] or of the specific SPS risk at issue[1565], which relates to an objective pursued under the SPS Agreement. This objective may inform the "conditions" that must be "identical or similar" under the first sentence of

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[1560] Panel Reports, *Russia – Pigs (EU)*, para. 7.1296; *India – Agricultural Products*, para. 7.388; and *Costa Rica – Avocados (Mexico)*, para. 7.2144.

[1561] This approach has been followed by previous panels. See e.g. Panel Reports, *Russia – Pigs (EU)*, para. 7.1292; *India – Agricultural Products*, para. 7.389; *US – Poultry (China)*, para. 7.317; *US – Animals*, para. 7.571; and *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

[1562] Appellate Body Report, *India – Agricultural Products*, para. 5.261.

[1563] Appellate Body Report, *India – Agricultural Products*, para. 5.261. The Appellate Body supported this assertion by noting that, in *Australia – Salmon*, it considered it would "first of all be necessary to determine the risk to Australia's salmonid population resulting from diseases". (Appellate Body Report, *India – Agricultural Products*, para. 5.261 and fn 703 (quoting Appellate Body Report, *Australia – Salmon*, para. 255 (italics omitted))). See also Appellate Body Report, *Korea – Radionuclides*, para. 5.58.

[1564] Appellate Body Report, *Australia – Apples*, para. 172.

[1565] See, *inter alia*, Panel Report, *US – Animals*, para. 7.580.

Article 2.3.[1566] In this connection, previous disputes have considered the presence of a disease within a territory and the concomitant risk associated with that disease to be relevant conditions.[1567]

7.714. The conditions referred to in Article 2.3 may include those found both in the products at issue and in the territory of the exporting or importing Member. They also include those territorial conditions that may not yet have manifested in products, but that are relevant in the light of the regulatory objective and specific SPS risks at issue.[1568]

7.715. With respect to the *existence of discrimination*, previous panels have been guided by the interpretation of the term "discrimination" in the context of other agreements, and in particular, the chapeau of Article XX of the GATT 1994.[1569] Accordingly, discrimination in the context of Article 2.3 has been interpreted to exist when different treatment is accorded to Members where identical or similar conditions prevail.[1570] Other provisions that have been referred to when interpreting the term "discrimination" are Article III:4 of the GATT 1994 and Article 5.5 of the SPS Agreement.[1571] Thus, a measure has been considered to discriminate if it "alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure".[1572] It has also been held that prohibiting imports of relevant products of one Member, while permitting imports of relevant products presenting an equivalent level of risk from other Members, is a "warning signal" of the existence of discrimination, as under Article 5.5 of the SPS Agreement.[1573]

7.716. With respect to the *arbitrary or unjustifiable* nature of discrimination, previous panels have also relied on interpretations given to the terms in the context of Article XX of the GATT 1994. As such, it has been determined that the analysis of this issue "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1574] The analysis would therefore focus on whether the measure at issue bears a "rational connection to" its stated objective.[1575]

Second sentence of Article 2.3 of the SPS Agreement

7.717. To interpret the scope of the obligation contained in this sentence of Article 2.3, that SPS measures are not applied in a manner which constitutes a disguised restriction on international trade, previous panels have looked to the interpretation of these terms in the context of Article XX

[1566] See also Appellate Body Report, *Korea – Radionuclides*, para. 5.59.

[1567] Panel Reports, *Russia – Pigs (EU)*, para. 7.1311; *India – Agricultural Products*, para. 7.460; and *Australia – Salmon (Article 21.5 – Canada),* para. 7.113.

[1568] Appellate Body Report, *Korea – Radionuclides*, paras. 5.63-5.65.

[1569] Panel Reports, *Russia – Pigs (EU)*, para. 7.1313; *India – Agricultural Products*, para. 7.400. The chapeau of Article XX of the GATT 1994 reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures.

In SPS disputes, it has been observed that there are a number of similarities between the language of Article 2.3 of the SPS Agreement and the chapeau of Article XX of the GATT 1994. (Panel Report, *Russia – Pigs (EU)*, para. 7.1316 (quoting Panel Report, *US – Animals*, para. 7.570)). Furthermore, the eighth recital of the preamble of the SPS Agreement states that Members desire to "elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)".

[1570] Appellate Body Report, *US – Shrimp*, para. 165.

[1571] The Appellate Body in *EC – Hormones* confirmed that Article 2.3 is an important part of the context of Article 5.5, and that, when read together with Article 2.3, Article 5.5 "mark[s] out and elaborat[es] a particular route leading to the same destination set out in Article 2.3". See Appellate Body Report, *EC – Hormones*, para. 212.

[1572] Panel Report, *US – Animals*, para. 7.573 (referring to Appellate Body Reports, *EC – Asbestos*, paras. 98-99; *Dominican Republic – Import and Sale of Cigarettes*, para. 96; and *Philippines – Distilled Spirits*, para. 256).

[1573] Panel Report, *US – Animals*, para. 7.605.

[1574] Panel Report, *Russia – Pigs (EU)*, paras. 7.1321 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225-226)-7.1323.

[1575] Panel Report, *Russia – Pigs (EU)*, paras. 7.1321 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227). This approach was adopted in the context of the SPS Agreement by panels in a number of disputes. (See Panel Reports, *Russia – Pigs (EU)*, para. 7.1323; *India – Agricultural Products*, para. 7.429; and *US – Animals*, para. 7.574).

of the GATT 1994.[1576] In that context, the terms "arbitrary discrimination", "unjustifiable discrimination", and "disguised restriction on international trade" have been considered to impart meaning to one another.[1577]

7.718. A disguised restriction on international trade has also been interpreted to encompass all measures that constitute arbitrary or unjustifiable discrimination.[1578] Accordingly, considerations made in the context of an assessment of whether or not there is arbitrary or unjustifiable discrimination will be relevant for determining whether a measure constitutes a disguised restriction on international trade within the meaning of the second sentence of Article 2.3.

7.719. It should also be recalled that it has been held that when an SPS measure is not based on a risk assessment, this is a strong indication that the measure "is not really concerned with the protection of human, animal or plant life or health but is instead a trade-restrictive measure taken in the guise of an SPS measure, i.e. a 'disguised restriction on international trade'".[1579]

7.720. The Panel agrees with the legal standard set out above and will proceed with its examination of Costa Rica's claim under Article 2.3 on this basis. In this connection, the Panel observes that, in its panel request, Costa Rica claimed that Measure 2 was inconsistent with Article 2.3, by referring to both sentences of that provision.[1580] However, in the course of these proceedings, Costa Rica has only made arguments relating to a possible inconsistency of that measure with the first sentence of Article 2.3.

7.721. Accordingly, in the absence of any argumentation, the Panel finds that Costa Rica has not made a *prima facie* case of inconsistency of Measure 2 with the second sentence of Article 2.3 of the SPS Agreement. The Panel will now proceed to examine Costa Rica's claim under the first sentence of that provision.

Whether Measure 2 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement

7.722. Costa Rica claims that Measure 2 is inconsistent with Article 2.3 of the SPS Agreement, since Panama arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, contrary to the first sentence of Article 2.3.[1581]

7.723. Before beginning its analysis, the Panel recalls that, according to Panama, Measure 2 is not subject to the obligations of Article 2.3 because the measure is an approval procedure within the meaning of Annex C.[1582] In this connection, the Panel concluded that the non-discrimination obligation under Article 2.3 extends to all types of SPS measures, and that it finds no reason why that provision would not apply to Measure 2.[1583] Accordingly, the Panel will now proceed to analyse Costa Rica's claim under the first sentence of Article 2.3.

[1576] See e.g. Panel Report, *India – Agricultural Products*, para. 7.476. See also Appellate Body Report, *Australia – Salmon*, para. 251.

[1577] Panel Report, *India – Agricultural Products*, para. 7.476 (quoting Appellate Body Report, *US – Gasoline*, p. 25).

[1578] Panel Report, *India – Agricultural Products*, para. 7.476 (quoting Appellate Body Report, *US – Gasoline*, p. 25). See also Appellate Body Report, *US – Shrimp*, para. 150.

[1579] Appellate Body Report, *Australia – Salmon*, para. 166.

[1580] The Panel notes that, in its panel request, Costa Rica made claims of inconsistency under Article 2.3 with respect to all the measures. (Costa Rica's panel request, p. 7). Subsequently, Costa Rica requested the Panel to find that Panama had acted in a manner inconsistent with Article 2.3 of the SPS Agreement, without specifying the scope of its request. (Costa Rica's first written submission, para. 1249(c); second written submission, para. 584(c)).

[1581] Costa Rica's first written submission, paras. 604-605; second written submission, para. 95.

[1582] Panama's second written communication, para. 244. See also Panama's first written submission, para. 18; response to Panel question No. 157, para. 150.

[1583] See para. 7.550 above.

7.724. As in previous disputes[1584], the Panel, in its analysis under the first sentence of Article 2.3, will first assess whether the conditions identified by Costa Rica are identical or similar in the Members concerned, within the meaning of that provision.

Whether identical or similar conditions prevail in territories of the Members in question

7.725. Under the legal standard set out above, one of the issues that Costa Rica must demonstrate as the complainant is that the conditions prevailing in Costa Rica are identical or similar to those prevailing in Peru, Mexico, and New Zealand for the purposes of Article 2.3 of the SPS Agreement. In this connection, the Panel considers that the relevant conditions to be compared must first be determined.

7.726. The conditions identified by Costa Rica as identical or similar with respect to Peru, Mexico, and New Zealand are the following:

a. the validity of the sanitary eligibility;

b. the types of establishments and products in question;

c. the steps taken by the countries to request renewal of the sanitary approvals;

d. the type of extension that should have been granted; and

e. when AUPSA decided to reject or approve the requested extensions.[1585]

7.727. As indicated above[1586], the particular "conditions" that must be shown to be "similar or identical" under that provision, should be informed by the nature of SPS measures and the particular circumstances of the case. Thus, "conditions" relating to the particular objective pursued (i.e. the protected interest as set out in Annex A(1) to the SPS Agreement) and the risks addressed by Measure 2 would be relevant for the Panel's analysis of whether identical or similar conditions prevail between the Members.[1587]

7.728. The Panel recalls that Measure 2 is maintained by virtue of the non-renewal of the sanitary approvals of 16 Costa Rican establishments to import dairy and meat products into Panama.[1588] The Panel concluded that Measure 2 aims (a) to ensure the safety of food imported into Panama by checking the sanitary conditions in Costa Rica, and (b) to protect animal and human life and health against animal diseases transmissible to humans (zoonoses).[1589]

7.729. Regarding the risk addressed by Measure 2, the Panel notes that, with respect to food safety, Measure 2 seeks to protect animal or human health or life from risks arising from additives, contaminants, toxins, or disease-causing organisms in dairy and meat products.[1590] In turn, with respect to diseases transmissible to humans (zoonoses), Measure 2 seeks to protect human life or health in Panama from diseases carried by by animals or products thereof.[1591]

7.730. Considering the above-mentioned objectives and risks, the Panel considers that all of the conditions identified by Costa Rica are relevant, because they are all closely linked to the different stages of the sanitary approval renewal procedure provided for in Panamanian regulations or those applied by Panama. In this connection, it should be noted that:

[1584] Appellate Body Report, *India – Agricultural Products*, para. 5.261. See also Appellate Body Report, *Korea – Radionuclides*, para. 5.58.
[1585] Costa Rica's first written submission, para. 618; response to Panel question No. 22, paras. 2.91-2.109; and second written submission, para. 96(a).
[1586] See para. 7.713 above.
[1587] Appellate Body Report, *Korea – Radionuclides*, para. 5.59.
[1588] See para. 7.506 above.
[1589] See paras. 7.517 and 7.519 above.
[1590] See para. 7.517 above.
[1591] See para. 7.519 above.

a. sanitary eligibility is a prerequisite for carrying out a procedure to renew the sanitary approvals of establishments1592;

b. the establishments and the products that they export to Panama are subject to scrutiny during the renewal procedure1593;

c. Members' requests to have the sanitary approvals of their establishments renewed initiate the renewal procedure1594;

d. the extensions granted by Panama, and to which Costa Rica alludes, were processed as part of the procedure that leads to the renewal of the sanitary approval, and is of the same type for the establishments of the four Members compared1595; and

e. the moment when AUPSA decided to reject or approve the extensions in question also marks the final stage of that procedure.1596

7.731. In the Panel's view, these procedures, which, according to Panama, are the same regardless of the origin of the product in question[1597], reflect AUPSA's objective to "[e]nsure an adequate level of protection of human health, the country's agricultural heritage, in relation to imported foods, taking into account the diversity and quality of their supply".[1598]

7.732. Panama submits that Costa Rica should have compared at least the following two relevant conditions: (a) the risks arising from the different products in question; and (b) territorial conditions that have the potential to affect the products in question.[1599] With respect to the first condition, Panama indicates that Peru, Mexico, and New Zealand requested the sanitary approval renewal for their establishments to export fish, pet food, and milk powder, respectively. Panama argues that Costa Rica has not advanced any arguments on the health risks posed by imports of those products from those origins, or on whether these risks are the same or similar to those posed by imports of milk and bovine products from Costa Rica.[1600] With respect to the second condition, Panama submits

[1592] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, para. 7: "In the event that sanitary or phytosanitary eligibility has not been recognized, the interested party should refer to the relevant manual on sanitary and phytosanitary eligibility procedures"; AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), paras. 3 and 4. See also Panama's response to Panel question No. 27, para. 95.

[1593] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, para. 7: "AUPSA may renew the approval of an establishment … on the basis of the following aspects, for which relevant information may be requested from the competent authority of the exporting country and/or interested party: … Sanitary conditions of the establishment and characteristics of the products that it wishes to continue introducing into the country … Experience and knowledge of, and trust in, the food inspection and certification systems … of the establishment … the compliance history".

[1594] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, para. 7: "The interested party shall submit the request in accordance with point 1 of this procedure and within the time-frame set out in the approval resolution of the Institutional Technical Commission".

[1595] See the procedure for renewing establishments' sanitary approvals described in para. 7 of section VII of AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23). The Panel notes that the extensions granted to the establishments in Costa Rica, Peru, and New Zealand are not regulated under the Panamanian framework. See Panama's response to Panel question No. 37, para. 120.

[1596] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, paras. 4-5 (indicating that "the Institutional Technical Commission … is responsible for approving establishments" and "[o]nce the establishment has been approved … the resolution of approval will be published and the establishment will be included in the database on the AUPSA web page").

[1597] Panama's response to Panel question No. 22, para. 88.

[1598] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 1; and AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 2. See also National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Articles 4 and 5.

[1599] Panama's response to Panel question No. 157, para. 153 (quoting Appellate Body Report, *Korea – Radionuclides*, para. 5.91).

[1600] Panama's response to Panel question No. 157, paras. 153-154.

that Costa Rica did not address the relevant territorial conditions in Peru, Mexico, and New Zealand, nor did it compare them to conditions in Costa Rica.[1601]

7.733. Costa Rica maintains that the conditions in the countries being compared are only those "relevant" for the purposes of Article 2.3. According to Costa Rica, the territorial conditions of the countries compared are not relevant conditions in the light of the measure at issue. Costa Rica also considers that it has addressed the health risks posed by imports of the products at issue by considering the sanitary status of the countries compared, in particular whether they had obtained their sanitary eligibility and whether there had been any changes in their sanitary status.[1602]

7.734. In the Panel's view, under the legal standard described above, the conditions identified by Panama are also relevant to the present case.[1603] The Panel understands that Costa Rica also agrees that at least the condition relating to the health risks of the products from the different countries is relevant, and is a condition of sanitary eligibility that Costa Rica identified within the relevant conditions.

7.735. Although Panama has not clearly identified the territorial conditions that could affect the products in question, the Panel considers that, as this is a comparison of conditions that could affect food products, these conditions would be those relating to the sanitary status of the countries compared.[1604] This sanitary status is closely linked to the health risks mentioned by Costa Rica with respect to the importation of the products from the countries compared. In particular, these health risks relate to the prevalence of animal diseases that may affect the products at issue. Accordingly, the Panel will examine the two conditions identified by Panama in the context of the sanitary status of the countries compared, which Costa Rica has referred to as sanitary eligibility.

7.736. Having determined the relevance of the conditions identified by the parties, the Panel will now proceed to assess whether the Members in question were in similar situations with respect to each of these conditions.

Validity of the sanitary eligibility and sanitary status

7.737. The parties agree on the need to have a sanitary eligibility approval of the exporting country in order to be able to renew the sanitary approvals of the exporting country's establishments or processing plants.[1605] However, the parties disagree on whether Panama has revoked Costa Rica's sanitary eligibility for all of the products at issue.[1606]

7.738. Costa Rica asserts that it obtained approval of its sanitary eligibility on 5 May 2009, through an amendment to the annex to Resolution AUPSA-DINAN-092-2007[1607], and that its sanitary status has not changed since then.[1608] Panama has confirmed that Costa Rica's status in the AUPSA database has not changed, and that Costa Rica's sanitary eligibility for the importation of the products subject to Measure 2 was approved as described by Costa Rica and remains valid.[1609] The Panel recalls its finding that Costa Rica has failed to demonstrate that Panama effectively revoked

[1601] Panama's response to Panel question No. 157, para. 154.
[1602] Costa Rica's comments on Panama's response to Panel question No. 157, paras. 3.215-3.216.
[1603] The Panel concurs with the Appellate Body that the considerations relating to the health risk of the products from the countries compared and the territorial conditions affecting those products are relevant conditions to be examined. See Appellate Body Report, *Korea – Radionuclides*, para. 5.92 (where the Appellate Body considered that the territorial conditions included, for example, the potential for contamination near the source).
[1604] The Panel recalls that previous panels have also considered the presence of a disease within a territory and the concomitant risk associated with that disease as relevant conditions. (See para 7.714 above).
[1605] Panama's first written submission, paras. 87-88; Costa Rica's first written submission, para. 42. See also AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII.
[1606] See e.g. Costa Rica's first written, paras. 5(b) and 42; Panama's first written submission, para. 84. See section 7.4.1.2.1 above.
[1607] Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26); the updated version of July 2014 (Exhibit CRI-27).
[1608] Costa Rica's response to Panel question No. 22, para. 2.92.
[1609] Panama's response to Panel question No. 34, para. 114; second written submission, paras. 58-60. See also AUPSA, Resolution No. 28 (2009) (Exhibit PAN-1).

or ceased to recognize Costa Rica's sanitary or animal health eligibility for all the products at issue.[1610]

7.739. The Panel observes that, in the context of its claims under Article 2.3, Costa Rica has also made arguments relating to establishments that produce food of animal origin for animal consumption. In the case of the Costa Rican establishments, these are Biomar and Central Veterinaria, and in the case of establishments of other Members, there is one establishment in Mexico. Given that the Panel has found that Biomar and Central Veterinaria are not covered by Measure 2[1611], the Panel does not consider it relevant to include in its assessment Mexico and the Mexican establishment identified by Costa Rica which, like Biomar and Central Veterinaria, exports food of animal origin for animal consumption to Panama. Accordingly, the Panel's analysis is limited to comparing the treatment accorded by Panama to the establishments in Peru and New Zealand on the one hand, and the establishments in Costa Rica on the other.

7.740. With respect to Peru and New Zealand, Costa Rica understands that (a) the sanitary eligibility of these countries was also approved for the products at issue, as demonstrated by the fact that their establishments were authorized to export to Panama, and (b) their sanitary status has not changed, so their respective sanitary eligibilities for the products at issue remain valid.[1612] Panama has confirmed the foregoing.[1613]

7.741. The only information in the record concerning the approval of country sanitary eligibilities granted by Panama is Resolution AUPSA-DINAN-092-2007 and its annex, updated in July 2014[1614], which is summarized below in relevant part.

Table 9 - Sanitary eligibility granted by Panama to Costa Rica, Peru, and New Zealand

Sanitary eligibility (by product)	Costa Rica	Peru	New Zealand
Fresh meat of bovine animals	2009 and 2014		
Meat products derived from bovine animals	2009 and 2014		
Fresh meat of swine and meat products derived from swine	2009 and 2014		
Dairy products of bovine animals	2009 and 2014	2014	2009 and 2014
Ripened processed cheeses	2009 and 2014		2009[1615]

2009: appears in the version of the annex of 2009 / 2014: appears in the version of the annex of 2014.

7.742. This information confirms the parties' claims that both Costa Rica and Peru and New Zealand obtained approval of their sanitary eligibilities for some of the products at issue. In particular, all three countries obtained sanitary eligibility for dairy products of bovine animals. The is no evidence in the record that indicates that the sanitary eligibility for those products was not valid as of the date of the Panel's establishment.

7.743. With regard to whether there were changes in their respective sanitary status, both Costa Rica and Panama agree that the sanitary status of Costa Rica has not changed since it was

[1610] See para. 7.500 above.
[1611] See paras. 7.504-7.506 above.
[1612] Costa Rica's response to Panel question No. 22, para. 2.93. See also Costa Rica's second written submission, para. 104.
[1613] Panama's response to Panel question No. 160, para. 159 (referring to Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26); its updated version of July 2014 (Exhibit CRI-27)).
[1614] Resolution AUPSA-DINAN-092-2007 concerning approval of sanitary eligibility (Exhibit CRI-26); its updated version of July 2014 (Exhibit CRI-27).
[1615] See Panama's response to Panel question No. 159, para. 158 (where Panama clarified that Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48) applies to milk in powder and whey (raw material); processed and ripened cheeses; and yoghurt, thus confirming the products for which New Zealand had sanitary eligibility).

granted sanitary eligibility.[1616] With respect to the sanitary status of Peru and New Zealand, Panama has confirmed that these sanitary statuses have not changed either.[1617]

7.744. The Panel observes that, in the context of the exchanges of information relating to Measure 2, on 12 July 2021[1618], DINASA sent comments to SENASA on the information that SENASA had sent to AUPSA on 2 June 2021.[1619] In particular, DINASA referred to the evaluation of the Sanitary and Phytosanitary Evaluation Unit (UNESYF) of the information it received from SENASA. According to UNESYF, there was some concern about the capacity and reliability of sanitary controls in Costa Rica in the following areas: (a) insufficient information; (b) with respect to bovine traceability, lack of progress in the individual identification of animals; (c) delegation of internal animal movement controls to institutions not specialized in the area of animal health; (d) worrying prevalence of bovine brucellosis and tuberculosis; and (e) Costa Rican standards and technical regulations that contravene Panamanian regulations.[1620]

7.745. Costa Rica points out that its territory is recognized by the OIE as free from classical swine fever and that, with respect to BSE, Panama and Costa Rica have the same sanitary status of negligible BSE risk.[1621] The evidence in the record also indicates that, in 2014, Panama classified Costa Rica as a country with a "controlled BSE risk", while New Zealand was classified as a country with a "negligible BSE risk".[1622]

7.746. Notwithstanding the different risk classification, the Panel considers that, given that sanitary eligibility is a precondition for imports which presupposes a review of the sanitary status of the country in question[1623], the fact that Panama granted that eligibility demonstrates that Panama considers the risks arising from the importation of the products for which eligibility was granted to be acceptable. In this context, the fact that the sanitary eligibility of the three countries compared was valid for the products in question demonstrates that they were in a similar situation from the perspective of the health risks involved in importing these products into Panama.

7.747. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that conditions in Costa Rica, on the one hand, and in Peru and New Zealand, on the other hand, are similar with respect to the granting of their sanitary eligibilities and the absence of changes in their sanitary statuses since that sanitary eligibility was granted.

Types of establishments and products in question

7.748. Costa Rica submits that its claim under Article 2.3 concerns the 18 Costa Rican establishments listed in its panel request.[1624] Costa Rica asserts that both the establishments in Costa Rica as well as those in Peru and New Zealand[1625], export to Panama products of animal origin for human consumption and animal consumption.[1626] For its part, Panama notes that the foods imported from Peru and New Zealand are fish and milk in powder, respectively.[1627]

[1616] See Costa Rica's first written submission, para. 550; Panama's response to Panel question 34, para. 114.
[1617] Panama's response to Panel question No. 160, para. 159.
[1618] Note DSA-335-2021 (Exhibit CRI-64). In its communication, DINASA states that it received from AUPSA the responses sent by Costa Rica for its consideration as part of the sanitary evaluation procedure that was being carried out. (Ibid. p. 1).
[1619] Memorandum SENASA-DG-725-2021 (Exhibit CRI-63); Costa Rica's responses to Panama's questionnaire for the sanitary evaluation of Costa Rica (3 June 2021) (Exhibit CRI-29).
[1620] Note DSA-335-2021 (Exhibit CRI-64).
[1621] Costa Rica's first written submission, para. 713.
[1622] Annex to Resolution AUPSA-DINAN-092-2007, updated version of July 2014 (Exhibit CRI-27). See also Resolution No. 002-2010 (Exhibit PAN-150), whereby AUPSA adopted as equivalent the OIE risk categorization for recognition of member countries' BSE disease status.
[1623] See para. 7.464 above.
[1624] Panama's response to Panel question No. 153, paras. 3.86-3.89. See also Costa Rica's panel request, annex, p. 9.
[1625] Costa Rica's first written submission, para. 621.
[1626] Costa Rica's second written submission, para. 105.
[1627] Panama's response to Panel question No. 157, para. 154 (referring to Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48)). See also Panama's response to Panel question No. 159, para. 158 (where Panama indicates that Resolution

7.749. The Panel recalls its finding that Measure 2 covers 16 Costa Rican establishments that export products of animal origin for human consumption to Panama.[1628] Accordingly, as indicated in paragraph 7.739 above, the Panel's assessment will address those 16 Costa Rican establishments.

7.750. The Panel notes that the evidence in the record confirms that the establishments in Costa Rica, Peru, and New Zealand export products of animal origin for human consumption:

Table 10 - Establishments approved by AUPSA and products authorized for import into Panama

	Number of establishments	Products authorized for import into Panama
Costa Rica[1629]	16	- Products of swine (fresh, chilled or frozen that require cooking) - Meat products of swine - Meat products of bovine animals - Dairy products of bovine animals - Meat products (sausages) of bovine animals, swine and poultry (subjected to a process to inactivate major infectious agents)
New Zealand[1630]	Various (not specified)	Dairy products and by-products for human consumption
Peru[1631]	8	Hydrobiological and fishery products for human consumption

7.751. The products that the Costa Rican establishments export to Panama can be identified in detail, as their tariff codes appear in the record.[1632] Although the same level of detail is not in the record for the products imported into Panama from the establishments in New Zealand and Peru, the information available[1633] indicates that these are products of animal origin for human consumption.

7.752. The Panel considers that, while there are differences between the specific products that the establishments of the Members in question export to Panama, in all cases they are products of animal origin for human consumption. Furthermore, the evidence in the record suggests that the situations of the Members in question are similar with respect to the health risk in question, as their establishments received a sanitary approval allowing them to export their products to Panama.

7.753. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the conditions in Costa Rica, on the one hand, and in Peru and New Zealand, on the other hand, are similar with respect to their establishments and the products they export to Panama, including with respect to the health risk posed by those products.

No.-018-AG-AUPSA-2020 (Exhibit CRI-48) applies to milk in powder and whey (raw material); processed and ripened cheeses; and yoghurt).

[1628] See para. 7.506 above.

[1629] Costa Rica's panel request, annex, p. 9; first written submission, para. 41 and annex.

[1630] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48).

[1631] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46).

[1632] The tariff codes of the products exported by each Costa Rican establishment can be found in their sanitary approvals, which can be consulted in: AUPSA, Resolution No. 43 (Exhibit CRI-206); AUPSA, Resolution No. 10 (2014) (Exhibit CRI-215); AUPSA, Resolution No. 48 (2014) (Exhibit CRI-219); AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225); AUPSA, Resolution No. 11 (2014) (Exhibit CRI-228); AUPSA, Resolution No. 12 (2014) (Exhibit CRI-231); AUPSA, Resolution No. 028-2014 (Exhibit CRI-234); AUPSA, Resolution No. 029-2014 (Exhibit CRI-236); AUPSA, Resolution No. 030-2014 (Exhibit CRI-237); AUPSA, Resolution No. 10-CTI-16 (Exhibit CRI-238); AUPSA, Resolution No. 14 (2014) (Exhibit CRI-241); AUPSA, Resolution No. 15 (2014) (Exhibit CRI-244); AUPSA, Resolution No. 039-2014 (Exhibit CRI-247); AUPSA, Resolution No. 46 (2014) (Exhibit CRI-250); AUPSA, Resolution No. 45 (2014) (Exhibit CRI-253); AUPSA, Resolution No. 44 (2014) (Exhibit CRI-256); AUPSA, Resolution No. 008-CTI-16 (Exhibit CRI-259); and AUPSA, Resolution No. 007-CTI-16 (Exhibit CRI-262).

[1633] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47); and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48). See also Panama's response to Panel question No. 159, para. 158.

Steps taken by the countries to request renewal of the sanitary approvals

7.754. Panama asserts that all establishments are subject to the same procedures for the renewal of their sanitary approvals, "irrespective of the origin of the product in question".[1634] Panama indicates that these procedures are provided for in section VII, paragraph 7 of the *AUPSA Manual for the approval of establishments*.[1635]

7.755. The following table summarizes the information in the record on the date of the requests to renew the sanitary approvals and the expiry date of the sanitary approvals of the establishments in each of the three Members compared.

Table 11 - Date of the requests for the renewal and the expiry date of the sanitary approvals of the establishments in Costa Rica, Peru, and New Zealand

	Date of the renewal requests	Expiry date of the sanitary approvals
Costa Rica	Between 13 January 2017 and 16 July 2020[1636]	30 June 2020[1637]
Peru	Not in the record	30 June 2020[1638]
New Zealand	Not in the record	Not in the record[1639]

7.756. No dates are given in the record for the renewal requests of the establishments in Peru and New Zealand, but the record does show that the authorities of Peru and New Zealand requested extensions of the sanitary approvals of their respective establishments.[1640] The Panel considers that the evidence in the record indicates that the three Members in question requested the renewal of the sanitary approvals of their establishments, in accordance with the procedure set out in the *AUPSA Manual for the approval of establishments*, which applies to all establishments, irrespective of their origin.

7.757. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the conditions in Costa Rica, on the one hand, and in Peru and New Zealand, on the other hand, are similar with respect to the steps taken to request the renewal of the sanitary approvals of their establishments.

Type of extension

7.758. Costa Rica also considers that the type of extension that the Panamanian authorities should grant to the establishments in Costa Rica, Peru, and New Zealand is a relevant similar condition in these three Members.[1641] In the Panel's view, the type of extension to which Costa Rica refers in this context corresponds to an extension of the validity of the sanitary approval of an establishment that does not fulfil the requirements to renew that approval as provided for in the *AUPSA Manual for the*

[1634] Costa Rica's second written submission, para. 107 (quoting Panama's response to Panel question No. 74, para. 209).
[1635] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), pp. 14-15.
[1636] The last time that Costa Rica reiterated its requests for renewal of the sanitary approvals of the 16 Costa Rican establishments before they expired was on 12 June 2020. After that date, Costa Rica requested the renewal of one establishment on 16 July 2020 (Memorandum SENASA-DG-840-2020 (Exhibit CRI-220)) and reiterated its requests for renewal on 3 July 2020 (Memorandum SENASA-DG-805-2020 (Exhibit CRI-235)), on 11 August 2020 (Memorandum SENASA-DG-946-2020 (Exhibit CRI-50)), and on 24 November 2020 (Memorandum SENASA-DG-1420-2020 (Exhibit CRI-42)).
[1637] Memorandum SENASA-DG-721-2020 (Exhibit CRI-43); AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217). This date corresponds to 16 of the 18 establishments affected by Measure 2, with the exception of Biomar and Central Veterinaria.
[1638] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46).
[1639] The Panel observes that the Resolution extending the sanitary approvals of the establishments in New Zealand did not indicate the date on which those approvals had expired. See Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fourth and fifth recitals.
[1640] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), third recital; Resolution No.-018-AG-AUPSA-2020 (Exhibit CRI-48), third recital.
[1641] Costa Rica's first written submission, paras. 612-618; response to Panel question No. 22, paras. 2.102-2.105; and second written submission, paras. 96(a) and 108.

approval of establishments.[1642] In this connection, the extension that Costa Rica requested on 12 June 2020[1643], and that Panama refused on 10 July 2020[1644], is of the same nature as the extension that Panama granted to the establishments in Peru and New Zealand in the same month, namely, an extension based on a documentary review, subject to an on-site audit being performed at a later date. In the case of those countries, Panama extended the sanitary approvals of those establishments on a documentary basis, subject to the performance of on-site audits at a later date, when the circumstances so allowed (primarily, the health crisis related to the COVID-19 pandemic).[1645]

7.759. The Panel observes that, despite having requested this information from Panama[1646], the record does not contain the extension requests that Peru and New Zealand submitted. However, the Panel notes that the resolutions granting the extensions to the establishments in Peru and New Zealand[1647] contain very similar language to the resolution granting the most recent extension to the Costa Rican establishments.[1648] All three resolutions refer to the CTI or to the AUPSA Executive Board deciding to "grant an extension" for a specified period of time to establishments whose "authorization" had expired at an earlier date.[1649]

7.760. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the conditions in Costa Rica, on the one hand, and in Peru and New Zealand, on the other hand, are similar with respect to the type of procedure for requesting and granting extensions to their establishments.

The moment when AUPSA ruled on the renewal or extension requests

7.761. Costa Rica asserts that AUPSA ruled on its renewal or extension requests, and those of Peru and New Zealand, in July 2020, i.e. at a time when border and logistical restrictions were in place as a result of the COVID-19 pandemic.[1650] Panama submits that the extensions of the sanitary approvals of the establishments in these three countries expired in the same period, between the end of 2019 and the first half of 2020.[1651]

7.762. The Panel observes that the record shows that Panama granted the extensions to the establishments in Peru and New Zealand during the last week of July 2020 (on 27 and 30 July 2020, respectively), for 90 days and 6 months, respectively.[1652]

7.763. In contrast, Panama did not grant extensions to the sanitary approvals of the 16 Costa Rican establishments that had requested their renewal or extension in writing, and whose sanitary approvals were due to expire on 30 June 2020.[1653] Panama last extended the sanitary approvals of

[1642] See fn 1110 above.
[1643] Memorandum SENASA-DG-721-2020 (Exhibit CRI-43).
[1644] Note AUPSA-AG-229-2020 (Exhibit CRI-45).
[1645] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47); and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48).
[1646] See Panel question No. 161(c) to Panama.
[1647] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48).
[1648] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).
[1649] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2); Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48).
[1650] Costa Rica's response to Panel question No. 22, para. 2.107.
[1651] Panama's response to Panel question No. 150, para. 140 (referring to Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48)). Panama also indicates that it granted extensions to the establishments in New Zealand until June or December 2023. However, Panama clarifies that the products from New Zealand that were imported from June 2020 onwards are different dairy products from those that Panama imports from Costa Rica. (Panama's response to Panel question No. 35, paras. 115 and 117).
[1652] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48).
[1653] See AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217). The Panel recalls that as of that date Panama had only extended the sanitary approvals of the Biomar and Central Veterinaria establishments. (See para. 7.503 above).

those establishments on 26 December 2019, for a period of six months which expired on 30 June 2020.[1654]

7.764. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the conditions in Costa Rica, on the one hand, and in Peru and New Zealand, on the other hand, are similar with respect to the fact that, after having submitted their respective renewal or extension requests around the same date, their establishments had to wait for a final decision from AUPSA in that regard.[1655]

Conclusion on whether identical or similar conditions prevail in the territories of the Members in question

7.765. The Panel concludes that, for the reasons set out above, Costa Rica has demonstrated that similar conditions prevail in the territories of the Members in question, namely Costa Rica, Peru, and New Zealand, with respect to the procedure for renewing the sanitary approvals of their establishments.

7.766. The Panel will now proceed to examine whether Measure 2 discriminates against the 16 Costa Rican establishments compared to the treatment accorded to the establishments in Peru and New Zealand.

Whether Measure 2 discriminates against the establishments in Costa Rica compared to the establishments in Peru and New Zealand

7.767. Costa Rica considers that Panama's discriminatory treatment of the Costa Rican establishments is demonstrated by two facts:

a. that Panama granted the extension of sanitary approvals for establishments in Peru and New Zealand after expiry[1656], but not for establishments in Costa Rica; and

b. that Panama allowed the process to renew the sanitary approvals of the establishments in Peru and New Zealand to begin with a documentary review, leaving the on-site audit of the establishments to a later date, while it did not do the same for the Costa Rican establishments, despite being in similar conditions.[1657]

7.768. Panama submits that no discrimination occurred, as AUPSA "extended the [sanitary] approvals for Costa Rican establishments for transitional periods ranging from 60 days to 6 months" on 15 October 2019 and 26 December 2019.[1658] According to Panama, by extending the sanitary approvals of the establishments in Peru and New Zealand, it afforded them the "same opportunity" that the Costa Rican establishments had benefited from at the end of 2019.[1659] Panama stresses that the longest extension that it granted, of six months, was to the Costa Rican establishments.[1660] In the case of New Zealand, Panama claims that the extension granted was of the same type as that which all Costa Rican dairy and meat product establishments had received in October and December 2019.[1661] Panama adds that: (a) the extensions of all establishments are subject to the fulfilment of certain conditions by the importers; (b) in all cases, it was established that AUPSA would determine a schedule for on-site audits prior to the expiry of the extension; and (c) all the extensions had the

[1654] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).
[1655] The Panel recalls that there is no record of the number of establishments in New Zealand affected by the AUPSA decision or of the expiry date of their sanitary approvals beyond 20 January 2021, as set out in Article 1 of Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48). However, Panama indicates that these establishments were granted additional extensions until June or December 2023. (Panama's response to Panel question No. 35, para. 115).
[1656] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth recital; Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fifth recital.
[1657] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), seventh recital; Resolution No. 018-AG-AUPSA2020 (Exhibit CRI-48), seventh recital. See also Costa Rica's first written submission, paras. 624 and 628. See also ibid. para. 627.
[1658] Panama's response to Panel question No. 22, para. 90.
[1659] Panama's response to Panel question No. 22, para. 91.
[1660] Panama's response to Panel question No. 150, para. 141.
[1661] Panama's first written submission, para. 147.

same legal basis, namely Decree Law No. 11 of 2006 and the resolutions granting sanitary eligibility to the respective country.[1662]

7.769. The Panel recalls that a central aspect of the analysis of whether there is discrimination is determining whether the measure at issue alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure.[1663]

7.770. In this dispute, the extension granted by Panama to the sanitary approvals of the establishments in Peru and New Zealand resulted in those establishments being able to export their products to Panama after their sanitary approvals had expired, which was between October 2019 and June 2020.[1664] In contrast, the 16 Costa Rican establishments affected as a result of their sanitary approvals not being renewed or extended have not been able to export their products to Panama since the expiry of those approvals on 30 June 2020.[1665]

7.771. Panama argues that the treatment was not discriminatory because the Costa Rican establishments benefited from two extensions to their approvals, granted in October and December 2019. In Panama's view, the granting of these two extensions to the Costa Rican establishments means that the Costa Rican establishments received the same treatment as the establishments in Peru and New Zealand.[1666] For Costa Rica, however, the fact that Panama granted those extensions in 2019 does not remedy the discrimination experienced when, in July 2020, Panama did not extend the sanitary approvals of the Costa Rican establishments unlike the establishments in Peru and New Zealand. Costa Rica asserts that discriminatory treatment cannot be offset by other instances in which no discrimination or even more favourable treatment occurred, as established under Article III:2 of the GATT 1994.[1667]

7.772. The Panel notes, first, that the discrimination challenged by Costa Rica under Article 2.3 does not relate to the extensions of the sanitary approvals granted in December 2019, but to Panama's decision not to extend the sanitary approvals of the 16 Costa Rican establishments when they expired in June 2020. The Panel recalls that, when examining the relevant conditions, it focused on the time-period between the expiry of the sanitary approvals of the 16 Costa Rican establishments in June 2020, and the rejection of the request to extend or renew those approvals, in July 2020. Accordingly, the Panel also frames its analysis within that time-period when assessing the situation of the establishments in Peru and New Zealand, which, at the end of July 2020, saw their approvals extended for 90 days[1668] and until 30 January 2021[1669], respectively.

7.773. Second, the Panel recalls that, despite having requested this information from Panama[1670], the record does not show whether the establishments in Peru and New Zealand benefited from any extension prior to the July 2020 extension, as the Costa Rican establishments had in 2019. Nevertheless, the Panel does not consider this issue to be dispositive because, as Costa Rica indicates, offsetting less favourable treatment with more favourable treatment does not nullify the discriminatory nature of a situation.[1671]

[1662] Panama's response to Panel question No. 150, paras. 142-144.

[1663] Panel Report, *US – Animals*, para. 7.573.

[1664] The sanitary approvals of the establishments in Peru expired on 30 June 2020. According to Panama, the expiry date of the sanitary approvals of the establishments in New Zealand was 31 October 2019. See Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth recital; Panama's response to Panel question No. 150, para. 140.

[1665] See para. 7.505 above.

[1666] See e.g. Panama's response to Panel question No. 150, para. 140.

[1667] Costa Rica's second written submission, para. 112 (quoting Panel Report, *Argentina – Hides and Leather*, para. 11.260, which in turn refers to GATT Panel Reports, *US – Tobacco*, para. 98; *US – Section 337*, para. 5.14; and Panel Report, *US – Gasoline*, para. 6.14); and referring to Appellate Body Report, *Canada – Periodicals*, p. 30).

[1668] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46).

[1669] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48).

[1670] See Panel question No. 161(e) to Panama.

[1671] In this connection, it should also be recalled that, under Article III:2 of the GATT 1994, this provision has been interpreted as "not permit[ting] Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances". (Panel Report, Argentina – *Hides and Leather*, para. 11.260 (referring to GATT Panel Reports, *US – Tobacco*, para. 98; and *US – Section 337*, para. 5.14; and Panel Report, *US – Gasoline,* para. 6.14);

7.774. In the following table, the Panel compiles the similarities in the conditions in the Members examined and in their establishments, and the differences in the treatment Panama accorded to each of them.

Table 12 - Similarities between Costa Rica, New Zealand, and Peru, and their establishments, and differences in the treatment accorded by Panama

	Costa Rica	New Zealand	Peru
Products	Products of animal origin for human consumption: - Products of swine (fresh, chilled or frozen that require cooking) - Meat products of swine - Meat products of bovine animals - Dairy products of bovine animals - Meat products (sausages) of bovine animals, swine and poultry (subjected to a process to inactivate major infectious agents)[1672]	Products of animal origin for human consumption: Dairy products and by-products for human consumption[1673]	Products of animal origin for human consumption: Hydrobiological and fishery products for human consumption[1674]
Expiry date of the sanitary approvals of the establishments	30 June 2020[1675]	Not in the record[1676]	30 June 2020[1677]
Date of renewal request	Between 13 January 2017 and 4 December 2018[1678]	Not in the record	Not in the record
Extension duration	Extension refused[1679]	Six months (until 31 January 2021)[1680]	90 days (until 27 October 2020)[1681]
Need for audit and evaluation of the health system	AUPSA indicated to SENASA that, taking into account the circumstances of the COVID-19 pandemic, the Costa Rican	It is indicated that AUPSA will set the timetable for the audit of each establishment before the	It is indicated that AUPSA will set the timetable for the audit of each establishment

Appellate Body Report, *Canada – Periodicals*, p. 30)). The Panel considers that this logic also applies under Article 2.3, as both provisions set out non-discrimination obligations.

[1672] Costa Rica's panel request, annex, p. 9; first written submission, para. 41 and annex.

[1673] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48). See Panama's response to Panel question No. 159, para. 158 (where Panama clarified that Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48) applies to milk in powder and whey (raw material); processed and ripened cheeses; and yoghurt, thus confirming the products for which New Zealand had sanitary eligibility).

[1674] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46).

[1675] Memorandum SENASA-DG-721-2020 (Exhibit CRI-43); AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217). This date corresponds to 16 of the 18 establishments affected by Measure 2, with the exception of Biomar and Central Veterinaria.

[1676] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48) (where it is indicated that it was "decided to grant an extension for a period of six months to the dairy establishments in New Zealand, whose authorization date expired").

[1677] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46).

[1678] The sanitary approvals of the Costa Rican establishments in question originally expired between January 2017 and June 2020. Therefore, AUPSA was asked to renew these approvals in that period. In December 2019, Panama granted an extension to the 16 Costa Rican establishments in question, which expired on 30 June 2020. (See AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2)). The last time that Costa Rica reiterated its requests for renewal of the sanitary approvals of the 16 Costa Rican establishments before they expired was on 12 June 2020 (Memorandum SENASA-DG-721-2020 (Exhibit CRI-43)). After that date, Costa Rica reiterated its renewal requests on 3 July 2020 (Memorandum SENASA-DG-805-2020 (Exhibit CRI-235)), on 11 August 2020 (Memorandum SENASA-DG-946-2020 (Exhibit CRI-50)), and on 24 November 2020 (Memorandum SENASA-DG-1420-2020 (Exhibit CRI-42)).

[1679] Note AUPSA-AG-229-2020 (Exhibit CRI-45).

[1680] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), article 1.

[1681] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), article 1.

	Costa Rica	New Zealand	Peru
	establishments could "be subject to a new procedure with a view to their approval once [its] authorities [were] ready and able to initiate the procedures for the evaluation and recognition of the Costa Rican sanitary system, and the at-source sanitary audits and inspections of these establishments".[1682]	expiry of the extension.[1683] The sanitary authority of New Zealand is requested to certify, "by means of documentation, the sanitary condition of the country and the dairy establishments".[1684]	before the expiry of the extension.[1685] The sanitary authority of Peru is requested to certify, "by means of documentation, the sanitary condition of the country and the production plants of hydrobiological and fishery products".[1686]
Acceptance of a documentary assessment	No. AUPSA asserts that a "documentary assessment alone does not satisfy or ensure compliance with the requirements stipulated in Panama's sanitary legislation".[1687]	Yes. AUPSA extends the sanitary approval of certain establishments in New Zealand, by accepting that they confirm by means of documentation: - the sanitary status of the country; and - that those establishments are essentially in compliance with the specific market requirements agreed for export to Panama.[1688]	Yes. AUPSA extends the sanitary approval of certain establishments in Peru, by accepting that they confirm by means of documentation: - the sanitary status of the country; and - that those establishments are essentially in compliance with the specific market requirements agreed for export to Panama.[1689]

7.775. In the Panel's view, the evidence in the record summarized in the table above supports the two instances of discrimination identified by Costa Rica with respect to the treatment that Panama accorded to the 16 Costa Rican food establishments, namely:

a. In July 2020, Panama extended the sanitary approvals of the establishments in Peru and New Zealand for a duration of 90 days and 6 months, while it did not do the same for the establishments in Costa Rica, in July 2020, when the sanitary approvals of the 16 Costa Rican establishments expired, although they were in similar conditions; and

b. Panama granted these extensions on the basis of a documentary assessment in the first instance, to be followed by an on-site audit at a later stage, allowing the authorities in Peru and New Zealand to certify the country's sanitary status on the basis of documentation.[1690] In contrast, Panama rejected Costa Rica's request to extend its sanitary approvals following that same procedure, and required that, as part of the sanitary approval procedure for its establishments, an evaluation of the Costa Rican

[1682] Note AUPSA-AG-229-2020 (Exhibit CRI-45).
[1683] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), article 4. See also the seventh recital, which indicates that after the documentary certification, "it is the responsibility of the sanitary authorities of New Zealand to make the preparations so that the audit of the establishments can be carried out in coordination at a later date".
[1684] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth recital.
[1685] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), article 4. See also the seventh recital, which indicates that after the documentary certification, "it is the responsibility of the National Fisheries Health Service (SANIPES) to make the preparations so that the audit of the hydrobiological and fishery products production plants can be carried out in coordination at a later date".
[1686] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fifth recital.
[1687] Note AUPSA-AG-229-2020 (Exhibit CRI-45).
[1688] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), sixth recital.
[1689] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), sixth recital.
[1690] The Panel notes that, in the resolutions concerning the establishments in Peru and New Zealand, AUPSA refers to the certification of the "*condición sanitaria*" ("sanitary conditions") of the country. This term is not defined in the *AUPSA Manual for the approval of establishments*, and the Panel understands that references to the "*condición sanitaria*" correspond to the "*estatus sanitario*" ("sanitary status"), which is defined in the Manual as "the status of a country, region, zone, area, place, or site with respect to a disease". (AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 4).

> sanitary system be carried out, without offering the Costa Rican authorities the possibility of certifying the country's sanitary status through documentation.[1691]

7.776. As a result of the foregoing, Panama permits the importation of products from the establishments in Peru and New Zealand, but not from those in Costa Rica. This difference in treatment constitutes discriminatory treatment for the purposes of Article 2.3 of the SPS Agreement, insofar as Panama permitted the importation of products from Peru and New Zealand, while it did not do the same for those from Costa Rica, by not extending the sanitary approvals of the 16 Costa Rican establishments.[1692] In this case, the distinction in treatment results from the manner in which Panama has handled the requests to extend those sanitary approvals.

Conclusion on whether Measure 2 discriminates against the Costa Rican establishments compared to the establishments in Peru and New Zealand

7.777. The Panel therefore concludes that Costa Rica has demonstrated that Panama accorded discriminatory treatment to the detriment of Costa Rica's establishments compared to Peru's establishments between July 2020 and October 2020, and New Zealand's establishments between July 2020 and January 2021.

7.778. Having found that there is discrimination to the detriment of the Costa Rican establishments, the Panel will now proceed to examine whether such discrimination is arbitrary or unjustifiable within the meaning of the first sentence of Article 2.3.

Whether Measure 2 discriminates arbitrarily or unjustifiably

7.779. Costa Rica submits that, if the objective of Measure 2 is to ensure food safety, there is no reason or basis for denying Costa Rica an extension and the documentary review afforded to Peru and New Zealand.[1693] Costa Rica adds that Panama cited the COVID-19 pandemic as a reason to justify both the granting of the extension to the Peruvian establishments and the non-renewal of the sanitary approvals of the Costa Rican establishments.[1694]

7.780. Panama submits that, as an approval procedure, Measure 2 is not covered by Article 2.3.[1695] Accordingly, Panama did not develop any arguments on whether Measure 2 discriminates arbitrarily or unjustifiably. However, in order to justify the difference in treatment, Panama initially argued that the extension of the sanitary approvals of the establishments in Peru without on-site audits was because those establishments were authorized to export meat not intended for human consumption (pet food and aquatic food).[1696] Panama subsequently clarified that those establishments produced products of animal origin for human consumption, and indicated that this fact should not change the Panel's analysis.[1697]

7.781. The Panel notes that AUPSA explained to SENASA that it could not accept its request to extend its sanitary approvals on a documentary basis followed by a on-site audit at a later date, for the following reasons: (a) the documentary assessment alone did not satisfy Panamanian sanitary regulations or ensure compliance with them by the Costa Rican establishments; and (b) the Costa Rican plants and sanitary system had not been subject to a comprehensive evaluation by the Panamanian authorities since 2014.[1698] In its first written submission, Panama also asserted that "the … circumstances of COVID-19 required even greater certainty on the matter of compliance with Panama's sanitary requirements" and, accordingly, the Costa Rican establishments could be subject

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[1691] Note AUPSA-AG-229-2020 (Exhibit CRI-45).

[1692] Previous panels have concluded that similar situations constitute discriminatory treatment. See Panel Report, *US – Animals*, para. 7.585. See also Appellate Body Report, *Australia – Salmon*, para. 163; Panel Report, *US – Poultry (China)*, para. 7.285. The last two reports addressed the concept of discrimination in the context of Article 5.5, which, as mentioned above, is an elaboration of Article 2.3.

[1693] Costa Rica's first written submission, paras. 640 and 643.

[1694] Costa Rica's first written submission, paras. 641-642. See also ibid. paras. 629-632 (quoting Note AUPSA-AG-0229-2020 (Exhibit CRI-45); Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46)).

[1695] Panama's second written communication, para. 244. See also Panama's first written submission, para. 18; response to Panel question No. 157, para. 150.

[1696] Panama's first written submission, para. 147.

[1697] Panama's response to Panel question No. 46, paras. 141-142.

[1698] Note AUPSA-AG-229-2020 (Exhibit CRI-45).

to approval procedures once the Panamanian authorities were in a position to carry out an evaluation of Costa Rica's animal health system, as well as the physical audit of the plants.[1699]

7.782. The Panel recalls that the analysis of whether discrimination is arbitrary or unjustifiable requires an examination of "the cause of the discrimination, or the rationale put forward to explain its existence"[1700], taking into account both the provisions relating to the measure's application and its actual application. The Panel's analysis will therefore focus on whether the discrimination stemming from Measure 2 bears a "rational connection to" its objective of protecting human or animal life or health from risks associated with food safety and zoonosis.[1701]

7.783. The Panel will now proceed to examine whether any of the reasons put forward by Panama to justify its refusal to extend the sanitary approvals of the Costa Rican establishments on the basis of an initial documentary assessment, followed by an on-site audit, have a rational connection to the objective of Measure 2 and the risk addressed by that measure.

The justification that a documentary assessment does not satisfy or ensure compliance with Panamanian sanitary regulations

7.784. The first reason put forward by Panama relates to compliance with its sanitary regulations. In its communication of 10 July 2020, in which it rejected Costa Rica's request to extend the sanitary approvals on the basis of a documentary assessment of the 16 Costa Rican establishments, Panama stated the following: "[a] documentary assessment alone does not satisfy or ensure compliance with the requirements stipulated in Panama's sanitary legislation to be met by these establishments".[1702] However, Panama has not explained why it considers that "a purely documentary review would not achieve Panama's level of sanitary protection".[1703]

7.785. In this connection, the Panel notes that Costa Rica did not request a "documentary assessment alone", as indicated by Panama in its communication to Costa Rica of 10 July 2020. Costa Rica requested that its establishments be evaluated and approved on a documentary basis, pending on-site audits at a later date.[1704] This same type of evaluation was applied by Panama to the extensions granted to establishments in Peru and New Zealand.[1705]

7.786. In the light of the foregoing, the Panel considers that Panama has not provided a convincing explanation as to why it was possible to accept imports from Peru and New Zealand on the basis of a documentary assessment and not imports from Costa Rica, taking into account the objective of Measure 2. In conclusion, the Panel considers that there is no rational connection between the differential treatment accorded to Costa Rican establishments compared to those in Peru and New Zealand, on the one hand, and the protection of human or animal life or health from risks associated with food safety and zoonosis, on the other.

The justification that there had not been a comprehensive evaluation of Costa Rican plants and the Costa Rican health system since 2014

7.787. The second reason put forward by Panama for rejecting the documentary assessment of the Costa Rican establishments is that, as AUPSA pointed out to SENASA, the "plants and the Costa Rican sanitary system ha[d] not been subject to a comprehensive evaluation … since 2014".[1706] In its submissions to the Panel, Panama explains that the "comprehensive evaluation" of 2014 to which it alludes in its communication to Costa Rica of 10 July 2020 refers to the establishment approval

[1699] Panama's first written submission, para. 106.
[1700] Panel Report, *US – Animals*, para. 7.574 (quoting Appellate Body Report, *Brazil –Retreaded Tyres*, para. 226).
[1701] This approach was adopted in the context of the SPS Agreement by panels in a number of disputes. (See Panel Reports, *Russia – Pigs (EU)*, paras. 7.1321 and 7.1323; *India – Agricultural Products*, para. 7.429; and *US – Animals*, para. 7.574).
[1702] Note AUPSA-AG-229-2020 (Exhibit CRI-45).
[1703] Panama's first written submission, para. 145 (referring to Memorandum DM-COR-CAE-0349-2020 (Exhibit CRI-34); Memorandum SENASA-DG-721-2020 (Exhibit CRI-43); Note AUPSA-AG-0229-2020 (Exhibit CRI-45); and Memorandum SENASA-DG-946-2020 (Exhibit CRI-50)).
[1704] Memorandum SENASA-DG-721-2020 (Exhibit CRI-43).
[1705] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fifth, sixth, and seventh recitals, and Article 4; Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth, sixth, and seventh recitals, and Article 4.
[1706] Note AUPSA-AG-0229-2020 (Exhibit CRI-45).

procedures carried out by AUPSA between 2011 and 2014 in relation to 13 of the 16 Costa Rican establishments affected by Measure 2.[1707]

7.788. The Panel highlights the following points relating to the evidence on this issue:

a. The comprehensive evaluations of 2014, referred to by Panama, are approval procedures for 13 establishments in accordance with the provisions of section VII of the *AUPSA Manual for the approval of establishments*. As mentioned above, these procedures consist of the following stages: (i) the request from the interested party; (ii) the documentary analysis of the sanitary evaluation; (iii) the audit at origin or on site (where applicable); (iv) the evaluation by the CTI; (v) the issuance of a resolution approving or refusing the renewal concerned; and, in the case of approval of the renewal, (vi) the publication of the approval resolution; and (vii) the inclusion of the establishment on the AUPSA web page.[1708] This is indicated in the resolutions approving the 13 establishments, and confirmed by Panama itself.[1709]

b. The five Costa Rican establishments affected by Measure 2 that do not appear on the list of establishments that were the subject of a comprehensive evaluation in 2014 submitted by Panama are Dos Pinos (No. 46B), El Ángel, Nutrilac, and Sigma Alimentos (No. 45 and No. 47):

   i. The approvals of Dos Pinos (No. 46B) and Nutrilac also date from 2014, following an approval procedure virtually identical to the procedures of the 13 establishments identified by Panama.[1710] This indicates that these establishments were also subject to a comprehensive evaluation in 2014, in the sense reported by Panama.

   ii. The approvals of El Ángel and the two establishments of Sigma Alimentos took place in 2016 through approval procedures virtually identical to the procedures of the 13 establishments identified by Panama.[1711] This would seem to indicate that these establishments were also subject to a comprehensive evaluation in 2016, in the sense reported by Panama.

c. In line with the above, Panama submits that the Costa Rican establishments were the subject of an evaluation of a similar nature in 2014 or 2015.[1712]

7.789. The aforementioned evidence indicates that the comprehensive evaluation of 2014, referred to by Panama, consisted of the usual establishment approval procedures provided for in the *AUPSA Manual for the approval of establishments*, and that these same procedures were applied to all

[1707] Panama's response to Panel question No. 40, paras. 125-127.

[1708] AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), sections VI-VII, pp. 7-15. See also Panama's response to Panel question No. 40, para. 126.

[1709] See AUPSA, Resolution No. 43 (2014) (Exhibit CRI-206); AUPSA, Resolution No. 10 (2014) (Exhibit CRI-215); AUPSA, Resolution No. 48 (2014) (Exhibit CRI-219); AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225); AUPSA, Resolution No. 11 (2014) (Exhibit CRI-228); AUPSA, Resolution No. 12 (2014) (Exhibit CRI-231); AUPSA, Resolution No. 028-2014 (Exhibit CRI-234); AUPSA, Resolution No. 030-2014 (Exhibit CRI-237); AUPSA, Resolution No. 14 (2014) (Exhibit CRI-241); AUPSA, Resolution No. 15 (2014) (Exhibit CRI-244); AUPSA, Resolution No. 46 (2014) (Exhibit CRI-250); AUPSA, Resolution No. 45 (2014) (Exhibit CRI-253); AUPSA, Resolution No. 44 (2014) (Exhibit CRI-256); and Panama's response to Panel question No. 40, paras. 125-127. There are differences in the language used by the Panamanian authorities in relation to three establishments that exported meat of bovine animals to Panama: Coopemontecillos No. 8, CIISA-El Arreo, and GICO. The main difference is that the resolutions refer to Resolution AUPSA-DINAN-92-2007 on country sanitary eligibility and to a resolution of the AUPSA Scientific and Technical Food Safety Council that refers to BSE. In these resolutions, the CTI approves the "sanitary eligibility of the plant", instead of approving the establishment or renewal of the plant, as in the case of all other establishments. (See AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225); AUPSA, Resolution No. 14 (2014) (Exhibit CRI-241); and AUPSA, Resolution No. 15 (2014) (Exhibit CRI-244)).

[1710] See AUPSA, Resolution No. 029-2014 (Exhibit CRI-236); AUPSA, Resolution No. 039-2014 (Exhibit CRI-247).

[1711] See AUPSA, Resolution No. 10-CTI-16 (Exhibit CRI-238); AUPSA, Resolution No. 008-CTI-16 (Exhibit CRI-259); and AUPSA, Resolution No. 007-CTI-16 (Exhibit CRI-262).

[1712] Panama's response to Panel question No. 150, para. 138.

establishments affected by Measure 2 between 2014 and 2016, and not only to the 13 establishments identified by Panama.

7.790. Furthermore, the non-renewal of the sanitary approvals of Costa Rican establishments after they expired on 30 June 2020 affects both establishments that were the subject of the comprehensive evaluation in 2014 and others that, according to Panama, were not (e.g. El Ángel or Nutrilac).

7.791. The record does not show whether the establishments in Peru and New Zealand were the subject of a "comprehensive evaluation" in the sense indicated by Panama and, if so, when. However, in response to a question from the Panel, Panama indicates that the scope of the evaluation of the establishments in these two countries was the same as the scope of the AUPSA's evaluation of the Costa Rican establishments.[1713] The Panel understands that the evaluations that led to the granting of the sanitary approvals of the establishments of these three Members are contemporaneous, given that these sanitary approvals expired on approximately the same date (October 2019 to June 2020). The fact that the comprehensive evaluation of 2014, referred to by Panama, consists of the usual establishment approval procedure set out in the *AUPSA Manual for the approval of establishments*, and Panama's confirmation that this was the case, indicates that the establishments in Peru and New Zealand were the subject of a similarly comprehensive evaluation when they obtained their approvals.

7.792. Given that the establishments in Costa Rica, Peru, and New Zealand were subject to the same comprehensive evaluation at approximately the same time, the Panel considers that Panama's argument would also not justify the difference in treatment to the detriment of the establishments in Costa Rica. In the Panel's view, this difference in treatment does not reflect a rational connection to the protection of human or animal life or health from risks associated with food safety and zoonosis.

The justification of the COVID-19 pandemic

7.793. Lastly, Panama relies on the COVID-19 pandemic to make the completion of approval procedures contingent upon the evaluation of Costa Rica's animal health systems and the physical audit of its plants.[1714] In this connection, Panama stated that "the … circumstances of COVID-19 required even greater certainty on the matter of compliance with Panama's sanitary requirements".[1715] Panama submits that this explanation was made in the context of AUPSA's communication of 10 July 2020, which was in response to SENASA's request to extend the sanitary approvals of the Costa Rican establishments. According to Panama, its refusal to grant an extension on the basis of a documentary assessment and no on-site audits, merely sought to enforce Panamanian law with a consistent level of sanitary protection. For Panama, the COVID-19 pandemic was not a reason for importing countries to stop applying its SPS measures or reduce its level of sanitary protection. Panama adds that it responded in a impartial manner to similar requests from Peru and New Zealand, by requiring that on-site audits be scheduled once "th[e] documentary process [is] complete".[1716]

7.794. Notwithstanding Panama's assertion, the Panel notes that, in the case of the extension granted to the Peruvian establishments, AUPSA took into account the international health situation caused by the COVID-19 pandemic[1717] precisely in order to grant the extensions to those establishments through a documentary process (followed by an on-site audit at a later date). The resolution granting the extension to the establishments in New Zealand does not expressly refer to the COVID-19 pandemic, but it is clear from the text that the pandemic was not an obstacle to the processing and approval of the extension.

7.795. Accordingly, given that Panama took into account the COVID-19 pandemic both to grant extensions based on a documentary assessment and to reject the same type of extensions, the Panel considers that the COVID-19 pandemic does not justify the difference in treatment to the detriment of the Costa Rican establishments. In this connection, the Panel considers that this difference in

[1713] Panama's response to Panel question No. 150, para. 146.
[1714] Panama's first written submission, para. 106.
[1715] Panama's first written submission, para. 106.
[1716] Panama's response to Panel question No. 151, paras. 147-148.
[1717] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth recital.

treatment does not reflect a rational connection to the protection of human or animal life or health from risks associated with food safety and zoonosis.

Conclusion on whether Measure 2 discriminates arbitrarily or unjustifiably

7.796. In the light of the foregoing, the Panel concludes that there is no reason or basis to rationally link the objectives of Measure 2 to the discriminatory treatment accorded to the establishments in Costa Rica, compared to the treatment accorded to the establishments in Peru and New Zealand.

Conclusion on Article 2.3 of the SPS Agreement

7.797. In the light of the foregoing, the Panel finds that Costa Rica has demonstrated that Measure 2 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement, because it arbitrarily and unjustifiably discriminates against 16 establishments in Costa Rica compared to the establishments in Peru and New Zealand.

7.798. The Panel also finds that, owing to a lack of argumentation, Costa Rica has not demonstrated that Measure 2 is inconsistent with the second sentence of Article 2.3 of the SPS Agreement.

7.4.2.4.3 Claims under Article 5.5 of the SPS Agreement

7.4.2.4.3.1 Main arguments of the parties

Costa Rica

7.799. Costa Rica claims that Panama acted inconsistently with Article 5.5 of the SPS Agreement by applying distinct ALOPs in different but comparable situations, given that these distinctions are arbitrary and unjustifiable[1718], and result in discrimination or a disguised restriction on international trade.[1719]

Panama

7.800. Panama submits that Measure 2 is not covered by the disciplines of Article 5.5 of the SPS Agreement because it constitutes "approval procedures", which fall exclusively within the scope of Article 8 and Annex C(1) of the SPS Agreement.[1720]

7.4.2.4.3.2 Assessment by the Panel

7.801. Article 5.5 provides, in relevant part, that:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade

7.802. As explained above[1721], this provision elaborates on the non-discrimination obligations set out in Article 2.3.[1722]

7.803. The Panel recalls that Costa Rica considers that the Panel could exercise judicial economy with respect to the claims under Article 5.5 of the SPS Agreement after having found that Measure 2

[1718] Costa Rica's panel request, p. 7; first written submission, para. 668.
[1719] Costa Rica's first written submission, para. 663.
[1720] Panama's first written submission, para. 18.
[1721] See para. 7.697 above.
[1722] Appellate Body Report, *EC – Hormones*, para. 212.

is inconsistent with Article 2.3 of the SPS Agreement.[1723] Panama does not object to this assessment by Costa Rica.[1724]

7.804. The Panel considers that its findings under the first sentence of Article 2.3 are sufficient to enable the DSB to make recommendations or rulings aimed at achieving a satisfactory settlement of the matter.[1725] While it has not made findings under the second sentence of Article 2.3 and, therefore, has not concluded whether Measure 2 is a disguised restriction on trade, the Panel considers that an additional finding on this issue would not affect the manner in which Panama should adjust Measure 2 to comply with the findings under Article 2.3 of the SPS Agreement, and in that sense would not affect the recommendations of the DSB in this respect. Accordingly, the Panel decides to exercise judicial economy with respect to Costa Rica's claims under Article 5.5 of the SPS Agreement in respect of Measure 2.

7.4.2.5 Claims under Articles 5.6 and 2.2 of the SPS Agreement

7.4.2.5.1 Main arguments of the parties

7.4.2.5.1.1 Costa Rica

7.805. Costa Rica claims that Measure 2 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP. Costa Rica considers that there is an alternative measure reasonably available to Panama that achieves its ALOP and is significantly less restrictive to trade. Costa Rica also claims that, consequently, Measure 2 is inconsistent with Article 2.2 of the SPS Agreement, as it is not applied only to the extent necessary.[1726]

7.806. Costa Rica argues that Panama could have, as an alternative measure to Measure 2, conducted a documentary assessment of Costa Rica's sanitary system and the Costa Rican establishments, without suspending the trade in dairy and meat products of these establishments.[1727] According to Costa Rica, this was the treatment that Panama accorded Peru, Mexico and New Zealand, by granting extensions to their establishments and agreeing to process the renewal of their sanitary approvals on a documentary basis, pending the completion of on-site audits after the expiry of the extension.[1728]

7.807. Costa Rica submits that the alternative measure fulfils the three requirements under footnote 3 to Article 5.6 of the SPS Agreement.[1729]

7.808. First, Costa Rica argues that the alternative measure is reasonably available to Panama taking into account technical and economic feasibility, given that Panama has renewed the sanitary approvals of establishments in Peru, Mexico, and New Zealand where, according to Costa Rica, the prevailing conditions were the same as in the Costa Rican establishments.[1730]

[1723] Costa Rica's response to Panel question No. 65, para. 3.14 (referring to Panel Reports, *India – Agricultural Products*, para. 7.481; *Russia – Pigs (EU)*, para. 7.1406).
[1724] Panama's response to Panel question No. 65, paras. 197-198.
[1725] Article 3.4 of the DSU.
[1726] Costa Rica's panel request, p. 6; first written submission, paras. 585-586 and 601; and second written submission, paras. 86 and 94.
[1727] Costa Rica's first written submission, para. 587; second written submission, para. 87 (referring to the alternative of "renewing [the sanitary approvals of] the Costa Rican establishments on a documentary basis").
[1728] Costa Rica's first written submission, para. 588 (referring to Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth recital; Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fifth recital; and Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47), second recital); second written submission, para. 87.
[1729] Costa Rica's first written submission, para. 586; second written submission, para. 87.
[1730] Costa Rica's first written submission, paras. 591 and 594; second written submission, para. 88.

7.809. Second, Costa Rica submits that the alternative measure would enable Panama to achieve its ALOP, as Panama has adopted that measure in respect of establishments in Peru, Mexico and New Zealand that, according to Costa Rica, were subject to the same ALOP.[1731]

7.810. Third, according to Costa Rica, the alternative measure is significantly less restrictive to trade than Measure 2, as it would enable trade to resume, while Measure 2 is an "import prohibition"[1732] that is "as trade-restrictive as can be".[1733] Costa Rica notes that its establishments cannot export dairy and meat products to Panama due to the impossibility of conducting the renewal process. Costa Rica states that, under the alternative measure, these establishments would have had their sanitary approvals renewed, which would have enabled them to continue exporting to Panama without interruption.[1734] Costa Rica adds that the possibility of conducting on-site audits at a later date, even after the expiry of the extension, would ensure that trade is not suspended owing to a lack of time to perform this part of the procedure.[1735]

7.4.2.5.2 Panama

7.811. Panama submits that Measure 2 is not covered by the disciplines of Articles 2.2 and 5.6 of the SPS Agreement because it constitutes "approval procedures" that fall exclusively within the scope of Article 8 and Annex C(1) of the Agreement.[1736] Under the latter provisions, Panama submits that a purely documentary review would not achieve its ALOP. In this regard, Panama mentions that the extension was granted to the Peruvian and Mexican establishments without on-site audits as these establishments were authorized to export meat not intended for human consumption (pet food and aquatic animal food). Panama adds that it granted a provisional six-month extension to a New Zealand dairy product establishment, just as it did to all the Costa Rican dairy and meat product establishments in October and December 2019.[1737]

7.4.2.5.3 Assessment by the Panel

7.812. The Panel recalls that, in response to Panama's argument that Measure 2 is not subject to the obligations of Article 5.6 as it is an approval procedure within the meaning of Annex C[1738], it concluded that the obligation contained therein also applies to Measure 2.[1739] Accordingly, the Panel will proceed with its analysis of Costa Rica's claim under Article 5.6 of the SPS Agreement.

7.4.2.5.3.1 Relevant legal standard

7.813. To determine whether Measure 2 is inconsistent with Article 5.6, in accordance with the legal standard set out above[1740], the Panel will examine whether the alternative measure proposed by Costa Rica: (a) is reasonably available taking into account technical and economic feasibility; (b) achieves Panama's ALOP; and (c) is significantly less restrictive to trade than Measure 2. The Panel will examine Measure 2 on the basis of these elements.

[1731] Costa Rica's second written submission, para. 90. See also ibid. para. 89 (quoting Panama's response to Panel question No. 95, paras. 268-269); Costa Rica's first written submission, paras. 595-596.

[1732] Costa Rica's first written submission, paras. 599-600 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.114); second written submission, para 92.

[1733] Costa Rica's second written submission, para. 92.

[1734] Costa Rica's second written submission, para. 92. See also Costa Rica's first written submission, paras. 598 and 600.

[1735] Costa Rica's first written submission, para. 598.

[1736] Panama's first written submission, para. 18; second written submission, para. 244; and response to Panel question No. 164, para. 166.

[1737] Panama's first written submission, para. 147. Panama later clarified that the Peruvian establishments produced products of animal origin for human consumption and indicated that this fact had no bearing on the Panel's analysis. (Panama's response to Panel question No. 46, paras. 141-142).

[1738] Panama's second written submission, para. 244. See also Panama's first written submission, para. 18; response to Panel question No. 157, para. 150.

[1739] See para. 7.553 above.

[1740] See section 7.3.1.3.2.1 above.

7.814. The Panel recalls that, in previous disputes, a finding of inconsistency with Article 5.6 was considered to create a rebuttable presumption of inconsistency with Article 2.2.[1741]

7.815. As noted above, the Panel shares the assessments of the applicable legal standard under Articles 5.6 and 2.2 described in section 7.3.1.3.2.1 in relation to Measure 1 and will proceed with its assessment on this basis.

7.816. The Panel will first assess whether Costa Rica has demonstrated the existence of an alternative measure to Measure 2 that meets the three cumulative requirements under footnote 3 to Article 5.6 of the SPS Agreement. The Panel will then address Costa Rica's consequential claim under Article 2.2 of the Agreement.

7.4.2.5.3.2 Whether Measure 2 is inconsistent with Article 5.6 of the SPS Agreement

The alternative measure proposed by Costa Rica

7.817. Costa Rica proposes an alternative measure to Measure 2 that consists of assessing its sanitary system and its establishments on a documentary basis, subject to subsequent on-site audits being undertaken. This alternative measure, which Panama applied in respect of the establishments in Peru, Mexico and New Zealand, would not imply the suspension of trade.[1742]

7.818. Panama maintains that it did not accord different treatment to the establishments in Peru, Mexico and New Zealand compared with those in Costa Rica, as Costa Rica asserts. Accordingly, in Panama's view, Costa Rica's claim under Article 5.6 of the SPS Agreement should fail, given that it is based exclusively on such difference in treatment.[1743]

7.819. The Panel recalls that the Costa Rican establishments that export products of animal origin for animal consumption (Biomar and Central Veterinaria) are not covered by Measure 2.[1744] Therefore, the Panel does not consider it relevant to include Mexico and the Mexican establishment that exports products for animal consumption in its assessment. Accordingly, the Panel's analysis is limited to assessing the availability of the alternative measure identified by Costa Rica that Panama applied to the establishments in Peru and New Zealand.

Whether the alternative measure is reasonably available

7.820. Costa Rica claims that the alternative measure is reasonably available, as Panama has accepted it in the case of Peru and New Zealand.[1745]

7.821. Costa Rica argues that it is in the same situation as Peru and New Zealand given that: (a) the Costa Rican establishments export products of animal origin for human consumption to Panama; (b) the Costa Rican authorities requested an extension from Panama so that the establishments could continue to export during the approval renewal process, and asked that the renewal process be of a documentary nature, with the possibility of performing the on-site audits at a later date; and (c) the Panamanian authorities considered it necessary to examine the sanitary systems of these

[1741] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; *Russia – Pigs (EU)*, paras. 7.841 and 7.846. See also Appellate Body Report, *Australia – Salmon*, fn 166 (where the Appellate Body stated that "[t]he establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a violation of the necessity requirement of Article 2.2").

[1741] Costa Rica's first written submission, paras. 578-588 (referring to Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth recital; Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fifth recital; and Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47), second recital); second written submission, para. 87.

[1743] Panama's responses to Panel question No. 165, para. 169, and No. 167, para. 172. See also Panama's response to Panel question No. 150, paras. 136-146 (where Panama presents its arguments as to why there is no difference in treatment between the establishments of the Members considered).

[1744] See paras. 7.504-7.506 above.

[1745] Costa Rica's first written submission, para. 589.

countries, as a condition for processing the renewals of the sanitary approvals of the establishments.[1746]

7.822. According to Costa Rica, in the case of Peru and New Zealand, Panama allowed the review of the sanitary system to be carried out in parallel with the process of renewing the sanitary approvals of the establishments, without suspending trade and by means of a documentary review.[1747] Costa Rica asserts that Panama granted an extension to the establishments of these countries while it was processing the renewal of their sanitary approvals on the basis of a documentary review, requiring the authority of the exporting country to coordinate with AUPSA to arrange for the on-site audits to be performed at a later date, including after the expiry of the extension.[1748] In Costa Rica's view, the fact that Panama accepted the process described above for Peru and New Zealand demonstrates that this measure was reasonably available to Panama.[1749]

7.823. Panama has not responded to Costa Rica's arguments that the proposed alternative measure is reasonably available, but it disagrees with some of the latter's factual assertions.

7.824. Panama observes that it applies the same procedures, set forth in paragraph 7 of the *AUPSA Manual for the approval of establishments*, regardless of the origin of the product in question.[1750] Panama asserts that it granted the same treatment to the establishments in Peru and New Zealand as it did to the Costa Rican establishments. Panama argues that (a) on two occasions, in October and December 2019, it extended the approvals of Costa Rican establishments for transitional periods of two and six months, respectively (as it had done for the establishments in Peru and New Zealand), and (b) it has extended the authorizations of Central Veterinaria and Biomar that export pet food.[1751] According to Panama, the extensions granted to the establishments in Peru and New Zealand expired on 28 October 2020 and 30 January 2021, respectively.[1752]

7.825. The Panel notes that the main disagreement between the parties as to whether the alternative measure is reasonably available or not, concerns the treatment that Panama granted the establishments in Peru and New Zealand on the one hand, and those in Costa Rica on the other. The Panel recalls that, when assessing the consistency of Measure 2 with Article 2.3, it concluded that Panama had accorded discriminatory treatment to the Costa Rican establishments compared with the establishments in Peru and New Zealand.[1753] This finding informs the analysis below, as it is relevant for determining whether the alternative measure proposed by Costa Rica was reasonably available to Panama.

7.826. The exhibits containing the resolutions through which extensions were granted to the establishments in Peru and New Zealand indicate that:

a. Regarding *the extensions*: in July 2020, the extension of the expired sanitary approvals of the establishments in Peru and New Zealand was approved. In the case of Peru, the extension was for 90 days for certain plants handling hydrobiological and fishery products

[1746] Costa Rica's first written submission, paras. 592-593. See also Costa Rica's response to Panel question No. 22, paras. 2.91-2.109 (where it details what it considers to be the similarities between its establishments and those in Peru and New Zealand).

[1747] Costa Rica's first written submission, para. 593.

[1748] Costa Rica's first written submission, paras. 588-589. See also Costa Rica's second written submission, para. 91.

[1749] Costa Rica's first written submission, para. 591. See also Costa Rica's second written submission, para. 88.

[1750] Panama's response to Panel question No. 22, para. 88 (referring to AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23)).

[1751] Panama's response to Panel question No. 22, paras. 91-92 (referring to Note AUPSA-AG-399-2019 (Exhibit CRI-35); AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2); and AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217)). The Panel includes this mention of Biomar and Central Veterinaria, even though they are not covered by Measure 2, as it considers that the extensions that Panama granted to these establishments are relevant for its analysis of whether the alternative measure proposed by Costa Rica was reasonably available to Panama. See para. 7.828 below.

[1752] Panama's response to Panel question No. 35, para. 115 (referring to Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46); Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47); and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48)).

[1753] See section 7.4.2.4.2.2 above.

for human consumption.[1754] In the case of New Zealand, the extension was for six months for dairy product establishments.[1755]

b. Regarding the *sanitary status of the country*: the sanitary authorities of the exporting country are required to certify the country's sanitary status by documentary means.[1756]

c. Regarding the *sanitary status of the establishments*: the sanitary authorities of the exporting country shall certify, by documentary means, the sanitary status of the establishments (with respect to the previous three years), and confirm, by documentary means, that the plants substantially comply with Panama's requirements.[1757]

d. Regarding the *on-site audits*: AUPSA "shall establish a schedule" for the audit prior to the expiry of the extension.[1758]

e. Regarding the *products*: the three resolutions refer to products of animal origin for human consumption.[1759]

7.827. In the Panel's view, this evidence demonstrates that Panama granted extensions for the sanitary approvals of establishments in Peru and New Zealand and allowed the sanitary status of the country and establishments to be certified by documentary means. Furthermore, while these extensions were being processed, an on-site audit was planned, implying that an audit had not been performed when the extension was granted. In addition, the measure has been used for products that fall under the category of products of animal origin for human consumption. In this regard, the information in the record indicates that the measure identified as an alternative by Costa Rica has been used by Panama.

7.828. The Panel observes that permitting imports by extending the sanitary approvals of the 16 Costa Rican establishments forms part of the treatment that Costa Rica proposes as an alternative measure.[1760] Although Panama does not permit imports of the products of the 16 Costa Rican establishments covered by Measure 2, Panama submits that it accords the same treatment to the Costa Rican establishments as it did to those in Peru and New Zealand.[1761] As indicated in the Panel's assessment under Article 2.3 of the SPS Agreement, in July 2020, Panama permitted imports from the establishments in Peru and New Zealand by virtue of extending their sanitary approvals, and prevented imports from the establishments in Costa Rica as a consequence of rejecting the request for extensions to be granted for their sanitary approvals.

7.829. The extension that Panama granted to certain Costa Rican establishments in December 2019 contains the same language as the aforementioned Resolutions concerning the Peruvian and New Zealand establishments.[1762] However, this extension expired in June 2020, when the sanitary approvals of the other Costa Rican establishments also expired.

7.830. For the 16 Costa Rican establishments, Panama has not granted any extensions since the expiry of their sanitary approvals on 30 June 2020. As explained above, in July 2020, Panama reported that it required that the Costa Rican plants be subject to "a new procedure with a view to their approval", once the processes for "the evaluation and recognition of Costa Rica's sanitary

[1754] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), Articles 1-2.
[1755] Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), Articles 1 and 4.
[1755] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth and fifth recital; Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47), second and third recital; and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth and sixth recital.
[1757] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth and fifth recital; Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47), second and third recital; and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), fifth and sixth recital.
[1758] Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), Article 4; Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47), Article 4; and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), Article 4.
[1759] See Table 10 - Establishments approved by AUPSA and products authorized for import into Panama, above.
[1760] Costa Rica's first written submission, paras. 598-600.
[1761] Panama's response to Panel question No. 165, para. 169.
[1761] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).

system and the inspections and audits at origin" could be agreed on.[1763] In January 2020, Panama requested up-to-date information from Costa Rica on its sanitary and safety conditions.[1764] In February 2021, Panama announced the "formal initiation of the animal health evaluation procedure for Costa Rica" in writing, requested additional information from Costa Rica, and reiterated the necessity of performing on-site audits.[1765]

7.831. The foregoing means that Panama initiated a documentary assessment of the country, as provided for in the *AUPSA Manual for the approval of establishments*[1766], but the Costa Rican establishments would be unable to export until the sanitary evaluation procedure in question had finished and the on-site audits had been performed. Panama submits that, in the case of each extension, Panama had planned to perform an on-site audit.[1767] However, there is nothing in the record to show that Panama had conducted such audits for the establishments in Peru or New Zealand when granting the respective extensions. Therefore, the measure applied to the establishments in Peru and New Zealand in July 2020, which allows for exports through the extension of the validity of sanitary approvals, the documentary assessment of establishments and the postponement of on-site audits, has not been applied to the Costa Rican establishments and constitutes an alternative measure.

7.832. In previous disputes, it has been considered that the existing use of a measure by an importing Member, in the same or a different context, implies that this measure is reasonably available to that Member.[1768] The Panel observes that Panama considers that the panel's approach in *Korea – Radionuclides* should be treated with caution, as it was not based on a substantive assessment of the measure at issue and the alternative measure.[1769] According to Panama, a technically and economically feasible alternative in one context might not be so in different contexts. Panama adds that the two reports referred to by the panel in *Korea – Radionuclides* do not support its approach either. Panama asserts that, in *Japan – Apples (Article 21.5 – US)*, the paragraph referred to mentions the trade-restrictive nature of the proposed alternative, and the reasoning was not based on whether this alternative was in use at the time. Regarding *India – Agricultural Products*, Panama asserts that the panel did not reach the conclusion that the alternative was feasible simply on account of it being in use, but instead performed a comprehensive analysis of the proposed alternative compared to the measure at issue.[1770]

7.833. The Panel notes that, in *Korea – Radionuclides*, the panel considered that it had before it an alternative measure that was applied to every consignment of Japanese food products that crossed Korea's border, and the respondent had not denied that it was capable of applying this measure.[1771] In the dispute *Japan – Apples (Article 21.5 – US)*, contrary to Panama's assertion, the application of the measure to all exports of the product in question also had a bearing on the panel's finding that the alternative measure was reasonably available taking into account technical and economic feasibility.[1772] The panel considered that the complainant had demonstrated that its controls could

[1763] Note AUPSA-AG-0229-2020 (Exhibit CRI-45). In June and July 2020, Costa Rica requested the extension of the sanitary approval of the 16 Costa Rican establishments and the postponement of the audit at origin until circumstances permitted. (See Memorandum SENASA-DG-0721-2020 (Exhibit CRI-43); Memorandum DM-COR-CAE-0330-2020 (Exhibit CRI-44)).

[1764] Note AUPSA-AG-001-2020 (Exhibit CRI-38).

[1765] Note AUPSA-AG-100-2021 (Exhibit CRI-57). Panama has attached a questionnaire for the animal health evaluation of a country to that communication. (Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268)).

[1766] See AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), section VII, para. 7 (where it is noted that AUPSA can request relevant information from the competent authority of the exporting country and/or from the interested party).

[1767] Panama's comments on Costa Rica's response to Panel question No. 105, para. 26.

[1768] Panel Report, *Korea – Radionuclides*, para. 7.144 (quoting Panel Report, *India – Agricultural Products*, paras. 7.541-7.542). See also Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.1903-7.1904 (where the respondent had adopted a measure that was essentially the same as the alternative measure).

[1769] Panama's response to Panel question No. 105, para. 20 (referring to Panel Report, *Korea – Radionuclides*, paras. 7.145-7.149); comments on Costa Rica's response to Panel question No. 105, para. 22.

[1770] Panama's response to Panel question No. 105, paras. 20-22.

[1771] Panel Report, *Korea – Radionuclides*, para. 7.149.

[1772] Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.169 (where it is stated that "[the alternative measure] is undeniably 'reasonably available taking into account technical and economic feasibility' since [it is] already applied by the United States under the US Apple Export Act for all exports abroad").

provide sufficient guarantees, and the respondent had failed to demonstrate otherwise.[1773] Similarly, in *India – Agricultural Products*, the panel considered that there was no support for the respondent's statement that the measure already applied in various different contexts could not be applied in the complainant's case as it carried higher or different risks.[1774,1775] Therefore, the Panel sees no reason not to take into consideration the direction of the panel in *Korea – Radionuclides* concerning the use of a measure by the importing country and its implications when analysing the availability of an alternative measure to that Member.

7.834. In the light of the foregoing, the Panel notes that Panama has used this measure in relation to imports of products of animal origin for human consumption from other Members, and even for the same establishments in Costa Rica in the past. In addition, Panama has not contested that this measure was reasonably available. Accordingly, the Panel concludes that Costa Rica has demonstrated that the alternative measure is reasonably available to Panama taking into account technical and economic feasibility, within the meaning of footnote 3 to Article 5.6.

7.835. The Panel will now assess whether the alternative measure identified by Costa Rica achieves Panama's ALOP.

Whether the alternative measure achieves Panama's ALOP

7.836. Under the legal standard described above[1776], the Panel will first identify Panama's ALOP and subsequently compare it with the level of protection that would be achieved through the alternative measure proposed by Costa Rica.

Panama's ALOP

7.837. Panama notes that its ALOP for animal health measures is "the prevention, […] control, and eradication of animal diseases and/or pests, in order to protect the country's animal heritage and contribute to public health and environmental protection". Panama indicates that this ALOP is set out in Article 1 of Law No. 23 of 1997. According to Panama, Article 12 of Executive Decree No. 49 of 2001 implements this highly restrictive ALOP by providing that the Panamanian sanitary authority shall issue an opinion on sanitary eligibility "if the animal health evaluation does not identify any animal health hazards or risks".[1777] Panama also states that Article 5.1 of Decree-Law No. 11 of 2006 establishes that Panama's ALOP for food safety is "[t]o prevent the introduction and establishment of pests and diseases that are transmissible through food and might affect human health and the country's animals and plants, using strictly scientific-technical criteria".[1778]

7.838. Costa Rica acknowledges that Panama provided its ALOP for dairy and meat products.[1779]

7.839. The Panel recalls that an ALOP could be understood as an "objective" that the SPS measure seeks to attain.[1780] Moreover, Members have the "prerogative" to determine their ALOP, provided that this can be distinguished with sufficient precision as to enable the application of the relevant provisions of the SPS Agreement, for example, based on documents setting out health protection

[1773] Panel Report, *Japan – Apples (Article 21.5 – US)*, paras. 8.177-8.179.
[1774] Panel Report, *India – Agricultural Products*, paras. 7.541-7.542.
[1775] Panama also asserts that, in *US – Gambling*, the Appellate Body held that "while a panel's analysis of alternatives can start with the available measures, its investigation should not end there". (Panama's comments on Costa Rica's response to Panel question No. 105, para. 22). The Panel observes that, in the paragraph referred to, the Appellate Body merely noted that the panel in that dispute had considered both available alternatives and alternatives not currently in place that the complainant had identified as alternative measures. (Appellate Body Report, *US – Gambling*, para. 320).
[1776] See paras. 7.333 and 7.336 above.
[1777] Panama's response to Panel question No. 95, para. 268 (quoting Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-105); Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24)).
[1778] Panama's response to Panel question No. 166, para. 171 (quoting National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Article 5.1).
[1779] Costa Rica's comments on Panama's response to Panel question No. 163, para. 3.232 (referring to Panama's responses to Panel question No. 95, para. 268, and No. 166, para. 171).
[1780] Appellate Body Reports, *Australia – Salmon*, para. 200; *Korea – Radionuclides*, para. 5.23; *India – Agricultural Products*, para. 5.205; *Australia – Apples*, para. 342; and *Australia – Salmon*, para. 199.

objectives.[1781] The regulations quoted by Panama indicate that the objective of Panama's sanitary requirements is to protect the country's animal heritage and contribute to public health by ensuring the prevention, control, and eradication of animal diseases and/or pests.[1782] In addition, these requirements seek to prevent "the introduction and establishment" of pests and diseases that are transmissible through food, and that might affect human health and the country's animal and plant heritage.[1783] The Panel recalls that the objective of Measure 2 is to check the fulfilment of the sanitary requirements for the importation of dairy and meat products into Panama. Accordingly, the relevant procedures would seek to contribute to this objective.

7.840. The Panel notes that the sanitary protection objective in respect of Measure 2 is expressed in general terms and does not mention specific diseases or pests. Although an ALOP can be described more precisely, it has been considered that, as expressions of a general objective, ALOPs are often set forth in a qualitative and generic manner.[1784]

7.841. According to Panama, its ALOP is "highly restrictive".[1785] The Panel notes that the record contains evidence relating to Measure 2 that allows Panama's protection objectives and, accordingly, its ALOP to be identified. The AUPSA Manuals establishing the procedures for country-level sanitary eligibility and the approval of establishments indicate that the AUPSA's objectives include "[e]nsur[ing] an appropriate level of protection of human health and the country's agricultural and livestock assets, in relation to imported food, taking into account the diversity and quality of supplies".[1786] The *AUPSA Manual on sanitary eligibility* provides a framework for developing and operating a regulatory system for the introduction of food, "with the aim of protecting human life or health and the country's agricultural and livestock assets, as well as facilitating trade in food".[1787] In addition, the communications from Panama's authorities to Costa Rica's authorities refer to the objective of "guarantee[ing] food safety and human, animal and plant health; in order to guarantee an appropriate level of sanitary protection"[1788]; and to ensuring the fulfilment of Panama's sanitary requirements.[1789]

7.842. Compliance with the approval and renewal procedures for the sanitary approvals of establishments is a precondition for importing into Panama. According to Panama, if the renewal procedures are not complete when the approval expires, imports from such establishments will be suspended until these procedures have been completed.[1790] This reflects a high-level protection approach that requires the fulfilment of Panama's sanitary requirements in order to ensure the prevention, control, and eradication of animal diseases and pests, as well as to prevent the introduction and establishment of pests and diseases that are transmissible through food and might affect human health and the country's animal and plant heritage. However, it is not a level of protection entailing zero tolerance to risk because, on the basis of the documents examined, it can be inferred that the sanitary and animal health protection objectives coexist with trade facilitation objectives.

7.843. In the light of the foregoing, the Panel concludes that Panama's relevant ALOP could be formulated as a high level of protection, focused on ensuring the prevention, control, and eradication of animal diseases and pests, as well as preventing the introduction and establishment of pests and diseases that are transmissible through food and might affect human health or the country's animal heritage.

[1781] Appellate Body Report, *India – Agricultural Products*, para. 5.205.
[1782] Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-105), Article 1.
[1783] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Article 5.1.
[1784] Panel Report, *US – Animals*, para. 7.380.
[1785] Panama's response to Panel question No. 95, para. 268.
[1786] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 1; AUPSA, *Manual for the approval of establishments, production chains and/or processing plants* (2013) (Exhibit CRI-23), p. 2.
[1787] AUPSA, *Manual on the sanitary eligibility, phytosanitary recognition and approval of production chains and/or processing plants* (2013) (Exhibit CRI-22), p. 2.
[1788] Note DSA-335-2021 (Exhibit CRI-64).
[1789] Note AUPSA-AG-0229-2020 (Exhibit CRI-45). This objective is also expressed in resolutions granting extensions of sanitary approvals. See e.g. AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2).
[1790] Panama's response to Panel question No. 35, para. 106.

The level of protection achieved by the alternative measure proposed by Costa Rica

7.844. Costa Rica submits that the alternative measure would enable Panama to achieve its ALOP, given that Panama has adopted this measure in respect of establishments in Peru and New Zealand where the prevailing conditions were similar to those in Costa Rica[1791] and which were subject to the same ALOP.[1792]

7.845. Panama confirms that it applies the same ALOP in the case of sanitary measures concerning dairy and meat products from Costa Rica, Peru and New Zealand.[1793] Panama also confirms that its ALOP for imports of dairy and meat products from Costa Rica has not changed as a result of Measure 2.[1794] However, Panama submits that carrying out the renewal procedure through a purely documentary review of the pertinent information would fail to achieve its ALOP[1795] given that it "neither satisfies nor ensures the fulfilment of the requirements" of its sanitary legislation.[1796] Panama does not explain why this would be the case, but focuses on the fact that, despite the extensions, on-site audits were considered a requirement for obtaining further extensions.[1797]

7.846. Costa Rica's argument that the alternative measure would achieve Panama's ALOP for imports of dairy and meat products from Costa Rica is based on a comparison of Costa Rica's conditions on the one hand, and those of Peru and New Zealand on the other.[1798] Costa Rica's comparison of the conditions in these countries implies a comparison of the risk posed by the corresponding imports.

7.847. As mentioned above, the Panel considers that the level of risk is relevant for determining whether a measure would achieve a Member's ALOP.[1799] In this case, if the risk posed by imports from Costa Rica is greater than that posed by imports from Peru and New Zealand, the same measure could not achieve the same ALOP.

7.848. Costa Rica refers to the arguments that it uses in the context of its claim of discrimination under Article 2.3 to maintain that its prevailing conditions are identical or similar to the conditions in those Members.[1800] As mentioned in paragraph 7.726 above, under Article 5.6, Costa Rica refers to identical or similar conditions with regard to Peru and New Zealand in respect of: (a) the validity of the sanitary eligibility; (b) the types of establishments and products in question (products of animal origin for human consumption); (c) the steps taken by the countries to request renewal of the sanitary approvals; (d) the type of extension that should have been granted; and (e) when AUPSA decided to reject or approve the requested extensions.[1801]

7.849. After assessing the evidence concerning these aspects, the Panel concluded with regard to the claim under Article 2.3 that Costa Rica has demonstrated that its prevailing conditions are similar to those in Peru and New Zealand in respect of the risk posed by its imports of products of animal origin for human consumption that are subject to the measure at issue. The similarity in the

[1791] Costa Rica's first written submission, paras. 595-596.
[1792] Costa Rica's second written submission, para. 90. See also ibid. para. 89 (quoting Panama's response to Panel question No. 95, paras. 268-269).
[1793] Panama's response to Panel question No. 95, para. 269.
[1794] Panama's response to Panel question No. 95, para. 268 (quoting Legislative Assembly of Panama, Law No. 23 (1997) (Exhibit PAN-105); Ministry of Agricultural Development, Executive Decree No. 49 (2001) (Exhibit CRI-24)).
[1795] Panama's first written submission, para. 145. Panama refers to this argument in response to Costa Rica's claim under Annex C(1)(a) to the SPS Agreement. However, the Panel considers it relevant to the present analysis as Costa Rica states that the terms of the extension that Panama granted to Peru, Mexico, and New Zealand contradict Panama's assertion that a documentary review would fail to achieve its ALOP. (Costa Rica's response to Panel question No. 97, para. 3.169; second written submission, para. 91).
[1796] Note AUPSA-AG-0229-2020 (Exhibit CRI-45).
[1797] Panama's response to Panel question No. 167, para. 172.
[1798] Costa Rica's first written submission, paras. 595-597.
[1799] See para. 7.388 above. In this regard, the Panel recalls that "one given situation might only represent a small risk for which a lenient sanitary measure will achieve a high level of protection", "whereas another situation might pose very high risks requiring a very strict and different sanitary measure in order to meet that same high level of protection". (Panel Report, *Australia – Salmon*, para. 8.123).
[1800] Costa Rica's first written submission, paras. 614-621 (where Costa Rica develops its arguments regarding Article 2.3). See also section 7.4.2.4.2.1 above.
[1801] Costa Rica's first written submission, paras. 592 and 618; response to Panel question No. 22, paras. 2.91-2.109; and second written submission, para.96(a).

conditions that prevail in these countries indicates that the alternative measure proposed by Costa Rica would achieve Panama's ALOP for imports of products of animal origin for human consumption.

7.850. Accordingly, the Panel concludes that Costa Rica has demonstrated that the alternative measure that it proposes would achieve Panama's ALOP.

Whether the alternative measure is significantly less restrictive to trade

7.851. Costa Rica submits that the alternative measure is significantly less restrictive to trade than Measure 2, as it would enable trade to resume, while Measure 2 is "as trade-restrictive as can be"[1802] given that it is an "import prohibition".[1803] Costa Rica notes that, under the alternative measure, its establishments would have obtained an extension of their sanitary approvals that would have enabled them to continue to export to Panama.[1804] Costa Rica adds that the possibility of performing on-site audits at a later date would ensure that trade is not suspended owing to a lack of time to carry out this part of the procedure.[1805]

7.852. The Panel recalls that Panama's actions under this measure have made it impossible to import Costa Rican dairy and meat products into Panama.[1806]

7.853. As mentioned above, in previous disputes, an alternative measure that imposes import conditions but allows trade has been considered to be significantly less restrictive to trade than a measure that does not allow it, like a prohibition.[1807] Although conducting the procedure in the manner proposed by Costa Rica does not guarantee the final outcome, extending the sanitary approvals of the establishments would ensure that imports are not interrupted during this process.

7.854. Accordingly, the Panel considers that Costa Rica has demonstrated that the alternative measure would be significantly less restrictive to trade than Measure 2.

7.4.2.5.3.3 Conclusion on Article 5.6 of the SPS Agreement

7.855. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the alternative measure to Measure 2 that it proposes meets the three requirements in footnote 3 to Article 5.6, as it is reasonably available taking into account technical and economic feasibility, achieves Panama's ALOP, and is significantly less restrictive to trade.

7.856. Accordingly, the Panel finds that Measure 2 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP.

7.4.2.5.3.4 Whether Measure 2 is inconsistent with Article 2.2 of the SPS Agreement

7.857. The Panel concurs with what was said in previous disputes in that the finding that a measure is more trade-restrictive than required to achieve the Member's ALOP, in breach of Article 5.6, leads to a rebuttable presumption of inconsistency with the obligation under Article 2.2 that SPS measures should only be applied to the extent necessary to protect human, animal or plant life or health.[1808] The Panel considers that this rebuttable presumption arises in the present case because of its finding that Measure 2 is inconsistent with Article 5.6 of the SPS Agreement.[1809] Panama has failed to present arguments to rebut this presumption of inconsistency with Article 2.2.

[1802] Costa Rica's second written submission, para. 92.
[1803] Costa Rica's first written submission, paras. 599-600 (quoting Panel Report, *Brazil – Retreaded Tyres*, para. 7.114); second written submission, para 92.
[1804] Costa Rica's first written submission, paras. 598 and 600; second written submission, para. 92.
[1805] Costa Rica's first written submission, para. 598.
[1806] See para. 7.522 above.
[1807] Panel Reports, *Australia – Salmon*, para. 8.182; *India – Agricultural Products*, paras. 7.590 and 7.595-7.596.
[1808] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; *Russia – Pigs (EU)*, paras. 7.841 and 7.846.
[1809] See para. 7.856 above.

7.858. Accordingly, in the light of its finding that Measure 2 is inconsistent with Article 5.6 of the SPS Agreement, and in the absence of a rebuttal by Panama of the presumption of inconsistency with Article 2.2 of this Agreement, the Panel finds that Measure 2 is inconsistent with Article 2.2 of the SPS Agreement because it does not apply only to the extent necessary to protect human and animal life or health.

7.4.2.5.3.5 Conclusion on Article 2.2 of the SPS Agreement

7.859. In the light of the foregoing, the Panel finds that Measure 2 is inconsistent with Article 2.2 because it does not apply only to the extent necessary to protect human and animal life or health.

7.4.2.6 Claims under Article 7 and Annex B of the SPS Agreement

7.4.2.6.1 Main arguments of the parties

7.4.2.6.1.1 Costa Rica

7.860. In its panel request, Costa Rica claims that all the measures at issue are inconsistent with Article 7 and Annex B(1) of the SPS Agreement, "because Panama failed to comply with its transparency and publication obligations in relation to each of the measures at issue".[1810]

7.861. In its first written submission, Costa Rica submits that Panama acted inconsistently with the obligation under Annex(B)(5)(b), or, alternatively, with that under Annex(B)(6)(a). Costa Rica requests the Panel to find that Panama acted inconsistently with Article 7 as a consequence of the inconsistency with Annex B.[1811]

7.862. Costa Rica argues that its panel request also includes a claim under Article 7 of the SPS Agreement, which "can be applied independently of Annex B".[1812] Costa Rica adds that, in the event that the Panel were to consider that Article 7 can be invoked independently of Annex B, the Panel would have all the elements necessary to "find that Panama failed to notify the prohibitions to the WTO".[1813]

7.4.2.6.1.2 Panama

7.863. Panama notes that Costa Rica's first written submission does not contain any claim under Annex B(1) in respect of Measure 2.[1814]

7.864. Furthermore, Panama submits that Costa Rica's claims under Article 7 and Annex B(5)(b) and Annex B(6)(a) of the SPS Agreement are not within the Panel's terms of reference.[1815]

7.4.2.6.2 Assessment by the Panel

7.865. The Panel recalls that, in its analysis of Costa Rica's claims under Article 7 and Annex B in respect of Measure 1, it has noted that:

a. In its preliminary ruling of 5 April 2023, the Panel found that the claims under Annex B(5)(b) and Annex B(6)(a) of the SPS Agreement fall outside the Panel's terms of reference.[1816]

[1810] Costa Rica's panel request, p. 7. Costa Rica also states that the inconsistency of the measures at issue with Article 7 and Annex B(1) "also gives rise to a violation of Article X:1 of the GATT 1994, since Panama failed to publish laws, regulations and administrative rulings of general application pertaining to requirements, restrictions or prohibitions on imports". Ibid. The Panel recalls that Costa Rica has failed to develop its claim under Article X:1 of the GATT 1994. See Costa Rica's response to Panel question No. 67.

[1811] Costa Rica's first written submission, para. 507.

[1812] Costa Rica's response to Panel question No. 66, paras. 3.25 and 3.28.

[1813] Costa Rica's response to Panel question No. 106, paras. 2.15-2.17.

[1814] Panama's first written submission, para. 33.

[1815] Panama's first written submission, para. 17.

[1815] See para. 7.421 above (referring to the Panel's preliminary ruling of 5 April 2023, para. 5.1(b)).

b. Annex B elaborates on the obligations that must be met under Article 7 and, consequently, Annex B and Article 7 are intertwined and must be read together.[1817]

c. In these proceedings, Costa Rica has not advanced any argument to support its claim concerning the publication of the measures at issue under Article 7 and Annex B(1).[1818]

7.866. Therefore, in the absence of any argumentation by Costa Rica, the Panel considers that Costa Rica has failed to demonstrate that Measure 2 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement in respect of the publication obligations established thereunder.

7.4.2.6.3 Conclusion on Article 7 and Annex B(1) of the SPS Agreement

7.867. In view of the foregoing, the Panel finds that Costa Rica has failed to demonstrate that Measure 2 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement.

7.4.2.7 Claims under Articles 1.1 and 2.1 of the SPS Agreement

7.4.2.7.1 Main arguments of the parties

7.868. Costa Rica claims that Measure 2 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement, as the measure is inconsistent with the provisions of the SPS Agreement. In the light of all the inconsistencies that, according to Costa Rica, it has demonstrated, Costa Rica requests the Panel to find that Panama has, consequently, acted inconsistently with its obligations under Articles 1.1 and 2.1 of the SPS Agreement.[1819]

7.869. Panama submits that Costa Rica was unable to establish its claims under Articles 1.1 and 2.1, as it has failed to demonstrate that Measure 2 is inconsistent with the provisions of the SPS Agreement.[1820]

7.4.2.7.2 Assessment by the Panel

7.870. The Panel recalls the general obligation under Articles 1.1 and 2.1 of the SPS Agreement that any SPS measure must be consistent with the provisions of the Agreement. The Panel also recalls that previous panels found a measure at issue to be inconsistent with Articles 1.1 and 2.1 after finding that measure to be inconsistent with one of the obligations under the SPS Agreement.[1821]

7.871. The Panel has found that Measure 2 is inconsistent with Articles 2.2, 2.3, 5.6, and 8 and Annex C(1)(a) and Annex (C)(1)(c) of the SPS Agreement. Accordingly, the Panel finds that Measure 2 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement.

7.4.3 Claims under the GATT 1994 and the Agreement on Agriculture

7.4.3.1 Main arguments of the parties

7.4.3.1.1 Costa Rica

7.872. Costa Rica claims that Measure 2 is inconsistent with Article I:1 of the GATT 1994. Costa Rica submits that the measure: (a) belongs to the group of "rules and formalities in connection with importation" covered by this Article; (b) provides an advantage to other Members (i.e. Peru, Mexico, and New Zealand); (c) affects like products, as it results in discrimination based exclusively

[1817] See paragraph 7.423 above (referring to Panel Reports, *India – Agricultural Products*, para. 7.741; *Russia – Pigs (EU)*, para. 7.1416).
[1818] See para. 7.424 above.
[1819] Costa Rica's panel request, p. 6; first written submission, paras. 726-729; and second written submission, paras. 171-173.
[1820] Panama's first written submission, para. 443; second written submission, para. 244.
[1821] See para. 7.430 above.

on the origin of the products; and (d) the advantage granted to other Members is not accorded immediately and unconditionally to the products from Costa Rica.[1822]

7.873. Costa Rica also claims that Measure 2 is inconsistent with Article XI:1 of the GATT 1994 because this measure: (a) falls within the broad residual category of "other measures" that may be challenged under Article XI:1 of the GATT 1994; and (b) amounts to an import prohibition, since Panama's decision to suspend imports of dairy and meat products constitutes "a legal ban on the trade or importation of a specified commodity".[1823]

7.874. Furthermore, Costa Rica claims that Measure 2 is inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture. According to Costa Rica, the Agreement on Agriculture is applicable to Measure 2, as dairy and meat products are agricultural products classified under Chapters 2 and 4 of the Harmonized System. Costa Rica submits that a violation of Article XI:1 of the GATT 1994 implies a violation of the obligation not to resort to quantitative import restrictions or similar border measures on agricultural products, set forth in Article 4.2 and footnote 1 of the Agreement on Agriculture.[1824]

7.4.3.1.2 Panama

7.875. Panama submits that Costa Rica "has not established its claims" under Article XI:1 of the GATT 1994 and Article 4.2 and footnote 1 of the Agreement on Agriculture.[1825]

7.4.3.2 Assessment by the Panel

7.876. With respect to the claims under the GATT 1994, the Panel observes that prior panels have recognized that the relationship between the SPS Agreement and the GATT 1994 could lead to circular reasoning that does not contribute to securing a positive resolution to the dispute. These panels have considered that any findings of inconsistency with GATT 1994 provisions would also require an examination of whether the measure was justified under Article XX(b) of the GATT 1994, which refers to measures necessary to protect human, animal or plant life or health.[1826] The Panel agrees with this reasoning and recalls that the SPS Agreement elaborates on Article XX(b) of the GATT 1994.[1827]

7.877. The Panel also recalls that it has found Measure 2 to be inconsistent with Articles 2.2, 2.3, 5.6, and 8, and Annex C(1)(a) and Annex C(1)(c) of the SPS Agreement.[1828] These findings relate both to the delays and the necessity of information requirements for the purposes of the relevant procedures, and to the discriminatory nature, necessity and degree of trade-restrictiveness of Measure 2.

7.878. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[1829] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the GATT 1994, and decides to exercise judicial economy in respect of these claims.[1830]

[1822] Costa Rica's first written submission, paras. 1128-1136; second written submission, paras. 567-573.
[1823] Costa Rica's first written submission, paras. 1237-1241; second written submission, paras. 574-577.
[1824] Costa Rica's first written submission, paras. 1242-1246; second written submission, paras. 578-582.
[1825] Panama's second written submission, para. 244. See also Panama's first written submission, para. 442.
[1826] Panel Reports, *Australia – Salmon*, para. 7.19; *US – Poultry (China)*, para. 7.481; *US – Animals*, para. 7.730; and *Costa Rica – Avocados (Mexico)*, para. 7.2318.
[1827] See fn 953 above.
[1828] See paras. 7.645 (with respect to Annex C(1)(a)), 7.690 (with respect to Annex C(1)(c)), 7.695 (with respect to Article 8), 7.797 (with respect to Article 2.3), 7.856 (with respect to Article 5.6) and 7.858 (with respect to Article 2.2) above.
[1829] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.
[1830] In previous disputes in which measures were challenged under the SPS Agreement and the GATT 1994, panels applied the principle of judicial economy in respect of the claims under the GATT 1994 after having found inconsistencies with the provisions of the SPS Agreement. See e.g. Panel Reports, *EC – Hormones (Canada)*, para. 8.275; *EC – Hormones (US)*, para. 8.272; *Australia – Salmon*, para. 8.185; *Japan – Apples*, para. 8.328; *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 6.3429;

7.879. With respect to the claims under the Agreement on Agriculture, the Panel notes that, according to Costa Rica, the inconsistency of Measure 2 with Article 4.2 and footnote 1 of the Agreement on Agriculture stems from its inconsistency with Article XI:1 of the GATT 1994. The Panel recalls that it has decided to exercise judicial economy with respect to Costa Rica's claim under the GATT 1994. Furthermore, the Panel has addressed the issue of the trade-restrictiveness of Measure 2 in relation to Article 5.6 of the SPS Agreement. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[1831] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the Agreement on Agriculture, and decides to exercise judicial economy in respect of these claims.[1832]

7.5 Measure concerning the importation of pineapples (Measure 3)

7.880. The Panel will now examine Costa Rica's claims in respect of Measure 3. As indicated in the section on the order of analysis, the Panel will begin its analysis by examining Costa Rica's claims under the SPS Agreement. First, the Panel will examine the applicability of that Agreement to Measure 3 and, in the event that it is applicable, will continue with its analysis of the claims under the relevant provisions of the SPS Agreement. If necessary, the Panel will subsequently address the claims under the GATT 1994 and the Agreement on Agriculture.

7.5.1 Claims under the SPS Agreement

7.5.1.1 Whether Measure 3 is an SPS measure within the scope of the SPS Agreement

7.5.1.1.1 Main arguments of the parties

7.5.1.1.1.1 Costa Rica

7.881. Costa Rica claims that Measure 3 is within the scope of the SPS Agreement because it is an SPS measure within the meaning of Annex A(1)(a) to the Agreement and it directly affects international trade, within the meaning of Article 1.1.[1833] Costa Rica submits that the apparent objective of Measure 3 is to protect plant life or health in Panama from the risks arising from the introduction of the pink mealybug pest.[1834] Costa Rica also asserts that Measure 3 affects trade in the most direct way possible by prohibiting the entry of fresh pineapples from Costa Rica into the Panamanian market.[1835]

7.5.1.1.1.2 Panama

7.882. Panama does not dispute that Measure 3 is an SPS measure in accordance with the definition in Annex A(1) and Article 1.1 of the SPS Agreement, to which the SPS Agreement applies.

India – Agricultural Products, para. 7.803; *US – Animals*, paras. 7.731-7.732; and *Costa Rica – Avocados (Mexico)*, para. 7.2319.

[1831] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[1832] The panel in *Japan – Apples*, in which measures were challenged under the SPS Agreement and the Agreement on Agriculture, applied the principle of judicial economy in respect of the claims under the Agreement on Agriculture after having found inconsistencies with the provisions of the SPS Agreement. (See Panel Report, *Japan – Apples*, para. 8.332). The panel in *US – Poultry (China)*, in which measures were challenged under the SPS Agreement, the GATT 1994 and the Agreement on Agriculture, applied the principle of judicial economy in respect of the claims under the Agreement on Agriculture after having found inconsistencies with the provisions of the SPS Agreement and the GATT 1994. In particular, that panel noted that it had resolved the aspects of the dispute related to the "restrictions". (See Panel Report, *US – Poultry (China)*, paras. 7.69 and 7.485-7.487).

[1833] Costa Rica's first written submission, paras. 737-738.

[1834] Costa Rica's first written submission, para. 737.

[1835] Costa Rica's first written submission, para. 738.

7.5.1.1.2 Assessment by the Panel

7.5.1.1.2.1 Relevant legal standard

7.883. The Panel will now examine whether, in accordance with the legal standard described in section 7.3.1.1.2.1 above, the SPS Agreement is applicable to Measure 3. In particular, the Panel will consider whether, as provided for in Articles 1.1 and 1.2 of that Agreement, Measure 3: (a) constitutes an SPS measure in accordance with the definition given in Annex A to the SPS Agreement; and (b) may, directly or indirectly, affect international trade.

7.5.1.1.2.2 Whether Measure 3 constitutes an SPS measure within the meaning of Annex A(1) to the SPS Agreement

7.884. As mentioned in the descriptive part, Measure 3 inactivates the resolution containing Panama's PIR for Costa Rican pineapple.[1836] Taking into account the legal standard described above, the task of this Panel is to determine whether Measure 3 has been applied to achieve at least one of the objectives listed in paragraphs (a)-(d) of Annex A(1), which are set out above.[1837] In this respect, the Panel notes that, in Note AUPSA-AG-032-2019, whereby Panama informed Costa Rica of Measure 3, Panama stated that measure was a "preventive measure".[1838] The Note indicates that the measure would be maintained until Costa Rica provided "further information … on the phytosanitary status of pineapple production areas, in reference to the pink mealybug pest ... and other pests indicating their … status" at that time.[1839]

7.885. Note AUPSA-AG-032-2019 identifies the pest of concern, namely the pink mealybug. It follows from the Note that Panama associates the risk of this pest with pineapple imports from Costa Rica, given that Panama inactivated the resolution containing the PIR for pineapple from Costa Rica after verifying its phytosanitary status in relation to imports of that product.[1840] In its response to this Note, the SFE of Costa Rica confirms that it understands that the measure is the result of an assessment that determined a risk consisting of the possible presence of pink mealybug in Costa Rican pineapples.[1841] In this regard, the Panel recalls that the pink mealybug is a highly polyphagous insect that affects a wide variety of plants[1842], including pineapple.[1843]

7.886. In the Panel's view, the notification of Measure 3 to Costa Rica indicates that the measure is applied because of the risk posed, according to Panama, by Costa Rican pineapples of the pink mealybug entering Panama.

7.887. Accordingly, the Panel considers that the objective of Measure 3 relates to the objective of "protect[ing] … plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests", set out in Annex (A)(1)(a) to the SPS Agreement.

7.888. With regard to the type of measure, the Panel considers that Measure 3, which consists of inactivating the resolution containing the PIR for Costa Rican pineapple, makes it impossible to import this product. Therefore, in the Panel's view, Measure 3 could qualify as a requirement for the purposes of Annex A(1).[1844] Moreover, as indicated above, even if it is not expressly included in the list of measures in Annex A(1), a measure may be considered an SPS measure if it is applied to achieve one of the objectives listed in that provision. Measure 3 meets this requirement and,

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[1836] See section 2.1.4.1 above.

[1837] See para. 7.62 above. See also Appellate Body Report, *Australia – Apples*, para. 172.

[1838] See para. 2.16 above.

[1839] Note AUPSA-AG-032-2019 (Exhibit CRI-65).

[1840] In Note AUPSA-AG-032-2019, AUPSA indicated that, based on its risk assessment, "the phytosanitary status of imports of fresh pineapples (*Ananas comosus*), originating in Costa Rica, [had been verified,] which finds the presence of the pest, the pink hibiscus mealybug (*Maconellicoccus hirsutus*)". See Note AUPSA-AG-032-2019 (Exhibit CRI-65).

[1841] Memorandum DSFE-083-2019 (Exhibit CRI-78).

[1842] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 3. The parties do not disagree over the general characteristics of the pink mealybug, including its hosts. See Costa Rica's first written submission, paras. 107 and 866.

[1843] See Hodgson and Łagowska (2011) (Exhibit PAN-53). See also CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p.19; Panel on Plant Health, "Scientific opinion on the pest categorisation of *Maconellicoccus hirsutus*" (2022) (Exhibit PAN-48), p. 24.

[1844] See fn 310 above.

therefore, may be considered an SPS measure within the meaning of Annex A(1) to the SPS Agreement.

7.5.1.1.2.3 Whether Measure 3 may, directly or indirectly, affect international trade

7.889. The Panel considers that, given the nature of the measure, and as explained above in relation to Measure 1[1845], Measure 3 directly affects international trade by making it impossible to import Costa Rican pineapples into Panama as a result of the inactivation of the resolution containing the relevant PIR.

7.5.1.1.3 Conclusion on the applicability of the SPS Agreement to Measure 3

7.890. Having determined that Measure 3 constitutes an SPS measure within the meaning of Annex A(1)(a) to the SPS Agreement and that it directly affects international trade within the meaning of Article 1.1 of the Agreement, the Panel finds that the SPS Agreement does apply to this measure.

7.891. Accordingly, the Panel will examine Costa Rica's claims regarding the scientific basis of the measure under Articles 5.1, 5.2, 5.3, 2.2, and 5.7 of the SPS Agreement.

7.5.1.2 Claims under Articles 5.1, 5.2, 5.3, 2.2, and 5.7 of the SPS Agreement

7.892. Costa Rica asserts that Measure 3 is inconsistent with Articles 5.1, 5.2, and 5.3 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health. Costa Rica claims that, consequently, Measure 3 is also inconsistent with Article 2.2 of the SPS Agreement, given that it is not based on scientific principles and is maintained without sufficient scientific evidence.[1846] Moreover, Costa Rica considers that Measure 3 is not covered by the exemption provided for under Article 5.7 of the SPS Agreement because it does not meet the requirements of this provision.[1847] Costa Rica adds that Panama has not rebutted its *prima facie* case of the inapplicability of Article 5.7 of the SPS Agreement, nor has it met its burden of proving that all the requirements of this provision have been met.[1848]

7.893. Panama, for its part, asserts that Costa Rica has failed to establish a *prima facie* case that Panama does not meet the four requirements set out in Article 5.7 of the SPS Agreement.[1849] Panama requests the Panel to conclude that Measure 3 is a provisional measure covered by Article 5.7 and that, consequently, Panama has not acted inconsistently with Articles 2.2, 5.1, 5.2, and 5.3 of the SPS Agreement.[1850]

7.894. According to the allocation of the burden of proof under Article 5.7 set forth in paragraph 7.121 above, the Panel will first examine whether Measure 3 qualifies as a provisional measure within the meaning of Article 5.7 of the SPS Agreement. Depending on its findings with respect to that issue, the Panel will decide whether it is necessary to address Costa Rica's claims under Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement. In this regard, the Panel recalls that Article 5.7 has been considered a qualified exemption from the obligation under Article 2.2 to not maintain an SPS measure without sufficient scientific evidence and, by extension, from those under Article 5.1. Accordingly, in the event that Measure 3 were covered by the exemption under Article 5.7, the obligations under Articles 2.2, 5.1, 5.2, and 5.3 would not be applicable.[1851]

[1845] See para. 7.73 above.
[1846] Costa Rica's first written submission, para. 740.
[1847] Costa Rica's first written submission, paras. 762 and 1250(a); second written submission, para. 585.
[1848] Costa Rica's second written submission, para. 192.
[1849] Panama's first written submission, para. 280.
[1850] Panama's first written submission, paras. 166 and 435-436.
[1851] Articles 5.2 and 5.3 list a number of factors that should be taken into account in the assessment of risks provided for in Article 5.1. Therefore, insofar as the obligations under Article 5.1 are not applicable owing to the exemption under Article 5.7, the obligations under Articles 5.2 and 5.3, in respect of the assessment of risks provided for in Article 5.1, would not be applicable either.

7.5.1.2.1 Whether Measure 3 is an SPS measure covered by Article 5.7 of the SPS Agreement

7.5.1.2.1.1 Main arguments of the parties

Costa Rica

7.895. Costa Rica claims that Panama cannot justify Measure 3 under Article 5.7 given that it does not comply with the four cumulative requirements of this provision.[1852]

7.896. In respect of the *first requirement* under Article 5.7, Costa Rica submits that Panama has failed to demonstrate that it adopted Measure 3 in a situation of insufficient relevant scientific evidence that prevented it from performing an assessment of the risk in question.[1853] Costa Rica asserts that, when Panama suspended imports of Costa Rican pineapples in January 2019, Panama had all the necessary information to conduct an assessment of the risk of entry, establishment or spread of the pink mealybug through imports of fresh pineapples from Costa Rica, namely: (a) scientific information on the pink mealybug pest (morphology, symptoms, detection, reproductive system, survival conditions, natural enemies, control methods, etc.); and (b) information on Costa Rica's phytosanitary status in respect of that pest.[1854]

7.897. In respect of the *second requirement* of Article 5.7, Costa Rica submits that Measure 3 fails to meet this requirement because it is not based on the pertinent information available to Panama at the time the measure was adopted in January 2019.[1855] Costa Rica asserts that the following pertinent information was available to Panama when it adopted Measure 3:

a. information on the pink mealybug pest;

b. specific information on the phytosanitary status of the pink mealybug in Costa Rica indicating that: (i) it is a quarantine pest in Costa Rica, under official control, the presence of which has been reported in only one area and solely on hibiscus hosts, not on pineapple[1856]; (ii) there have been no reported interceptions of pink mealybug in pineapple shipments from Costa Rica; and (iii) pineapple imports from Costa Rica to Panama continued as usual[1857];

c. ISPM 2, "Framework for pest risk analysis", and ISPM 20, "Guidelines for a phytosanitary import regulatory system"[1858]; and

d. measures applied by Peru, the European Union and Panama itself to avocado and pineapple imports from Costa Rica, Colombia and the United States.[1859]

7.898. Costa Rica asserts that there is no rational and objective relationship between Measure 3 and the pertinent information available to Panama at the time the measure was adopted.[1860]

[1852] Costa Rica's first written submission, paras. 762 and 767.
[1853] Costa Rica's second written submission, para. 193.
[1854] Costa Rica's second written submission, para. 194. See also Costa Rica's first written submission, paras. 769, 775, and 778; opening statement at the first meeting of the Panel, para. 45.
[1855] Costa Rica's first written submission, paras. 780 and 792; second written submission, para. 231.
[1856] Costa Rica's first written submission, para. 781 (quoting Memorandum DSFE-261-2014 (Exhibit CRI-68); Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69)); second written submission, para. 218.
[1857] Costa Rica's first written submission, para. 781 (referring to INEC, Pineapple imports into Panama (2010-2020) (Exhibit CRI-77)).
[1858] Costa Rica's first written submission, para. 783 (quoting IPPC, ISPM 2 (Exhibit CRI-101); IPPC, ISPM 20 (Exhibit CRI-161)); second written submission, paras. 221-223.
[1859] Costa Rica's first written submission, paras. 784-789 (quoting Directorate Resolution No. 0042-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh avocados from Colombia (Exhibit CRI-163); Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164)); second written submission, paras. 224-231.
[1860] Costa Rica's first written submission, para. 781. See also Costa Rica's second written submission, para. 219.

7.899. Costa Rica submits that Panama did not adopt Measure 3 on the basis of the specific information on the status of the pink mealybug in Costa Rica and the long-standing trade in fresh pineapple with Costa Rica because that information indicated "the absence of any risk in respect of fresh pineapple from Costa Rica as a pathway for the introduction of the pink mealybug into Panamanian territory".[1861] Furthermore, Costa Rica asserts that Panama ignored IPCC standards and information from the measures applied by other Members and by Panama itself, so that information did not form the basis for the adoption of Measure 3 either.[1862]

7.900. In respect of the *third requirement* of Article 5.7, Costa Rica claims that Panama failed to meet this requirement because it did not seek to obtain the additional information necessary for a more objective assessment of risk.[1863] Costa Rica notes that Panama merely asked for "further information … on the phytosanitary status of pineapple production areas, in reference to the pink mealybug pest … and other pests indicating their current status", without specifying what information it required, the pests it was referring to[1864], or the insufficiencies in the relevant scientific evidence.[1865] Costa Rica explains that, faced with Panama's vague information request, it provided the information that it deemed relevant in order to allow trade to resume[1866], and showed its willingness to provide additional information.[1867] Costa Rica asserts that Panama did not inform it that it had not provided further information on the pink mealybug until two years after the closure of the market.[1868] Costa Rica indicates that it provided the information requested by Panama on 28 April 2021, despite considering it excessive and unnecessary, as well as additional information on the specific surveillance of pineapple producing areas three months later, on 23 July 2021.[1869]

7.901. Regarding the *fourth requirement* of Article 5.7, Costa Rica submits that Panama has not met this requirement to review the measure within a reasonable period of time because, as at the date of the establishment of the Panel, on 27 September 2021, Panama had not reviewed the measure despite having the information provided by Costa Rica since February 2019.[1870] In Costa Rica's view, the delay in reviewing Measure 3 is unjustified, as Panama had all the information that it needed for that purpose and there is no reason that justifies its inaction.[1871]

Panama

7.902. Panama claims that Costa Rica has failed to establish a *prima facie* case that Measure 3 is inconsistent with Article 5.7.[1872]

7.903. Regarding the *first requirement* of Article 5.7, Panama submits that Costa Rica has not demonstrated that the scientific evidence was sufficient for an assessment of the risk in question at the time Measure 3 was adopted.[1873] Panama also notes that the general information on the pink mealybug and Costa Rica's report on the status of the pest was relevant information but insufficient

[1861] Costa Rica's first written submission, para. 781.
[1862] Costa Rica's first written submission, paras. 783 and 789.
[1863] Costa Rica's first written submission, paras. 794 and 810; second written submission, para. 232.
[1864] Costa Rica's first written submission, para. 795 (quoting Note AUPSA-AG-032-2019 (Exhibit CRI-65)).
[1865] Costa Rica's first written submission, para. 795 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679); second written submission, para. 234.
[1866] Costa Rica's first written submission, para. 797.
[1867] Costa Rica's first written submission, para. 798 (quoting Memorandum DSFE-083-2019 (Exhibit CRI-78)).
[1868] Costa Rica's first written submission, para. 803 (quoting Note DNSV-0112-2021-OIAR (Exhibit CRI-85), para 2).
[1869] Costa Rica's first written submission, paras. 806-808 (quoting Memorandum DSFE-0254-2021 (Exhibit CRI-90); and referring to SFE, *Information required to assess the risks associated with importing pineapples from Costa Rica into Panama* (2021) (Exhibit CRI-91), Memorandum DSFE-0497-2021 (Exhibit CRI-92); and the pink mealybug specific surveillance report (Exhibit CRI-93)); second written submission, paras. 242 and 243. See also Costa Rica's second written submission, para. 240; response to Panel question No. 81, paras. 3.122-3.123 (quoting Panel Report, *Russia – Pigs (EU)*, paras. 7.618 and 7.705).
[1870] Costa Rica's first written submission, para. 812; second written submission, para. 255.
[1871] Costa Rica's first written submission, para. 816; second written submission, paras. 246 and 250.
[1872] Panama's first written submission, para. 249.
[1873] Panama's first written submission, para. 291.

for an assessment of the risk of entry, establishment or spread of the pink mealybug through fresh pineapple imports from Costa Rica.[1874]

7.904. Panama asserts that, to perform an assessment of this risk, its authorities "required, at least, technical evidence relating to the phytosanitary status of pineapple production areas in Costa Rica with reference to M. hirsutus; information on the surveillance and specific phytosanitary control of the pest in production areas; survey procedures; and current mitigation or risk management strategies".[1875] Panama adds that it therefore requested "further information … on the phytosanitary status of pineapple production areas, in reference to the pink mealybug pest (*Maconellicoccus hirsutus*) and other pests indicating their current status".[1876]

7.905. Panama asserts that it decided to exercise caution by temporarily suspending imports of pineapples from Costa Rica owing to: (a) the discovery in 2018 of a publication from 2011 indicating that the pink mealybug pest had been identified on pineapple in Fiji, which called "into question its previous conclusions on the risk of transmission of *M. hirsutus* through pineapples"; and (b) Costa Rica's notification that the pink mealybug was present in its territory.[1877]

7.906. In respect of the *second requirement* of Article 5.7, Panama asserts that Measure 3 is based on the following available pertinent information:

a. the fact that pineapples are a confirmed host of the pest, as indicated in the 2011 publication, of which Panama became aware in 2018;

b. the presence of the pink mealybug pest in Costa Rica; and

c. the lack of further technical data on the phytosanitary status of pineapple production areas in Costa Rica with reference to the pink mealybug pest, which would allow the risk of this pest spreading further in pineapples in Costa Rica to be assessed.[1878]

7.907. Panama claims that there is a rational and objective relationship between this information and Measure 3, hence the latter should be deemed to have been adopted on the basis of that information.[1879]

7.908. In respect of the information identified by Costa Rica, Panama submits that the specific information on the status of the pink mealybug in Costa Rica and on the long-standing trade in fresh pineapple with Costa Rica between 2014 and 2019 does not demonstrate the absence of any phytosanitary risk, as Costa Rica claims. According to Panama, Costa Rica's notifications in 2014 confirm the presence of the pink mealybug, a polyphagous pest that, as noted in the 2011 scientific publication, is a potential invasive pest of pineapple.[1880] Panama adds that the fact that the pest was not intercepted in pineapple shipments from Costa Rica between 2014 and 2019 does not constitute pertinent information that proves the absence of any phytosanitary risk because if it were necessary to wait until the pest were intercepted in a shipment of Costa Rican pineapples before adopting a provisional measure, the right to take precautionary action under Article 5.7 would be undermined.[1881]

7.909. Panama does not consider ISPM 2 or ISPM 20 to be pertinent either because they do not say anything about the phytosanitary risk in question[1882], and it asserts that, even if they were pertinent, they would not support Costa Rica's arguments[1883] because ISPM 20 does not restrict the adoption

[1874] Panama's response to Panel question No. 52, paras. 148-152.
[1875] Panama's first written submission, para. 289.
[1876] Note AUPSA-AG-032-2019 (Exhibit CRI-65).
[1877] Panama's first written submission, paras. 281-284 (quoting Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 8).
[1878] Panama's response to Panel question No. 182, para. 201; opening statement at the second meeting of the Panel, para. 77. See also Panama's first written submission, paras. 292 and 309.
[1879] Panama's first written submission, para. 292; second written submission, para. 154.
[1880] Panama's first written submission, para. 300.
[1881] Panama's first written submission, para. 301; second written submission, para. 159.
[1882] Panama's first written submission, para. 303. See also Panama's responses to Panel question No. 225, para. 328, and No. 104, para. 9.
[1883] Panama's first written submission, paras. 303-304. See also Panama's second written submission, para. 158; response to Panel question No. 93, para. 263.

of emergency measures to cases of non-compliance or interception of a pest in a commodity shipment.[1884] Lastly, Panama submits that the phytosanitary measures applied by Peru and Panama that Costa Rica has identified are not pertinent because, unlike Measure 3, they stem from an objective assessment of the phytosanitary risk.[1885]

7.910. Regarding the *third requirement* of Article 5.7, Panama submits that Costa Rica has failed to demonstrate that Panama did not seek to obtain the additional information necessary for a more objective assessment of the risk in question.[1886] According to Panama, its efforts to obtain the additional information necessary were frustrated by Costa Rica's refusal to provide further technical information that Panama required.[1887] Panama submits that Costa Rica's communications of February and October 2019 show that Costa Rica knew precisely what information Panama required.[1888] Furthermore, Panama considers that Costa Rica knew that the information provided initially was insufficient, as it indicated that the SFE was compiling the technical information required by Panama.[1889]

7.911. In respect of the *fourth requirement* of Article 5.7, Panama submits that Costa Rica has failed to demonstrate that Panama did not review Measure 3 within a reasonable period of time.[1890] Panama notes that it faced considerable difficulties in obtaining the information necessary for a more objective assessment of risk, as this information was solely in the hands of Costa Rica. Accordingly, Panama considers that any delay incurred was a direct result of Costa Rica's actions and omissions.[1891] Panama asserts that the information that it received from Costa Rica between 6 February 2019 and 19 February 2021 was insufficient for the assessment of risk.[1892] Panama contends that the information requests it sent to Costa Rica were not excessive, as they concerned the information necessary for a more objective assessment of risk.[1893] Panama adds that the months that elapsed between the moment that Costa Rica "*finally* sought" to provide the information in April 2021 and the establishment of the Panel in September 2021 were insufficient for its authorities to evaluate the information.[1894] Panama asserts that the COVID-19 pandemic affected the review of Measure 3, and that Costa Rica's failure to provide information was the reason the information gathering process became protracted "until the COVID-19 period was well under way".[1895]

7.5.1.2.1.2 Assessment by the Panel

Relevant legal standard

7.912. As mentioned in respect of Measure 1, for an SPS measure to be considered covered by Article 5.7, the Member that adopts the measure must meet four cumulative requirements: adopting the measure (a) in a situation where "relevant scientific evidence is insufficient"; and (b) "on the basis of available pertinent information"; (c) "seek[ing] to obtain the additional information necessary for a more objective assessment of risk"; and (d) "review[ing] the … measure accordingly within a reasonable period of time".[1896]

[1884] Panama's first written submission, para. 304. See also Panama's response to Panel question No. 225, para. 331.
[1885] Panama's first written submission, paras. 307-308.
[1886] Panama's first written submission, para. 323.
[1887] Panama's first written submission, para. 310; second written submission, paras. 135 and 166.
[1888] Panama's first written submission, paras. 313, 315-316 and 320 (quoting Memorandum DSFE-083-2019 (Exhibit CRI-78); Memorandum DSFE-0838-2019 (Exhibit CRI-82)). See also Panama's first written submission, paras. 312 and 314; second written submission, para. 168.
[1889] Panama's second written submission, para. 170 (quoting Memorandum DSFE-083-2019 (Exhibit CRI-78)).
[1890] Panama's first written submission, para. 336.
[1891] Panama's first written submission, para. 326; second written submission, paras. 180 and 183.
[1892] Panama's first written submission, para. 332.
[1893] Panama's second written submission, para. 182.
[1894] Panama's second written submission, para. 183. (emphasis original) See also Panama's first written submission, para. 278.
[1895] Panama's first written submission, paras. 333-334.
[1896] See para. 7.109 above (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 89; and referring to Appellate Body Reports, *US/Canada – Continued Suspension*, para. 676; *Japan – Apples*, para. 176; and *Korea – Radionuclides*, para. 5107).

7.913. The Panel will now examine whether Measure 3 is covered by Article 5.7 of the SPS Agreement. As with Measure 1, the Panel will first examine whether Measure 3 was adopted in a situation where relevant scientific evidence was insufficient.

Whether Panama adopted Measure 3 in a situation where relevant scientific evidence was insufficient

7.914. The Panel recalls that it concurs with the interpretation in previous disputes that there is a situation of insufficient relevant scientific evidence within the meaning of Article 5.7 where deficiencies in the body of available scientific evidence do not allow a Member, in quantitative or qualitative terms, to perform an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement.[1897]

7.915. Costa Rica submits that Panama has not demonstrated that Measure 3 was adopted in a situation where the relevant scientific evidence was insufficient for an assessment of the risk in question.[1898] According to Costa Rica, Panama had sufficient information on the pink mealybug pest and the phytosanitary status of Costa Rica with respect to that pest.[1899] Panama, for its part, asserts that Costa Rica has not demonstrated that the scientific evidence was sufficient for an assessment of the risk.[1900]

7.916. The Panel will now examine whether the scientific evidence available to Panama at the time Measure 3 was adopted would have allowed it to carry out the risk assessment. The Panel will begin its analysis by considering the issue of relevant risk, followed by the information that Panama needed to assess the risk in question.

The relevant risk

7.917. Panama has indicated that the risk that it seeks to address by adopting Measure 3 is the risk of entry, establishment[1901] or spread of the pink mealybug through imports of fresh pineapples from Costa Rica.[1902]

7.918. Costa Rica states that "Panama had to evaluate the probability of entry, establishment and spread of this pest within Panamanian territory through pineapples imported from Costa Rica".[1903] In Costa Rica's view, the relevant information available at the time Measure 3 was adopted indicated the absence of that risk.[1904]

7.919. The Panel considers that these statements by the parties do not reflect a disagreement over the relevant risk, but rather the likelihood of that risk materializing. Accordingly, the Panel considers that the assessment to be carried out by Panama, concerning the risk of entry, establishment or spread of pink mealybug through imports of fresh pineapples from Costa Rica, corresponds to the first sentence of Annex A(4) to the SPS Agreement. That sentence refers to "the likelihood of entry, establishment or spread of a pest ... within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences".

Information necessary for the assessment of the risk in question

7.920. As mentioned above, the insufficiency of relevant scientific evidence referred to in Article 5.7 is determined by the information that is necessary to assess the risk in question.[1905] Therefore, the

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[1897] See para. 7.111 above, and Appellate Body Reports, *Japan – Apples*, para. 179; *US/Canada – Continued Suspension*, paras. 674 and 677.

[1898] Costa Rica's second written submission, para. 193.

[1899] Costa Rica's second written submission, para. 194.

[1900] Panama's second written submission, para. 139.

[1901] The Panel notes that the definition of "risk assessment" in Annex A(4) to the Spanish version of the SPS Agreement refers to "*radicación*" instead of "*establecimiento*" ("[l]a evaluación de la probabilidad de entrada, *radicación* o propagación de plagas") ("[t]he evaluation of the likelihood of entry, establishment or spread of a pest "). The Panel understands the Spanish words to be synonyms in this context.

[1902] Panama's first written submission, para. 285.

[1903] Costa Rica's second written submission, para. 213.

[1904] Costa Rica's first written submission, para. 781.

[1905] See para. 7.147 above.

Panel considers it necessary to identify the information that Panama needed to assess the relevant risk in order to thus be able to determine whether Panama had sufficient relevant scientific evidence for the assessment of that risk at the time that measure was adopted.

7.921. Panama asserts that it needed "further information … on the phytosanitary status of pineapple production areas [in Costa Rica], in reference to the pink mealybug pest (*Maconellicoccus hirsutus*) and other pests indicating their current status".[1906] Costa Rica, in turn, claims that Panama had sufficient information for the assessment of the risk in question because it had: (a) information on the pink mealybug pest (morphology, symptoms, detection, reproduction system, survival conditions, natural enemies, control methods, etc.); and (b) information on Costa Rica's phytosanitary situation in respect of that pest (Costa Rica's phytosanitary status as notified to Panama and the IPPC in May 2014, no instances of the pest having been intercepted in pineapple shipments from Costa Rica to Panama, and pineapple imports from Costa Rica into Panama continuing as usual).[1907]

7.922. The Panel considers that ISPM 11, on pest risk analysis for quarantine pests[1908], provides valuable guidance in this regard. The Panel finds this ISPM relevant, given that: (a) it provides details for the conduct of a "pest risk assessment" as part of the PRA for quarantine pests[1909]; (b) the pink mealybug is considered "a pest of quarantine concern" owing to its wide injurious range[1910]; (c) Panama informed Costa Rica that the pink mealybug is "a pest of quarantine concern" for Panama[1911]; and (d) Panamanian regulations provide that the Pest Risk Analysis and Phytosanitary Requirements Section of the Directorate of Plant Health (DNSV) will prepare PRA studies in accordance with the stages set out in ISPM 11, among others.[1912]

7.923. ISPM 11 indicates that the "pest risk assessment" stage (stage 2 of a PRA) consists of three interrelated steps: (a) pest categorization; (b) assessment of the probability of introduction and spread; and (c) assessment of potential economic consequences (including environmental impacts).[1913] The Panel will focus on the information necessary for assessing the probability of introduction and spread of the pink mealybug, given that Panama argues that there is a situation of insufficiency with regard to this step of the risk assessment.[1914]

7.924. ISPM 11 identifies three components as part of the assessment of the probability of introduction and spread of a pest: (a) probability of entry; (b) probability of establishment; and (c) probability of spread after establishment. The ISPM outlines the information that could be considered to assess each of these probabilities. However, ISPM 11 does not require the country conducting the risk assessment to request all the information specified therein or to follow each and every one of the steps described therein. As is evident from the text of the ISPM itself, which often introduces factors to be considered with terms such as "factors to consider", "examples of factors to

[1906] Note AUPSA-AG-032-2019 (Exhibit CRI-65). See also Panama's first written submission, para. 311.
[1907] Costa Rica's second written submission, para. 194.
[1908] IPPC, ISPM 11 (Exhibit CRI-142).
[1909] ISPM 11 indicates that PRA for quarantine pests follows a process defined by three stages: (a) Stage 1 (initiating the process); (b) Stage 2 (risk assessment); and (c) Stage 3 (risk management). (IPPC, ISPM 11 (Exhibit CRI-142), p. 6).
[1910] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 3.
[1911] Note AUPSA-AG-032-2019 (Exhibit CRI-65). In addition, the record shows that the pink mealybug pest is a "quarantine pest absent" from Panama. See SFE, *Sampling manual for the pink hibiscus mealybug in pineapple* (2021) (Exhibit CRI-94), p. 40 (referring to the IPPC International Phytosanitary Portal) (FAO, 2018)).
[1912] Ministry of Agricultural Development, Resolution No. DAL-015-ADM-2011 (2011) (Exhibit PAN-97), Article 8. The other ISPM referred to in this provision are ISPM 2 (of a general nature, which ISPM 11 expands on in respect of stages 2 and 3 of the PRA for quarantine pests) and ISPM 21 (which expands on ISPM 2 for regulated non-quarantine pests). See IPPC, ISPM 2 (Exhibit CRI-101), pp. 2 and 13. It should also be noted that the provisions of ISPM 11 were fully adopted by Panama through Resolution No. DAL-043-ADM-08 of 7 July 2008 (Ministry of Agricultural Development, Resolution No. DAL-015-ADM-2011 (2011) (Exhibit PAN-97), sixth recital).
[1913] IPPC, ISPM 11 (Exhibit CRI-142), p. 10.
[1914] Panama's first written submission, para. 285.

consider" or similar, the factors listed therein do not constitute an exhaustive list[1915], and the complexity of the risk assessment will be determined by the circumstances.[1916]

Probability of entry of a pest[1917]

7.925. In this section, ISPM 11 addresses the following five issues:

a. Identification of pathways for a PRA initiated by a pest

   i. ISPM 11 states that "[p]est interception data may provide evidence of the ability of a pest to be associated with a pathway and to survive in transport or storage".[1918] It also states that entry by natural means should also be assessed.[1919]

b. Probability of the pest being associated with the pathway at origin

   i. The ISPM provides that "[t]he probability of the pest being associated, spatially or temporally, with the pathway at origin should be estimated" and, to that end, it includes a non-exhaustive list of factors to consider, namely: (a) prevalence of the pest in the source area; (b) occurrence of the pest in a life stage that would be associated with commodities, containers or conveyances; (c) volume and frequency of movement along the pathway; (d) seasonal timing; and (e) pest management, cultural and commercial procedures applied at the place of origin (application of plant protection products, handling, culling, roguing, grading).[1920]

c. Probability of survival during transport or storage

   i. ISPM 11 identifies the following factors to consider: (a) speed and conditions of transport and duration of the life cycle of the pest in relation to time in transport and storage; (b) vulnerability of the life stages during transport or storage; (c) prevalence of pest likely to be associated with a consignment; and (d) commercial procedures (e.g. refrigeration) applied to consignments in the country of origin, country of destination, or in transport or storage.[1921]

d. Probability of pest surviving existing pest management procedures

   i. According to ISPM 11, assessing this probability means evaluating "[e]xisting pest management procedures (including phytosanitary procedures)[,] applied to consignments against other pests from origin to end use, ... for effectiveness against the pest in question".[1922] It also mentions the need to estimate "[t]he probability that the pest will go undetected during inspection or survive other existing phytosanitary procedures".[1923]

e. Probability of transfer to a suitable host

   i. ISPM 11 lists a number of factors to consider: (a) dispersal mechanisms; (b) whether the imported commodity is to be sent to a few or many destination points in the PRA area; (c) proximity of entry, transit and destination points to suitable hosts; (d) time of year at which import takes place; (e) intended use of the commodity (e.g.

[1915] See e.g. IPPC, ISPM 11 (Exhibit CRI-142), pp. 14-15.
[1916] IPPC, ISPM 11 (Exhibit CRI-142), p. 10.
[1917] "[E]ntry" of a pest is understood to mean the "[m]ovement of a pest into an area where it is not yet present, or present but not widely distributed and being officially controlled". (IPPC, ISPM 5 (Exhibit CRI-75), p. 12).
[1918] IPPC, ISPM 11 (Exhibit CRI-142), p. 13.
[1919] IPPC, ISPM 11 (Exhibit CRI-142), p. 13.
[1920] IPPC, ISPM 11 (Exhibit CRI-142), p. 14.
[1921] IPPC, ISPM 11 (Exhibit CRI-142), p. 14.
[1922] IPPC, ISPM 11 (Exhibit CRI-142), p. 14.
[1923] IPPC, ISPM 11 (Exhibit CRI-142), p. 14.

for planting, processing and consumption); and (f) risks from by-products and waste.[1924]

Probability of establishment[1925]

7.926. ISPM 11 states that "reliable biological information (life cycle, host range, epidemiology, survival, etc.) should be obtained from the areas where the pest currently occurs", and that "[c]ase histories concerning comparable pests can be considered".[1926]

7.927. Among the examples of the factors to be considered, the ISPM includes the following: (a) availability, quantity and distribution of hosts in the PRA area; (b) environmental suitability in the PRA area; (c) potential for adaptation of the pest; (d) reproductive strategy of the pest; (e) method of pest survival; and (f) cultural practices and control measures.[1927]

7.928. In the section on probability of establishment, ISPM 11 addresses the following four issues:

a. Availability of suitable hosts, alternate hosts and vectors in the PRA area

    i. In this regard, factors to consider according to the ISPM are: (a) whether hosts and alternate hosts are present and how abundant or widely distributed they may be; (b) whether hosts and alternate hosts occur within sufficient geographic proximity to allow the pest to complete its life cycle; (c) whether there are other plant species, which could prove to be suitable hosts in the absence of the usual host species; (d) whether a vector, if needed for dispersal of the pest, is already present in the PRA area or likely to be introduced; and (e) whether another vector species occurs in the PRA area.[1928]

b. Suitability of environment

    i. ISPM 11 states that factors in the environment (e.g. suitability of climate, soil, pest and host competition) that are critical to the development of the pest, its host and if applicable its vector, and to their ability to survive periods of climatic stress and complete their life cycles, should be identified.[1929]

c. Cultural practices and control measures

    i. According to ISPM 11, where applicable, practices employed during the cultivation/production of the host crops should be compared to determine if there are differences in such practices between the PRA area and the origin of the pest that may influence its ability to establish.[1930]

    ii. Pest control programmes or natural enemies already in the PRA area which reduce the probability of establishment may also be considered, as may the availability, or lack, of suitable methods for eradication.[1931]

d. Other characteristics of the pest affecting the probability of establishment

[1924] IPPC, ISPM 11 (Exhibit CRI-142), p. 14.
[1925] "[E]stablishment" of a pest is understood to mean the "[p]erpetuation, for the foreseeable future, of a pest within an area after entry". (IPPC, ISPM 5 (Exhibit CRI-75), p. 13).
[1926] IPPC, ISPM 11 (Exhibit CRI-142), p. 15.
[1927] IPPC, ISPM 11 (Exhibit CRI-142), p. 15.
[1928] IPPC, ISPM 11 (Exhibit CRI-142), p. 15.
[1929] IPPC, ISPM 11 (Exhibit CRI-142), p. 16.
[1930] IPPC, ISPM 11 (Exhibit CRI-142), p. 16.
[1931] IPPC, ISPM 11 (Exhibit CRI-142), p. 16.

i. Other characteristics of the pest affecting the probability of establishment include: (a) reproductive strategy of the pests and method of pest survival[1932]; (b) genetic adaptability[1933]; and (c) minimum population needed for establishment.[1934]

Probability of spread after establishment[1935]

7.929. In order to estimate the probability of spread of the pest, reliable biological information should be obtained from areas where the pest currently occurs. The situation in those areas can then be compared with that in the PRA area. ISPM 11 also notes that case histories concerning comparable pests can usefully be considered.[1936]

7.930. Examples of the factors that ISPM 11 indicates should be considered are: (a) suitability of the natural and/or managed environment for natural spread of the pest; (b) presence of natural barriers; (c) the potential for movement with commodities or conveyances; (d) intended use of the commodity; (e) potential vectors of the pest in the PRA area; and (f) potential natural enemies of the pest in the PRA area.[1937]

7.931. Having identified the information that, according to ISPM 11, Panama might need to assess the risk of entry, establishment and spread of the pink mealybug through imports of Costa Rican pineapples, the Panel will now assess whether Panama had sufficient relevant scientific evidence for such an assessment at the time Measure 3 was adopted.

Relevance and sufficiency of the scientific evidence available at the time Measure 3 was adopted

7.932. The information that the parties have identified as available to Panama at the time Measure 3 was adopted can be grouped into two categories: (a) information on the pink mealybug pest; and (b) information on Costa Rica's phytosanitary status in respect of this pest.[1938]

7.933. Regarding the *relevance* of this information, the Panel notes that, generally speaking, the parties do not disagree over the fact that these two categories of information may be relevant to the risk in question.[1939] The Panel agrees with the parties that the information on both the pink mealybug and Costa Rica's phytosanitary status in respect of this pest may constitute scientific evidence relevant to the risk of entry, establishment or spread of the pest through imports of fresh pineapples from Costa Rica. This is confirmed by ISPM 11, given that it indicates that information on both the pest in general and the phytosanitary status and regulations of the place of origin of the product to be imported (Costa Rica) may be necessary in order to perform a risk assessment.[1940]

7.934. In respect of the *sufficiency* of this information for the purpose of performing an assessment of the risk in question, the Panel recalls that what is relevant in the context of the first requirement under Article 5.7 is that the body of available scientific evidence does not allow, in quantitative or

[1932] Information on characteristics that enable the pest to reproduce effectively in the new environment, such as parthenogenesis/self-crossing, duration of the life cycle, number of generations per year, resting stage, etc. See IPPC, ISPM 11 (Exhibit CRI-142), p. 16.

[1933] Information on whether the species is polymorphic and the degree to which the pest has demonstrated the ability to adapt to conditions like those in the PRA area. See IPPC, ISPM 11 (Exhibit CRI-142), p. 16.

[1934] IPPC, ISPM 11 (Exhibit CRI-142), p. 16.

[1935] "[S]pread" of a pest is understood to mean the "[e]xpansion of the geographical distribution of a pest within an area".

[1936] IPPC, ISPM 11 (Exhibit CRI-142), p. 17.

[1937] IPPC, ISPM 11 (Exhibit CRI-142), p. 17.

[1938] See paras. 7.896 and 7.905 above.

[1939] Costa Rica's second written submission, para. 199; Panama's first written submission, para. 289; Panama's second written submission, paras. 144 and 146; and Panama's response to Panel question No. 92, para. 257.

[1940] In this regard, the Panel concurs with previous panels that considered general information on the pest in question to be relevant. See e.g. Panel Reports, *Japan – Apples*, para. 8.216 (in relation to fire blight disease); *Russia – Pigs (EU)*, paras. 7.662-7.663 (in relation to African swine fever).

qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A(4).[1941]

7.935. The Panel notes that Panama has identified the following situations of insufficient scientific evidence with respect to the assessment of the risk of entry, establishment or spread of pink mealybug through imports of fresh pineapples from Costa Rica:

a. Situation of insufficient scientific evidence resulting from the discovery in 2018 by the Panamanian authorities of scientific evidence from 2011[1942] reporting on the presence of the pink mealybug pest on pineapple in Fiji.

b. Situation of insufficient scientific evidence regarding the phytosanitary status of pineapple production areas in Costa Rica in respect of the pest and, more specifically, the following aspects: (i) technical evidence concerning the phytosanitary status of pineapple production areas in Costa Rica in reference to the pink mealybug; (ii) surveillance and specific phytosanitary control of the pest in pineapple production areas; (iii) survey procedures; and (iv) current mitigation or risk management strategies.[1943]

7.936. The Panel will now examine these two situations of alleged insufficient scientific evidence identified by Panama.

Alleged situation of insufficient scientific evidence in relation to the pest

7.937. With regard to the 2011 scientific publication that Panama claims to have discovered in December 2018, Panama notes that, when it adopted the PIR for Costa Rican pineapple in July 2008, the available scientific evidence did not suggest that pineapples were hosts of the pink mealybug.[1944] Panama contends that the discovery of this publication was one of the triggers for the adoption of Measure 3, by calling into question its previous conclusions as to the risk associated with the transmission of the pink mealybug in pineapple.[1945]

7.938. Costa Rica submits that the 2011 scientific publication simply confirmed that pineapple may be another of the hundreds of potential hosts of the pink mealybug. Costa Rica notes that Panama has not indicated what it was that, according to Panama, was "called into question" following the publication of this scientific evidence in 2011.[1946] Costa Rica adds that Panama should have been aware that pineapple appears as a host of the pink mealybug in scientific journals and databases such as those of CABI and EPPO, since it asserts that it develops its PIR using those resources.[1947]

7.939. The Panel notes that, following the first substantive meeting, Panama has not developed its argument regarding the 2011 publication, instead it has focused exclusively on the situation of insufficient scientific evidence regarding Costa Rica's phytosanitary status in respect of the pest. Panama itself appears to confirm this by asserting that "the only issue before the Panel is whether the Panamanian authorities had sufficient information on Costa Rica's status to perform a risk assessment".[1948] However, as part of its objective assessment of the matter before it, the Panel will examine whether Panama's discovery of that publication in 2018 created a situation of insufficient relevant scientific evidence.

[1941] Panel Report, *Russia – Pigs (EU)*, para. 7.647 (referring to the Appellate Body report in *Japan – Apples*, para. 179). It should be recalled that Annex A(4) to the SPS Agreement defines the relevant "risk assessment" as "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences".

[1942] Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 8.

[1943] Panama's first written submission, para. 289.

[1944] Panama's first written submission, para. 257.

[1945] Panama's first written submission, paras. 259-260. Panama identifies two factors that led it to "take the precaution of temporarily suspending imports of pineapples from Costa Rica": (a) the 2011 study by Hodgson and Łagowska, and (b) the presence of the pink mealybug in Costa Rica. (Ibid. para. 260).

[1946] Costa Rica's second written submission, para. 203.

[1947] Costa Rica's second written submission, para. 202 (quoting Panama's response to Panel question No. 9).

[1948] Panama's response to Panel question No. 186, para. 220. See also Panama's second written submission, para. 145.

7.940. The Panel agrees with Costa Rica that Panama has not identified the "previous conclusions" or the specific aspects that the 2011 publication calls into question. It seems to follow from Panama's argument that the discovery reported in the publication is the fact that pineapple is a potential host of the pink mealybug pest. The 2011 publication indicates that the pest was detected in Fiji for the first time, but it does not indicate that this was the first time that this pest was detected on pineapple. In this regard, the Panel notes that the CABI datasheet on the pink hibiscus mealybug identifies pineapple as a host of the pest, and links this information not only to the 2011 publication identified by Panama, but also to a publication from 2004.[1949] The fact that, in 2004, scientific evidence linked the pest in question with pineapple would call into question the discovery that, according to Panama, was presented in the 2011 publication by indicating that pineapple could be a host of the pest.

7.941. Having examined the 2011 publication, the Panel notes that, of the 30 pages that make up the publication, only a few lines are devoted to the pink mealybug. These lines report the presence of the pink mealybug in Fiji for the first time, once on hibiscus and once on pineapple.[1950] The rest of the publication mainly deals with the discovery of new species of mealybug in Fiji. The authors recall that this polyphagous pest is widespread throughout southern Asia, Australia and Africa, and that it has spread to many geographic areas in recent years. The authors state that it is a potential invasive pest of several crops, particularly pineapple.[1951] The publication includes a list of mealybug species recorded in Fiji that indicates that the pink mealybug was found on two of Fiji's islands on the following host plants: *Ficus* sp.[1952], *Hibiscus rosa-sinensis*[1953] and *Ananas comosus* (pineapple).[1954]

7.942. The authors of this publication do not indicate that their findings question existing scientific evidence; they merely state that, during their "small survey"[1955], they recorded the pink mealybug pest in Fiji for the first time and that the pest could be potentially very important ecologically and economically.[1956] In the Panel's view, this publication does not question previous scientific evidence on hosts of the pest, instead it complements existing information on the pest by reporting its presence on pineapple in Fiji. Given the "highly polyphagous"[1957] nature of the pest, detected in more than 300 plant genera in over 85 families[1958], the fact that a scientific publication reports the detection of the pest on pineapple in Fiji does not appear to call into question the scientific evidence on the matter, but rather to confirm the pest's polyphagous nature.

7.943. In the light of the foregoing, the Panel considers that Panama has not demonstrated that, at the time Measure 3 was adopted, there was a situation of insufficient relevant scientific evidence in relation to pineapple as a host of the pest stemming from the 2011 publication that Panama claims to have discovered in 2018.

7.944. With regard to the rest of the relevant scientific evidence on the pest, for which Panama has not identified any situation of insufficiency, the Panel notes that Costa Rica has included in the record a broad sample of the extensive literature that exists on the pest. That literature includes (a) CABI

[1949] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71) (referring to D.J. Williams, *Mealybugs of Southern Asia* (Malaysia: Natural History Museum/Southdene Sdn Bhd, 2004)).

[1950] Hodgson and Łagowska (2011) (Exhibit PAN-53), pp. 1 and 8. The Panel notes that the table on p. 28 of that publication includes a third host of the pink mealybug: *Ficus* sp.

[1951] Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 8.

[1952] The EPPO Global Database does not identify the common name of this plant in Spanish. See https://gd.eppo.int/taxon/FIUSS (accessed 13 August 2024).

[1953] The Spanish common names that correspond to this scientific name are: "*clavel japonés*", "*cucarda*", "*hibisco pacífico*" and "*rosa de China*". See https://gd.eppo.int/taxon/HIBRS (accessed 13 August 2024).

[1954] Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 28.

[1955] The authors refer to the small survey that took place during a three-week trip to Fiji during which one of the authors collected about 100 lots of scale insect material on Viti Levu, Kadavu and Taveuni. (Hodgson and Łagowska (2011) (Exhibit PAN-53), pp. 2 and 19).

[1956] Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 2.

[1957] The classification of the pest as "polyphagous" refers to the fact that it "it feeds on many plant species (hosts)". (OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 11).

[1958] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), pp. 3 and 11.

and EPPO datasheets[1959] which refer to sources prior to the adoption of Measure 3; (b) the OIRSA contingency plan for an outbreak of the pest in a country in the region (published in 2010)[1960]; (c) the OIRSA technical report on the current status of the pest (published in 2018, shortly before the adoption of Measure 3)[1961]; and (d) a series of publicly available academic articles and studies.[1962] In turn, these documents contain additional bibliographic references relating to the pest.[1963]

7.945. In the Panel's view, this scientific evidence on the pest addresses in sufficient detail the issues that, according to ISPM 11, should be considered in a risk assessment as part of a PRA. These issues include topics such as the pest's biological information, hosts, dispersal mechanisms, environmental suitability, reproductive strategy and method of survival.[1964] Accordingly, the Panel considers that Panama has not demonstrated that there is a situation of insufficient scientific evidence about the pest that prevents it from assessing the risk in question.

Alleged situation of insufficient scientific evidence concerning the phytosanitary status of pineapple production areas in Costa Rica in respect of the pest

7.946. The Panel will now examine the second situation of alleged insufficient scientific evidence identified by Panama, which concerns Costa Rica's phytosanitary status in respect of the pink mealybug.

7.947. As mentioned above, Panama asserts that it could not assess the risk of entry, establishment or spread of the pink mealybug through fresh pineapple imports from Costa Rica because, at the time Measure 3 was adopted, it did not have "further information … on the phytosanitary status of pineapple production areas" in reference to the pest.[1965] Specifically, this information refers to (a) technical evidence concerning the phytosanitary status of pineapple production areas in Costa Rica in reference to the pink mealybug; (b) information on the surveillance and specific phytosanitary control of the pest in production areas; (c) survey procedures; and (d) current mitigation or risk-management strategies.[1966]

7.948. For its part, Costa Rica asserts that Panama could have assessed the risk in question with the available scientific evidence on Costa Rica's phytosanitary status in relation to the pink mealybug, namely: (a) Costa Rica's notifications to the IPCC and Panama in May 2014 reporting that the pink mealybug was present in its territory, not widely distributed and under official control[1967]; (b) the fact that pineapple imports from Costa Rica into Panama continued after these

[1959] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71); EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144).

[1960] OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72).

[1961] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70).

[1962] See e.g. Martínez Rivero (2007) (Exhibit CRI-73); USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74); Ganjisaffar et al. (2019) (Exhibit CRI-146); SAGARPA, SENASICA, *Pink hibiscus mealybug*, Datasheet No. 6 (2016) (Exhibit CRI-147); Seth et al. (2016) (Exhibit CRI-148); Chong et al. (2015) (Exhibits CRI-149, PAN-50); Culik et al. (2013) (Exhibit CRI-150); Briseño Fierro et al. (2013) (Exhibit CRI-151); Isiordia-Aquino et al. (2011) (Exhibit CRI-153); Hernández-Moreno et al. (2012) (Exhibit CRI-154); SINAVEF, *Epidemiological report on pink hibiscus mealybug* (2011) (Exhibit CRI-155); Rosas-García and Parra-Bracamonte (2011) (Exhibit CRI-56); Isiordia-Aquino et al. (2012) (Exhibit CRI-157); Chong et al. (2008) (Exhibit CRI-158); and SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159).

[1963] EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144), pp. 6-8; CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), pp. 44-60; OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72), pp. 46-48, 79-80, 93, 119, 131, 141-142; and OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), pp. 28-29.

[1964] For the list of issues that, according to ISPM 11, should be considered in a risk assessment as part of a PRA, see paras. 7.928 -7.930 above.

[1965] Note AUPSA-AG-032-2019 (Exhibit CRI-65).

[1966] Panama's first written submission, para. 289.

[1967] Memorandum DSFE-261-2014 (Exhibit CRI-68); Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69).

notifications in May 2014 until the adoption of Measure 3 in January 2019[1968]; and (c) the fact that the pink mealybug was not detected in shipments of Costa Rican pineapples.[1969]

7.949. The Panel observes that, in its communications to Costa Rica following the adoption of Measure 3 and during these proceedings, Panama has identified, with varying degrees of detail, the information that it considered necessary to carry out the assessment of the risk of entry, establishment or spread of the pink mealybug through imports of fresh pineapples from Costa Rica. Initially, when it notified Costa Rica of Measure 3 in January 2019, Panama requested "further information … on the phytosanitary status of pineapple production areas, in reference to the pink mealybug pest ... and other pests indicating their current status ".[1970] More than two years later, on 1 March 2021, Panama reiterated its request for "further information on the status of the pest ... in pineapple production areas" and clarified that it needed (a) "information on, *inter alia*, the specific phytosanitary surveillance of the pest in production sites in areas where the pest is present, pest-free areas, and survey procedures"; (b) "the list of exporting companies subject to official control by the SFE, interested in exporting fresh pineapple fruit" to Panama; and (c) "the mitigation measures used for the pest, during the cultivation stages and in packing centres".[1971] Ten days after reiterating its request for further information, Panama sent a detailed list of the information required in response to a request from Costa Rica.[1972]

7.950. Subsequently, in its written submissions to the Panel, Panama indicated that, in order to assess the risk in question, it required "technical evidence concerning the phytosanitary status of pineapple production areas in Costa Rica in reference to *M. hirsutus*; information on the surveillance and specific phytosanitary control of the pest in production areas; survey procedures; and current mitigation or risk management strategies".[1973] Lastly, in its responses after the second substantive meeting, Panama provided a table comparing the information that it had requested from Costa Rica on 10 March 2021 with the information that ISPM 11 considers necessary to conduct an assessment of the risk in question.[1974] In this table, Panama included fewer issues than those listed in its communication of 10 March 2021.[1975]

[1968] Costa Rica's first written submission, para. 781.
[1969] Costa Rica's first written submission, para. 781.
[1970] Note AUPSA-AG-032-2019 (Exhibit CRI-65).
[1971] Note DNSV-0127-2021 (Exhibit CRI-87).
[1972] Note DNSV-0177-2021 (Exhibit CRI-88). This information concerned the following issues: (a) list of companies exporting pineapples to Panama subject to official control by the SFE (including contact details); (b) the scientific name of the product (*Ananas comosus*); (c) the specific part of the plant to be imported (fruit); (d) end use of the imported product; (e) whether it was a transgenic product; (f) condition of the product to be exported; (g) type of packaging; (h) specific location and description of the geographic production areas of the product in the country of origin (including administrative division, maps of designated export production areas and other production areas); (i) climate data on the production area (temperature, humidity, precipitation, wind, etc. including maps); (j) crop phenology, sowing and harvesting season; (k) description of the pest; (l) information on the specific phytosanitary surveillance of the pest in production areas; (m) survey procedures; (n) current mitigation or risk management strategies (control techniques, monitoring, phytosanitary treatments); (o) production practices, harvest, pre- and post-harvest treatments and crop storage before export; (p) official inspection procedure for phytosanitary certification, selection and packaging for export; (q) means of transport used for exports; (r) product-related regulations, existence of pest-free areas, and surveillance and phytosanitary certification systems; (s) volume and value of exports to the country during the period 2014-2019; (t) photographs of the product; and (u) bibliographic references. (Ibid. pp. 3-4).
[1973] Panama's first written submission, para. 289; second written submission, para. 146.
[1974] Panama's response to Panel question No. 179, para. 195. See also the comparison of the information identified in ISPM 11 with Costa Rica's pest status report and the information requested by Panama on 10 March 2021 (Exhibit PAN-140). Panama asserts that it requested less information than that recommended in ISPM 11. (Panama's response to Panel question No. 179, para. 196).
[1975] Panama indicates that, of the information identified in ISPM 11 to carry out a risk assessment, it requested the following from Costa Rica on 10 March 2021: (a) in relation to the probability of entry of a pest: (i) geographical distribution and host range of the pest; (ii) other potential pathways, such as other types of commodities, packing materials, etc.; (iii) prevalence of the pest in the source area; (iv) pest management, cultural and commercial procedures applied at the place of origin; (v) speed and conditions of transport and duration of the life cycle of the pest in relation to time in transport and storage; (vi) commercial procedures (e.g. refrigeration) applied to consignments in the country of origin, country of destination, or in transport or storage; (vii) existing pest management procedures (including phytosanitary procedures) applied to consignments against other pests from origin to end use; and (viii) intended use of the commodity; (b) in relation to the probability of establishment: (i) suitability of climate, soil, pest and host competition; (ii) practices employed during the cultivation/production of the host crops; (iii) genetic adaptability; and

7.951. Aside from the more or less detailed formulation chosen by Panama to refer to the information that it requested from Costa Rica on its phytosanitary status in respect of the pest, the Panel sees no contradictions in the information required by Panama. The Panel notes that information concerns pineapple production areas in Costa Rica, as Panama itself indicated to Costa Rica when informing it of the adoption of Measure 3[1976], and repeated in its submissions to the Panel.[1977]

7.952. On that basis, the Panel will now examine whether, at the time Measure 3 was adopted, Panama had sufficient information on the phytosanitary status of pineapple production areas in Costa Rica in respect of the pest to be able to assess the risk in question.

7.953. In this regard, the Panel observes that the information set forth in ISPM 11 in relation to the assessment of the probability of entry, establishment and spread of a pest can be grouped into three categories: (a) information on the pest[1978]; (b) information on the PRA area (Panama)[1979]; and (c) information "from the areas where the pest currently occurs" or "the origin of the pest".[1980] The Panel recalls that Costa Rica informed Panama and the IPPC in May 2014 that the pest is present in Costa Rica, but not in pineapple production areas. Specifically, the pest appears to be linked to a single host (the hibiscus plant), not widely distributed (in Río Oro de Santa Ana in the province of San José) and under official control.[1981] Panama confirms that, when it adopted Measure 3, it verified the presence of the pink mealybug in Costa Rica and knew that Costa Rica's status had not changed since the notification of the pest in 2014, as confirmed by Costa Rica's reports to the IPPC.[1982]

7.954. In respect of the necessary information to assess the *probability of pest entry*, the Panel notes that Panama was aware of Costa Rica's pest status (absent from pineapple production areas), as well as the fact that it had not detected the pest in shipments of Costa Rican pineapples, which continued as usual between May 2014 and the adoption of Measure 3 in January 2019. The Panel considers that, in the light of in the provisions of ISPM 11[1983], this information allowed Panama to assess the probability of entry and, in particular, the probability of the pest being associated with the pathway, without needing to request further information on the phytosanitary status of pineapple production areas in Costa Rica in respect of the pest.

7.955. Panama also had information on pest management in the OIRSA region, as both Panama and Costa Rica are part of this organization. OIRSA published a technical report in 2018, shortly before the adoption of Measure 3, which sets out control strategies in the OIRSA region and its member countries. In the case of Costa Rica, it is reported that "[i]n 2012 and 2013, parasitoids were exported to Costa Rica following the detection of the pest in the province of San José and neighbouring areas in Alajuela".[1984] In respect of the OIRSA region, the Organization's members reaffirmed "the importance of the biological control programme against the PMP [pink mealybug pest] since its inception, enabling the continued protection of the OIRSA region from the negative

(iv) minimum population needed for establishment; and (c) in relation to the probability of spread: reliable biological information from areas where the pest currently occurs. (See the comparison of the information identified in ISPM 11 with Costa Rica's pest status report and the information requested by Panama on 10 March 2021 (Exhibit PAN-140)).

[1976] Note AUPSA-AG-032-2019 (Exhibit CRI-65) (where AUPSA refers to the need to receive "further information … on the *phytosanitary status of pineapple production areas* [in Costa Rica], in reference to the pink mealybug pest"). (emphasis added)

[1977] See e.g. Panama's first written submission, paras. 276 and 319; second written submission, para. 182; and opening statement at the second meeting of the Panel, para. 67.

[1978] For example, reproductive strategy of the pest, method of pest survival, genetic adaptability or minimum population needed for establishment. (IPPC, ISPM 11 (Exhibit CRI-142), p. 16).

[1979] For example, availability, quantity and distribution of hosts in the PRA area, environmental suitability in the PRA area or potential natural enemies of the pest in the PRA area. (IPPC, ISPM 11 (Exhibit CRI-142), pp. 15 and 17).

[1980] IPPC, ISPM 11 (Exhibit CRI-142), pp 15 and 16.

[1981] Report by Costa Rica to the IPPC Secretariat on pink hibiscus mealybug (2014) (Exhibit PAN-52).

[1982] Panama's response to Panel question No. 6, para. 26 (referring to Report by Costa Rica to the IPPC Secretariat on pink hibiscus mealybug (2014) (Exhibit PAN-52). Panama asserts that "Costa Rica's pest report to the IPPC confirming the presence of *M. hirsutus* [in] Costa Rica was last updated on 25 October 2018". (Panama's response to Panel question No. 6, fn 37).

[1983] See para. 7.925 above.

[1984] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 3. The report indicates that Costa Rica requested support from the regional programme to purchase 259,000 parasitoids to release in pest-affected areas. (Ibid., p. 26).

effects of the pest over the past 18 years of operation".[1985] The report also indicates that, "as a result of the good pest management, the accelerated spread of the pest in the OIRSA countries was avoided".[1986] The Panel therefore understands that Panama, as a member of the OIRSA, had first-hand information on how the pest was handled in the region, including in Costa Rica.

7.956. In any event, the Panel considers that the information referred to in ISPM 11 does not cover detailed information on the management of the pest in pineapple production areas in Costa Rica, given that, as Panama acknowledges, there is no record of the pest being present in those areas and, therefore, it is not appropriate to request information on the management of a pest in an area where the pest is not present.

7.957. In respect of the necessary information to assess the *probability of establishment* of the pest, the Panel notes that ISPM 11 provides that "reliable biological information ... should be obtained from the areas where the pest currently occurs"[1987], as should information on the PRA area (in this case, Panama).[1988] Therefore, Panama did not need additional information on the phytosanitary status of the pest in pineapple production areas in Costa Rica, in which the pest is not present, to perform this assessment.

7.958. Lastly, with regard to the *probability of spread of the pest*, ISPM 11 indicates that "reliable biological information should be obtained from areas where the pest currently occurs" so that the status of these areas can then be compared with that of the PRA area (in this case, Panama).[1989] Again, as there is no record of the pest being present in pineapple production areas in Costa Rica, ISPM 11 does not support the relevance of the information on these areas requested by Panama to assess the probability of spread of the pest.

7.959. Therefore, the examination of the information necessary to assess the risk in question in the light of in the provisions of ISPM 11 does not support Panama's argument that it needed "further information … on the phytosanitary status of pineapple production areas, in reference to the pink mealybug pest"[1990], beyond what it already had at the time Measure 3 was adopted, namely:

a. information on the phytosanitary status of Costa Rica in respect of the pest, in the sense that the pink mealybug in Costa Rica was a quarantine pest, not widely distributed and under official control, notified to Panama and the IPPC in 2014, and absent from pineapple production areas;

b. information derived from the fact that Costa Rican pineapple imports into Panama continued as usual from the notification of the pest in 2014 until Measure 3 was adopted in January 2019 (e.g. the information required under the PIR for pineapple from Costa Rica regarding the production, harvesting, packaging or packaging; or information concerning ports of entry and means of transport used as documented in the customs declarations)[1991]; and

c. the absence of pink mealybug interceptions by Panama in pineapple shipments from Costa Rica, which, according to ISPM 11, "may provide evidence of the ability of a pest to be associated with a pathway and to survive in transport or storage".[1992]

[1985] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 4.
[1986] OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 4.
[1987] IPPC, ISPM 11 (Exhibit CRI-142), p. 15.
[1988] IPPC, ISPM 11 (Exhibit CRI-142), p. 15.
[1989] IPPC, ISPM 11 (Exhibit CRI-142), pp. 16-17.
[1990] Note AUPSA-AG-032-2019 (Exhibit CRI-65).
[1991] For example, the fact that pineapple imports from Costa Rica to Panama continued as usual between May 2014 and the adoption of Measure 3 in January 2019 implies that Panama, through customs declarations, could have been aware of the means of transport used and the ports of entry through which the commodity was introduced into its territory. (Customs declarations for pineapple imports into Panama (2014-2016) (Exhibit PAN-141)). Furthermore, Panama knew that these pineapple imports were subject to the relevant PIR and, therefore, had to comply with requirements for, *inter alia*, the packing and containers used or packaging and/or cushioning materials. (Resolution AUPSA-DINAN-116-2008 (Exhibit CRI-66), Articles 6-9).
[1992] IPPC, ISPM 11 (Exhibit CRI-142), p. 13.

7.960. In the light of the foregoing, the Panel concludes that Panama has not demonstrated that it adopted Measure 3 in a situation of insufficient scientific evidence with respect to the phytosanitary status of pineapple production areas in Costa Rica in respect of the pest that prevented it from performing an assessment of the probability of entry, establishment and spread of the pest in Panama through pineapples from Costa Rica.

Conclusion on whether Panama adopted Measure 3 in a situation where the relevant scientific evidence was insufficient

7.961. In the light of the foregoing, the Panel finds that Panama has not demonstrated that, at the time Measure 3 was adopted, there was a situation of insufficient relevant scientific evidence in relation to (a) information concerning the pink mealybug pest, or (b) the phytosanitary status of pineapple production areas in Costa Rica in respect of this pest, which prevented it from assessing the risk of entry, establishment and spread of the pink mealybug pest in Panama through imports of pineapples from Costa Rica.

7.962. Accordingly, the Panel finds that Panama has not demonstrated that Panama adopted Measure 3 in a situation of insufficient relevant scientific evidence within the meaning of Article 5.7 of the SPS Agreement.

7.963. As mentioned in respect of Measure 1, this finding would be sufficient to conclude that Measure 3 is not covered by Article 5.7, given that the requirements of Article 5.7 are cumulative.[1993] However, the Panel considers it appropriate to also address the second requirement of Article 5.7, which, like the first, concerns the adoption of the measure.

Whether Panama adopted Measure 3 on the basis of available pertinent information

7.964. In accordance with the legal standard described above[1994], the Panel will now examine whether Panama's decision to "temporarily inactivate Resolution AUPSA-DINAN-116-2008"[1995] establishing the PIR for fresh pineapple from Costa Rica was based on the pertinent information available to Panama on 29 January 2019. The Panel recalls that, in order to meet this requirement, Panama must demonstrate that there is a "rational and objective relationship"[1996] between Measure 3 and the pertinent available information regarding the risk of entry, establishment and spread of the pink mealybug pest in Panama through pineapple imports from Costa Rica. The Panel will address the different categories of information identified by the parties, summarized in the table below, to determine, first of all, whether they are pertinent and whether they were available to Panama at the time of the adoption of Measure 3 in January 2019. If that is the case, the Panel will assess whether Panama adopted the Measure on the basis of that information.

[1993] See para. 7.203 above.
[1994] See para. 7.912 above.
[1995] Note AUPSA-AG-032-2019 (Exhibit CRI-65). See Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66).
[1996] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

Table 13 - Available pertinent information according to Costa Rica and Panama

Costa Rica	Panama
General information concerning the pink mealybug: • CABI (2021) and EPPO (2021) datasheets.[1997] • OIRSA contingency plan (2010) and technical report (2018). • Publicly available academic articles and studies on the pest.[1998]	General information concerning the pink mealybug pest[1999]: • Publication reporting the presence of the pest in pineapple in Fiji (2011).
Information on Costa Rica's phytosanitary status in respect of the pink mealybug pest: • Costa Rica's phytosanitary status: quarantine pest, not widely distributed and under official control, notified to Panama and the IPPC in 2014, and absent from pineapple crops in Costa Rica. • Imports of Costa Rican pineapples into Panama continued as usual from the notification of the pest in 2014 until the adoption of Measure 3 in January 2019. • Absence of interceptions of the pink mealybug reported by Panama in pineapple shipments from Costa Rica.[2000]	Information on Costa Rica's phytosanitary status in respect of the pink mealybug[2001]: • Pest's presence in Costa Rica. • Absence of technical tests concerning the phytosanitary status of pineapple-producing areas in Costa Rica in reference to the pest, and the surveillance, control, and mitigation/risk management measures adopted by Costa Rica in this regard.
ISPM 2 and ISPM 20.[2002]	
Measures applied by Panama, Peru, and the European Union to imports of host fruits of the pest (pineapples and avocados) from countries where the pink mealybug is present (Colombia, Costa Rica, and the United States).[2003]	

General information concerning the pink mealybug pest

7.965. The first category of information that Costa Rica considers pertinent is general information concerning the pink mealybug pest, which consists of: (a) the CABI and EPPO datasheets; (b) the OIRSA technical report and contingency plan in respect of the pest; and (c) publicly available academic articles and studies.[2004] Panama considers that, although this information is pertinent for

[1997] The Panel notes that the CABI and EPPO datasheets in the record are dated 2021, which is when they were last updated, as indicated on the respective web pages (see the CABI Digital Library, available at https://www.cabidigitallibrary.org/doi/10.1079/cabicompendium.40171; and the EPPO Global Database, available at https://gd.eppo.int/taxon/PHENHI/datasheet (accessed 13 August 2024)). However, since these resources are regularly updated, the date does not mean that earlier versions of the datasheets were not available to Panama prior to the adoption of Measure 3. This is indirectly confirmed by Panama itself when it states that it used the CABI and EPPO databases to conduct the verification of pests that, in its view, constituted a risk analysis in the framework of developing PIR for foods of plant origin. (Panama's response to Panel question No. 8, paras. 30-31). Moreover, with specific regard to the EPPO datasheet, it should be noted that the EPPO web page contains a history of the datasheet, which indicates that the datasheet was first published in 2005. The EPPO also notes that the sections of the datasheet entitled "Identity", "Hosts", and "Geographical distribution" are updated automatically from the database, while, for the remaining sections, the date of the last update is indicated on the datasheet. See the EPPO Global Database, available at https://gd.eppo.int/taxon/PHENHI/datasheet (accessed 13 August 2024).

[1998] Costa Rica's first written submission, para. 780 (referring to CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71); EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144); OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72); and OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70)).

[1999] Panama's first written submission, para. 292. See also ibid. para. 309.

[2000] Costa Rica's first written submission, para. 781 (quoting Memorandum DSFE-261-2014 (Exhibit CRI-68); and Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69); and referring to INEC, Pineapple imports into Panama (2010-2020) (Exhibit CRI-77)).

[2001] Panama's first written submission, para. 292. See also ibid. para. 309.

[2002] Costa Rica's first written submission, para. 783 (quoting IPPC, ISPM 2 (Exhibit CRI-101); IPPC, ISPM 20 (Exhibit CRI-161)); second written submission, paras. 221-223.

[2003] Costa Rica's first written submission, paras. 784-789 (quoting Directorate Resolution No. 0042-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh avocados from Colombia (Exhibit CRI-163); Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164)); second written submission, paras. 224-231.

[2004] Costa Rica's first written submission, para. 780.

the purposes of Article 5.7, it is not sufficient.[2005] Panama asserts that "the available 'pertinent information' within the meaning of Article 5.7 refers to 'some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment'".[2006] The Panel understands that Panama has identified an "evidentiary basis" related to information on the pest, namely the 2011 scientific publication reporting the presence of the pest in pineapple in Fiji.[2007]

7.966. The Panel agrees with the parties that the information concerning the pink mealybug pest is pertinent, as the risk identified by Panama relates to this particular pest.[2008] The Panel also considers that, in January 2019, Panama had this information, since it is contained in documents that are freely accessible or were published by institutions of which Panama is a member (such as OIRSA) or to which it often turns for information to prepare its PIR (such as CABI and the EPPO).[2009]

7.967. With respect to whether Measure 3 was adopted on the basis of this information, Panama asserts that its discovery in 2018 of a 2011 publication reporting a case of pink mealybug in pineapple in Fiji[2010] called into question its previous conclusions on the risk of transmission of the pink mealybug through Costa Rican pineapples. Panama asserts that this publication, together with the presence of the pest in Costa Rica, led it to adopt Measure 3.[2011]

7.968. As mentioned above, in the section concerning the first requirement of Article 5.7, the 2011 publication merely reports the presence of the pink mealybug in pineapple in Fiji, thereby complementing existing information on hosts of the pest. The publication indicates that the pink mealybug is a potential invasive pest of several crops, particularly pineapple[2012], and that it could be potentially very important ecologically and economically.[2013] However, the publication does not elaborate on these assertions or provide recommendations on the measures to be taken in the light of the earlier characterization of the pest.

7.969. The Panel recalls that the fact that the CABI datasheet refers to a 2004 publication when including pineapple as a host casts doubt on how new the link between pineapples and the pest is.[2014]

7.970. The Panel observes that Panama does not claim to have based Measure 3 on other available scientific evidence on the pest, such as the CABI and EPPO datasheets, the OIRSA contingency plan for an outbreak of the pest in a country of the region, the OIRSA technical report on the current status of the pest, or existing scientific literature. A review of this scientific evidence shows the relevance of the different methods of control in the management of the pest, particularly biological

[2005] Panama's second written submission, para. 144.

[2006] Panama's second written submission, para. 154 (referring to Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678).

[2007] Panama's first written submission, para. 292. Panama identifies two other evidentiary bases related to Costa Rica's phytosanitary status in respect of the pest: (a) the presence of the pest in Costa Rica; and (b) the absence of information on the phytosanitary status of pineapple-producing areas in Costa Rica in reference to the pest. (Ibid. para. 292; Panama's response to Panel question No. 182, paras. 200-202).

[2008] This approach is consistent with that taken in previous disputes, where general information on the pest in question was considered pertinent. See Panel Reports, *Japan – Apples*, para. 8.218; *Russia – Pigs (EU)*, para. 7.661.

[2009] Panama's response to Panel question No. 9, para. 31. See also fn 1997 above on the date of the CABI and EPPO datasheets submitted by Costa Rica.

[2010] The Panel recalls that the available scientific evidence confirms Panama's claim, not contested by Costa Rica, that pineapple is a potential host of the pink mealybug. (See e.g. CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 19; EPPO Global Database, available at https://gd.eppo.int/taxon/PHENHI/hosts (accessed 13 August 2024)).

[2011] Panama's second written submission, para. 154.

[2012] Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 8.

[2013] Hodgson and Łagowska (2011) (Exhibit PAN-53), p. 1.

[2014] See para. 7.940 above.

control, but also, if applicable, other cultural[2015], chemical[2016], physical[2017], and legal[2018] control measures.[2019] The available scientific evidence on the pest does not suggest a need to suspend the importation of products which may be hosts of the pest, even if they come from areas where the pest is present[2020], which is not the case of Costa Rica, since the presence of the pest has not been reported in pineapple-producing areas.

7.971. The Panel therefore concludes that Panama did not adopt Measure 3 on the basis of the 2011 scientific publication or of the remaining pertinent general information concerning the pink mealybug available to it at the time of the adoption of the measure, since this information does not support prohibiting the importation of a product as a pest control measure in a situation such as that which existed in the context of Measure 3.

Information on Costa Rica's phytosanitary status in respect of the pink mealybug pest

7.972. The second category of information that Costa Rica considers pertinent is information on Costa Rica's phytosanitary status in respect of the pink mealybug pest. Costa Rica notes that, when Measure 3 was adopted, Panama had information indicating that: (a) the pink mealybug is a quarantine pest in Costa Rica (not widely distributed and under official control), notified to Panama and the IPPC in 2014; (b) the pest was absent from pineapple crops in Costa Rica[2021]; (c) for almost five years (from the notification of the presence of the pink mealybug in Costa Rica in 2014 until Measure 3 was adopted in January 2019), pineapple imports from Costa Rica continued as usual; and (d) Panama has never reported interceptions of pink mealybug in shipments of this product.[2022]

7.973. Panama does not question the pertinence of this information, with the exception of that concerning the absence of interceptions of the pest in pineapple shipments from Costa Rica. According to Panama, the absence of interceptions does not constitute pertinent information that demonstrates the absence of any phytosanitary risk, because if it were necessary to wait until the

[2015] Cultural control is "control exercised through agronomic practices that create an agro-ecosystem less favourable for the development and survival of pests". (SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), p. 15).

[2016] Chemical control is a type of control "that uses natural or synthetic chemicals that have biological activity". (SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), p. 16).

[2017] "Physical control of the pink mealybug consists of burning heavily infested plants, shrubs, bushes, and pruning waste". (SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), p. 17).

[2018] The purpose of a legal control is to "ensure that the movement of host plants, products and by-products of the pink mealybug and originating in areas under phytosanitary control is carried out in accordance with the regulations" in force. (SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), p. 21).

[2019] See e.g. OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72), p. 38; CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), pp. 42-43; EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144), p. 5; USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual* (2003) (Exhibit CRI-74), p. 11; Ganjisaffar et al. (Exhibit CRI-146), p. 2; SENASICA, *Technical and operational manual for the campaign against the pink hibiscus mealybug* (2008) (Exhibit CRI-159), pp. 15-22; Chong et al. (2015) (Exhibits CRI-149, PAN-50), pp. 10-12; Culik et al. (2013) (Exhibit CRI-150), pp. 390 and 393-395; Isiordia-Aquino et al. (2011) (Exhibit CRI-153), p. 486; and USDA, APHIS, Pest Alert – The Pink Hibiscus Mealybug (1999) (Exhibit PAN-49), p. 2.

[2020] See e.g. OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72), p. 38; Chong et al. (2015), "Biology and Management of *Maconellicoccus hirsutus* (Hemiptera: Pseudococcidae) on Ornamental Plants" (Exhibits CRI-149, PAN-50), p. 10: "In areas where *M. hirsutus* has not invaded, quarantine and regulatory restrictions on agricultural commodities imported from known *M. hirsutus*-infested regions or countries are commonly imposed. Exporting areas or countries require successful phytosanitary practices for commodities that meet the necessary regulatory requirements. USDA-APHIS currently recommends a 2-h fumigation with 64, 48, and 40 mg/liter of methyl bromide at 16-21, 21-26, and >26ºC, respectively, for mealybugs (USDA 2014, Treatment Schedule T104-a-2). With pending restrictions on methyl bromide, alternative phytosanitary practices for *M. hirsutus* include irradiation (Jacobsen and Hara 2003), hot water immersion (Hara and Jacobsen 2005), and vapor heat treatment (Follett 2004)."

[2021] Costa Rica's first written submission, para. 781 (quoting Memorandum DSFE-261-2014 (Exhibit CRI-68); Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69)).

[2022] Costa Rica's first written submission, para. 781 (quoting INEC, Pineapple imports into Panama (2010-2020) (Exhibit CRI-77)).

pest were intercepted in a shipment of Costa Rican pineapples before adopting a provisional measure, the right to take precautionary action for under Article 5.7 would be undermined.[2023]

7.974. The Panel considers that all the information on Costa Rica's phytosanitary status in respect of the pink mealybug, including that concerning the absence of interceptions, is pertinent, because it is directly related to the risk in question, namely the risk of entry, establishment and spread of the pest in Panama through imports of pineapples from Costa Rica. The Panel refers to ISPM 11, according to which "[p]est interception data may provide evidence of the ability of a pest to be associated with a pathway and to survive in transport or storage".[2024] Accordingly, the Panel sees no reason to deny the pertinence of the information concerning interceptions of the pest.

7.975. Furthermore, Panama had the information on Costa Rica's phytosanitary status in respect of the pink mealybug pest at the time Measure 3 was adopted. With regard to whether Measure 3 was adopted on the basis of this information, Panama itself indicates that this was not the case, by asserting that it adopted the measure on the basis of two pieces of information concerning Costa Rica's phytosanitary status in respect of the pest: (a) the presence of the pest in Costa Rica; and (b) the absence of information on the phytosanitary status of pineapple-producing areas in Costa Rica.[2025] According to Panama, the fact that the pest was present in Costa Rica implied a "risk that the pink mealybug will continue to spread to other areas of Costa Rica in other hosts, including pineapple".[2026] Therefore, and given the absence of "further technical information"[2027] that, according to Panama, would have enabled it to assess that risk, Panama decided to suspend imports of fresh pineapple from Costa Rica.

7.976. The Panel notes that Panama decided to adopt Measure 3, which prohibits imports and is considered under ISPM 11 to be "of last resort"[2028], despite knowing that the pink mealybug is a pest with limited distribution in Costa Rica, under official control, that has not been detected in pineapple-producing areas of Costa Rica, and that has not been intercepted. Moreover, Panama itself has confirmed that it knew the status of the pest in Costa Rica had not changed since it was notified in 2014.[2029]

7.977. The Panel finds nothing in the record to suggest that the information on Costa Rica's phytosanitary status in respect of the pest would justify the decision to inactivate the PIR for pineapple from Costa Rica, thereby preventing the importation of this product into Panama.

7.978. With regard to the lack of further technical data on the phytosanitary status of pineapple-producing areas in Costa Rica in reference to the pink mealybug, the Panel refers to the conclusions in the previous section on the necessary information according to ISPM 11.[2030] As explained in the examination of the first requirement of Article 5.7, this ISPM does not support the need to have such information in order to assess the risk in question and to adopt the measure appropriate to the level of risk determined when the pest has not been found to be present in pineapple-producing areas.

7.979. In the Panel's view, the body of information on Costa Rica's phytosanitary status in respect of the pest available to Panama in January 2019 does not support the adoption of Measure 3. Accordingly, the Panel concludes that Panama has failed to demonstrate that it adopted Measure 3

[2023] Panama's first written submission, para. 301; second written submission, para. 159.
[2024] IPPC, ISPM 11 (Exhibit CRI-142), p. 13.
[2025] Panama's first written submission, para. 292. See also ibid. para. 309.
[2026] Panama's opening statement at the second meeting of the Panel, para. 66.
[2027] This information includes: (a) the specific location and description of the geographical areas of pineapple production and export in Costa Rica, (b) the phytosanitary status of these areas in respect of the pink mealybug; (c) survey procedures; (d) the phytosanitary surveillance and control measures adopted in the areas where the pest is present and in pineapple-producing areas; and (e) current mitigation or risk management strategies. (Panama's opening statement at the second meeting of the Panel, para. 67.)
[2028] IPPC, ISPM 11 (Exhibit CRI-142), p. 26. ISPM 11 views the prohibition of the importation of a commodity as a "measure of last resort", which should be considered in light of the anticipated efficacy, and is applicable in situations where no satisfactory measure to reduce risk to an acceptable level can be found. (Ibid.)
[2029] Panama's response to Panel question No. 6, para. 26.
[2030] See para. 7.959 above.

on the basis of pertinent information on Costa Rica's phytosanitary status in respect of the pink mealybug pest available to it at the time the Measure was adopted in January 2019.

ISPM 2 and ISPM 20

7.980. The third category of information that Costa Rica considers pertinent consists of ISPM 2 and ISPM 20. For Costa Rica, these standards are pertinent because "they refer to 'emergency' actions – which may lead to the adoption of provisional measures pending technical justification – and establish when such measures may be taken".[2031] Panama disagrees with Costa Rica on the pertinence of these two ISPM, since they do not address the phytosanitary risk in question and, in its view, accepting their pertinence would mean imposing the particular ALOP reflected in these standards on all WTO Members, contrary to Article 3.3 of the SPS Agreement.[2032]

7.981. With regard to Panama's argument that the ISPM are not pertinent because they do not address the phytosanitary risk in question, the Panel recalls that, with respect to Measure 1, it has concluded that pertinent information within the meaning of Article 5.7 does not refer exclusively to information that addresses the particular risk in question.[2033] As explained above[2034], in the Panel's view, Article 5.7 would not *a priori* exclude the pertinence of international standards of a general nature that address the management of a particular situation (e.g. non-conformity), even if such standards do not specifically refer to the product or risk in question.

7.982. Pursuant to Annex A(3) to the SPS Agreement, the IPPC Secretariat is a relevant international organization in matters of plant health. In addition, the Panel notes that, unlike the provisions of Annex A(3)(a) to the SPS Agreement on Codex standards, Annex A(3)(c) refers in generic terms to "international standards, guidelines and recommendations developed under the auspices of the Secretariat of the [IPPC]", without referring to any particular aspect of the field of "plant health".[2035] In the Panel's view, this language confirms that the pertinence of such standards is not contingent on their addressing particular pests or products, as implied by Panama's argument. Accordingly, the Panel considers that the ISPM, as standards developed under the auspices of the IPPC Secretariat, constitute information "from" that organization that could be considered "pertinent" for the purposes of Article 5.7.

7.983. With regard to the pertinence of the ISPM in question, the Panel observes that Costa Rica refers to the following passages from ISPM 2 on the "Framework for pest risk analysis" and ISPM 20 on "Guidelines for a phytosanitary import regulatory system":

> **ISPM 2**
>
> **1.1.3. Review of phytosanitary policies**
>
> … For existing trade, no new measures should be applied until the revision or new PRA has been completed, unless this is warranted by new or unexpected phytosanitary situations that may necessitate emergency measures.[2036]
>
> **ISPM 20**
>
> **5.1.6. Non-compliance and emergency action**
>
> **5.1.6.2 Emergency action**
>
> Emergency action may be required in a new or unexpected phytosanitary situation, such as the detection of quarantine pests …

[2031] Costa Rica's second written submission, para. 223.
[2032] Panama's first written submission, para. 303.
[2033] See para. 7.225 above.
[2034] See paras. 7.217 -7.220 , 7.223 and 7.225 above.
[2035] Annex A(3)(a) refers specifically to "standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice".
[2036] Costa Rica's first written submission, para. 783 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8).

…

5.1.6.4 Withdrawal or modification of regulations

In the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs, the NPPO of the importing contracting party may withdraw the authorization (e.g. permit) allowing import, modify the regulation, or institute an emergency or provisional measure with modified entry procedures or a prohibition.[2037]

7.984. These sections of the ISPM address emergency actions and measures aimed at preventing the entry, establishment or spread of a pest in a new, unexpected or unforeseen situation not addressed by existing phytosanitary measures.[2038]

7.985. ISPM 2 provides a framework that describes the PRA process within the scope of the IPPC. ISPM 20, meanwhile, describes the structure and operation of a phytosanitary import regulatory system and the rights, obligations and responsibilities which should be considered in establishing, operating and revising the system.[2039]

7.986. The Panel agrees with Costa Rica that ISPM 2 and ISPM 20 are pertinent insofar as they provide guidance on the type of situations that may require emergency actions leading to the adoption of provisional measures such as is the case of Measure 3, according to Panama. ISPM 2 reserves emergency measures for "new or unexpected phytosanitary situations", while ISPM 20 provides that an "[e]mergency action may be required in a new or unexpected phytosanitary situation".[2040]

7.987. Costa Rica asserts that, when Measure 3 was adopted, no "new", "unexpected" or "unforeseen" event had occurred with respect to imports of Costa Rican pineapples, such as, for instance, an interception of the pest or significant non-compliance, to justify the application of emergency provisional measures.[2041]

7.988. Panama contends that "nothing in ISPM 20 restricts the adoption of emergency measures to cases of non-compliance or interception of a pest in a shipment of a commodity".[2042] In this regard, Panama indicates that the situation set forth in ISPM 20 of "[p]ests not regulated for a particular pathway" is "the case at hand", since Panama temporarily suspended imports of pineapples from Costa Rica in response to the presence of the pink mealybug in Costa Rica and scientific evidence that called into question its previous conclusions as to the transmission of the pest through pineapple imports from Costa Rica.[2043] Panama also contends that Article 5.7 does not require the prior detection of a pest for the adoption of a provisional measure such as Measure 3.[2044]

7.989. ISPM 2 does not provide guidance as to what may be considered a new, unexpected or unforeseen situation. Conversely, the Panel notes that ISPM 20, when addressing emergency action in section 5.1.6.2, refers to examples of the detection of pests. In the first paragraph of that section, ISPM 20 refers explicitly to "a new or unexpected phytosanitary situation, such as the detection of quarantine pests or potential quarantine pests".[2045] Furthermore, in the subsequent paragraphs of that section, which are reproduced below, ISPM 20 describes three "[c]ommonly encountered

[2037] Costa Rica's first written submission, para. 783 (quoting IPPC, ISPM 20 (Exhibit CRI-161), pp. 247-248).

[2038] An emergency action is a "prompt phytosanitary action undertaken in a new or unexpected phytosanitary situation", while an emergency measure is a "phytosanitary measure established as a matter of urgency in a new or unexpected phytosanitary situation". ISPM 5 clarifies that an emergency measure may or may not be a provisional measure. (IPPC, ISPM 5 (Exhibit CRI-75), pp. 8 and 17).

[2039] IPPC, ISPM 20 (Exhibit CRI-161), p. 239.

[2040] IPPC, ISPM 20 (Exhibit CRI-161), p. 247.

[2041] Costa Rica's first written submission, para. 783.

[2042] Panama's first written submission, para. 304. See also Panama's response to Panel question No. 225, para. 331.

[2043] Panama's first written submission, para. 304.

[2044] Panama's response to Panel question No. 225, para. 331.

[2045] IPPC, ISPM 20 (Exhibit CRI-161), p. 247.

situations requiring emergency action".[2046] In the three scenarios, reference is made explicitly or implicitly to the detection of pests.

7.990. In the first scenario, which concerns "[p]ests not previously assessed", ISPM 20 states that, "[a]t the time of interception, they may be categorized as regulated pests on a preliminary basis because the NPPO has a cause to believe they pose a pest risk".[2047] In the second scenario, which deals with "[p]ests not regulated for a particular pathway", ISPM 20 refers implicitly to the interception of the pest by stating that such pests "should be included on the appropriate list or within other measure if it is determined that *the occurrence of the pest in the same and similar circumstances may be anticipated in the future*".[2048] In the Panel's view, this language indicates that the emergency phytosanitary actions referred to in this scenario may be applied to non-regulated pests in respect of particular pathways where it is determined that they are present in a shipment. Lastly, the third scenario, which addresses the "[l]ack of adequate identification" of a pest, also explicitly links emergency actions to pest detection by establishing how to proceed "[w]here pests are routinely detected in a form that does not allow for adequate identification".[2049]

7.991. The context provided by other sections of ISPM 20, and by other ISPM and the IPPC, which will be discussed below, appears to confirm this understanding that the concept of new, unforeseen or unexpected situations is "commonly"[2050] linked to the detection of pests in imported consignments. Section 5.1.6.4 of ISPM 20 on "Withdrawal or modification of phytosanitary regulation" provides that the NPPO of the importing contracting party may institute an emergency or provisional measure in "the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".[2051] In this regard, it should be noted that the detection of regulated pests may be considered a significant instance of non-compliance, as indicated in ISPM 13 on "Guidelines for the notification of non-compliance and emergency action".[2052]

7.992. This same ISPM provides guidance for the notification of emergency measures related to the failure of an imported consignment to comply with requirements or the detection of pests or organisms therein. As indicated by Costa Rica[2053], ISPM 13 establishes that emergency actions are taken "on the detection in an imported consignment of … regulated pests" or "organisms posing a potential phytosanitary threat".[2054] The Panel also agrees with Costa Rica on the pertinence of Article VII.6 of the IPPC[2055], which confirms the above by establishing the right of any contracting party to "tak[e] appropriate emergency action on the detection of a pest posing a potential threat to its territories or the report of such a detection".[2056]

7.993. Having said this, the Panel agrees with Panama that the scenarios described in section 5.1.6.2 of ISPM 20 do not constitute an exhaustive list of situations that may warrant the adoption of an emergency action. This is evident from the use of expressions like "a new or unexpected phytosanitary situation, such as"[2057] and "[c]ommonly encountered situations requiring emergency action include".[2058] Therefore, the Panel does not rule out the possibility of scenarios not explicitly envisaged in ISPM 20 that are not linked to the detection of a pest and that require the adoption of emergency measures. Nevertheless, the scenarios discussed above, which are explicitly identified in section 5.1.6.2 of ISPM 20, are linked to the detection of a pest. Since Panama asserts that Measure 3 fits into one of these scenarios, namely that of "[p]ests not regulated for a particular pathway", Measure 3 should result from the detection of the pest. However, the record contains no evidence of the pest having been intercepted in shipments of Costa Rican pineapples.[2059]

[2046] IPPC, ISPM 20 (Exhibit CRI-161), p. 248.
[2047] IPPC, ISPM 20 (Exhibit CRI-161), p. 248.
[2048] IPPC, ISPM 20 (Exhibit CRI-161), p. 248. (emphasis added)
[2049] IPPC, ISPM 20 (Exhibit CRI-161), p. 248.
[2050] IPPC, ISPM 20 (Exhibit CRI-161), p. 248.
[2051] IPPC, ISPM 20 (Exhibit CRI-161), p. 248.
[2052] IPPC, ISPM 13 (Exhibit CRI-283), p. 6.
[2053] Costa Rica's response to Panel question No. 84, para. 3.138.
[2054] IPPC, ISPM 13 (Exhibit CRI-283), p. 6.
[2055] Costa Rica's response to Panel question No. 84, para. 3.141.
[2056] IPPC (1997) (Exhibit CRI-145), Article VII.6.
[2057] IPPC, ISPM 20 (Exhibit CRI-161), p. 247.
[2058] IPPC, ISPM 20 (Exhibit CRI-161), p. 248.
[2059] Panama's response to Panel question No. 54, para. 158.

7.994. Moreover, the Panel considers that Panama has failed to demonstrate the existence of a new, unexpected or unforeseen phytosanitary situation that could warrant the adoption of Measure 3. In this regard, the Panel notes Panama's assertion that it "temporarily suspended imports of pineapples from Costa Rica in response to the presence of *M. hirsutus* in Costa Rica and evidence that called into question its previous conclusions as to the transmission of the pest through imports of Costa Rican pineapples".[2060] In the Panel's view, the two elements that Panama mentions, namely the presence of the pink mealybug in Costa Rica and the 2011 publication reporting the presence of the pest in pineapple in Fiji, do not constitute new, unexpected or unforeseen situations, given that: (a) Panama knew since 2014 that the pest was present in Costa Rica because it was notified by Costa Rica[2061]; and (b) the 2011 publication was included in the CABI and EPPO datasheets on the pest, which are updated periodically, and which Panama consults regularly. Furthermore, the CABI datasheet mentions a 2004 publication in relation to pineapple as a host of the pest.[2062]

7.995. The foregoing leads the Panel to conclude that Panama has not demonstrated that it adopted Measure 3 on the basis of ISPM 2 and ISPM 20, since there is no evidence in the record of the pink mealybug having been intercepted in shipments of Costa Rican pineapples. Panama has also failed to demonstrate the existence of other kinds of new, unexpected or unforeseen situations that might justify the adoption of Measure 3.

Phytosanitary measures applied by other Members and by Panama itself

7.996. The Panel now turns to the phytosanitary measures applied by other Members and by Panama itself that Costa Rica considers pertinent information for the purposes of Article 5.7 of the SPS Agreement. The Panel will first examine whether these measures, summarized in the table below, constitute pertinent information for the purposes of Article 5.7 and, if so, whether Measure 3 was adopted on the basis of the information derived therefrom.

Table 14 - Measures applied by Panama and by other Members (identified by Costa Rica)

Member	Product and origin	Measure (or absence thereof)
Panama	Imports of fresh avocado from Colombia	An additional declaration is required in the official phytosanitary certificate indicating that "[t]he shipment is free from … *Maconellicoccus hirsutus*".[2063]
	Imports of fresh pineapple from the United States	No PIR relating to the pink mealybug are imposed on these imports.[2064]
	Imports of fresh pineapple from Colombia	No PIR relating to the pink mealybug are imposed on these imports.[2065]
Peru	Imports of fresh avocado and fresh pineapple from Colombia	The consignment must be accompanied by an official phytosanitary certificate with the additional declaration "[p]roduct free from: *Maconellicoccus hirsutus*".[2066]

[2060] Panama's first written submission, para. 304. (emphasis original)
[2061] Memorandum DSFE-261-2014 (Exhibit CRI-68).
[2062] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 19. See fn 2009 above.
[2063] Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164), Article 3.3. Panama considers this requirement "a mitigation measure for the pink mealybug". (Panama's response to Panel question No. 56, para. 163).
[2064] Costa Rica's second written submission, para. 226; Panama's response to Panel question No. 56, para. 162. Panama argued that the reason for the absence of PIR for pineapple from the United States and Colombia is that "[n]o risk assessments have been carried out for the importation of pineapples from the United States and Colombia". It further noted that, in Panama, "[t]he importation of fresh pineapple from the United States and Colombia is not permitted" and that "[t]he records of imports originating in Colombia and the United States relate to dried pineapple". (Costa Rica's second written submission, para. 226 (quoting Panama's responses to Panel question No. 55, para. 160, and No. 95, para. 270)).
[2065] Costa Rica's second written submission, para. 226; Panama's response to Panel question No. 56, para. 162.
[2066] Directorate Resolution No. 0042-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh avocados from Colombia (Exhibit CRI-163), single article, para. 2; Directorate Resolution No. 0041-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh pineapple from Colombia (Exhibit CRI-372), single article, para. 2.

Member	Product and origin	Measure (or absence thereof)
European Union	Imports of fresh pineapple from Costa Rica	Pineapples are exempt from the requirement to be accompanied by a phytosanitary certificate for their introduction into the territory of the European Union.[2067]

7.997. The Panel recalls that Article 5.7 allows Members to adopt SPS measures provisionally "on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members".[2068] The Panel therefore considers that the measures adopted by other Members identified by Costa Rica could be considered pertinent information for the purposes of the second requirement of Article 5.7 of the SPS Agreement. While Article 5.7 does not refer explicitly to measures of the Member adopting the provisional measure, the measures adopted by Panama may also be pertinent to the risk in question. The fact that the list of available pertinent information in Article 5.7 is not exhaustive, as denoted by the use of the term "including", would permit the consideration of not only the categories of information mentioned therein but also other information deemed pertinent to the risk in question that is available to the Member adopting the provisional measure.

7.998. Costa Rica considers that these measures are pertinent, even if they relate to fruit other than pineapples, because they concern risks arising from the pink mealybug pest.[2069] For its part, Panama does not consider them pertinent because, in its view, they are not related to the phytosanitary risk in question or were adopted in circumstances different from those of the present case.[2070]

7.999. With respect to Panama's argument that the measures of other Members applied to products other than pineapple are not pertinent because they are not related to the phytosanitary risk in question[2071], the Panel agrees with Costa Rica that the measures concerning the importation of avocados are pertinent, as both pineapple and avocado are considered to be hosts of the pest.[2072] As a result, countries that import these products face the risk of transmission of the pest through imports of those products. In addition, the Panel observes that the scientific literature on the pest does not distinguish between hosts when addressing issues such as the detection and identification of the pest, spread pathways, or control methods.[2073]

7.1000. The Panel also disagrees with Panama's position that some measures of other Members and of Panama itself are not pertinent because they were adopted in circumstances different from those of the present case with regard to the risk assessment in question. Panama refers specifically to the fact that "[t]he measures applicable to avocado imports [in Panama and Peru] stem from an objective assessment of phytosanitary risk based on the information enabling such an assessment"[2074], unlike Measure 3. The Panel considers that the text of Article 5.7 does not support Panama's approach, as it refers to "[SPS] measures applied by other Members". Accordingly, the language of the provision does not allow any measure applied by a Member to be excluded *a priori*. In the Panel's view, the pertinence of the measure in question should be determined on a case-by-case basis, and in the light of all relevant facts and circumstances.

7.1001. In addition, the evidence in the record lends partial support to Panama's assertion, since it shows only that risk assessments were conducted for the measures applied by Peru to avocado and

[2067] European Union's third-party response to Panel question No. 9, para. 30. Nevertheless, Costa Rica has clarified that, in line with its domestic legislation, pineapple shipments must be accompanied by a phytosanitary certificate. See SFE, *Information required to assess the risks associated with importing pineapples from Costa Rica into Panama* (2021) (Exhibit CRI-91), p. 34; Costa Rica's response to Panel question No. 173, para. 3.127.

[2068] The reference to "*partes contratantes*" ("contracting parties") in the Spanish version of the SPS Agreement should be understood as a reference to "Members". See fn 400 above.

[2069] Costa Rica's first written submission, para. 785.

[2070] Panama's first written submission, paras. 306-308.

[2071] Panama's first written submission, para. 306.

[2072] In the CABI datasheet, avocado is listed as a main host of the pest, whereas pineapple comes under "Other". The list of hosts of the pest in the EPPO database includes a single category ("host") that applies to all the products listed therein. See EPPO Global Database, https://gd.eppo.int/taxon/PHENHI/hosts (accessed 13 August 2024). (CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CR-71); EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144)).

[2073] See e.g. EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144), pp. 4-5.

[2074] Panama's first written submission, para. 307.

pineapple imports from Colombia.[2075] In the case of the measure applied by Panama to avocado imports from Colombia, Panama's responses to the Panel's questions on this matter are inconclusive. In response to the Panel's question as to whether Panama's PIR for avocado from Colombia are based on a risk assessment within the meaning of Annex A(4) to the SPS Agreement, Panama replied that these PIR "are based on a bilateral phytosanitary protocol between Colombia and Panama, and on the ICA resolution establishing provisions for the registration and management of farms producing fresh fruit for export and the registration of exporters".[2076] According to Panama, this bilateral phytosanitary protocol and the ICA resolution constitute the risk assessment, which "was characterized by the exchange and analysis of phytosanitary information, following which mutually agreed mitigation measures were established".[2077]

7.1002. The Panel observes that Panama adopted the PIR for avocado from Colombia in January 2007[2078] and modified them in December 2009.[2079] The bilateral phytosanitary protocol to which Panama refers is dated 16 December 2008[2080], and the ICA resolution, September 2004.[2081] Accordingly, the Panel understands that, when Panama asserts that the protocol and the resolution constitute the risk assessment for the PIR, it is referring to the 2009 PIR. Regarding these PIR, Panama asserts that it did not assess the risk associated with the pink mealybug in avocado from Colombia because, when it adopted the 2007 PIR, it already knew that the pest had been present in Colombia since 2003, and it had classified the pink mealybug as a pest of interest to Panama.[2082] The absence from the record of a risk assessment with respect to the pink mealybug leads the Panel to consider that Panama has failed to demonstrate that the measures it applies to avocado imports from Colombia are based on an objective assessment of the risk associated with the pink mealybug and that they were thus adopted in circumstances different from those of Measure 3 with regard to the risk assessment.

7.1003. Furthermore, the Panel observes that Panama presented a similar argument about the different circumstances affecting pineapple imports from the United States and Colombia. Initially, Panama suggested that the situation with regard to imports of pineapples from Costa Rica was different to that concerning imports of pineapples from Colombia and the United States because, "[u]nlike with these countries, Panama was unable to perform a more objective assessment of the risk in relation to Costa Rican pineapples because the technical information required was not available".[2083] However, Panama subsequently clarified that it had not performed an assessment of the risk of transmission of the pink mealybug through imports of fresh pineapples from these two countries.[2084]

7.1004. Having addressed Panama's arguments rejecting the pertinence of the measures identified by Costa Rica, the Panel will now consider the similarities between the measures of other Members and Panama, on the one hand, and Measure 3, on the other, which, in the Panel's view, would justify considering these measures as pertinent information for the purposes of Article 5.7. First, the Panel notes similarities between the products imported in the sense that the measures of Panama and Peru with regard to Colombian avocados concern the importation of a product (avocado) that, like pineapple, is considered a host of the pink mealybug pest.[2085] Second, the Panel observes similarities between the phytosanitary status of the exporting Members in respect of the pink mealybug. The pest is considered a quarantine pest and is present to a limited degree in both Colombia and

[2075] Directorate Resolution No. 0042-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh avocados from Colombia (Exhibit CRI-163); Directorate Resolution No. 0041-2016-MINAGRI-SENASA-DSV of Peru establishing the phytosanitary import requirements for fresh pineapple from Colombia (Exhibit CRI-372).

[2076] Panama's response to Panel question No. 185, para. 217.

[2077] Panama's response to Panel question No. 185, para. 217. See also Panama's response to Panel question No. 188, para. 224.

[2078] Resolution AUPSA-DINAN-026-2007 concerning the importation of avocados from Colombia (Exhibit PAN-136).

[2079] Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164).

[2080] Phytosanitary protocol for the export to Panama of fresh or chilled fruit and vegetables originating in Colombia (Exhibit PAN-139).

[2081] ICA Resolution No. 001806 of 2004 (Exhibit PAN-144).

[2082] Panama's responses to Panel question No. 56, para. 165, and No. 175, para. 179.

[2083] Panama's first written submission, para. 308.

[2084] Panama's response to Panel question No. 185, para. 216. See also Panama's response to Panel question No. 55, para. 160.

[2085] See fn 2072 above.

Costa Rica.[2086] Third, there are similarities between the Members that import avocados from Colombia: neither Panama nor Peru has reported the presence of this pest in its territory to the IPPC Secretariat.[2087] On the basis of these similarities, the Panel considers that the measures of Panama and Peru with regard to the importation of avocados from Colombia constitute pertinent information available to Panama when it adopted Measure 3.

7.1005. With respect to the exemption that the European Union grants to pineapple imports from any third country, including Costa Rica, which obviates the need for consignments to be accompanied by a phytosanitary certificate, the Panel observes that this exemption is provided for in Part C of Annex XI to Commission Implementing Regulation (EU) 2019/2072 of 28 November 2019.[2088] Panama adopted Measure 3 in January 2019, months prior to the entry into force of the Regulation providing for the exemption, and thus did not have this information at the time of the adoption of the measure. Accordingly, the Panel considers that the measure applied by the European Union to pineapples from Costa Rica does not constitute pertinent information for the purposes of the second requirement of Article 5.7 of the SPS Agreement.

7.1006. In relation to Panama's measures concerning the importation of pineapple from Colombia and the United States, the Panel notes significant factual discrepancies between the parties regarding the very existence of such imports.

7.1007. Costa Rica asserts that, "after adopting the prohibition on the importation of pineapples from Costa Rica on account of the pink mealybug, Panama has continued to import fresh pineapple from countries where the pest is also present"[2089], in particular Colombia and the United States.[2090] Costa Rica submitted data from the National Institute of Statistics and Censuses (INEC) on pineapple imports for the years 2010-2020[2091] that, despite failing to distinguish between fresh pineapple and dried pineapple from 2014 onwards, indicate, in its view, that it is "highly likely" that exports from the United States to Panama in 2020 and 2022 were also of, or included, fresh pineapple.[2092] Costa Rica also submitted USDA data on pineapple exports over the period 2018-2022.[2093] For Costa Rica, these data show that Panama imported fresh pineapple from Colombia and the United States before and after the adoption of Measure 3. Costa Rica adds that "it appears implausible" that, in 2020, no fresh pineapple was imported into the Panamanian market from the United States and Colombia, given that Panama imported pineapple only from these two countries.[2094] With respect to the customs documentation provided by Panama, Costa Rica notes that, for 2015, the quantities of imported pineapple reflected in the customs declaration, on the one hand, and in the official INEC data, on the other, do not match.[2095]

7.1008. For its part, Panama argues that there are no PIR for fresh pineapple from the United States and Colombia, whereas PIR do exist for dried pineapple from all countries. According to Panama, in the absence of PIR, importers cannot submit food import notifications.[2096] In addition, Panama provides documentation from its customs authorities that, in its view, demonstrates that pineapple imports from the United States and Colombia during the period from 2014 to 2016 and between 2020 and 2022 relate to dried pineapple, not fresh pineapple. Panama adds that the data provided in the customs declarations match, and are corroborated by, the c.i.f. values in Panama's INEC data.[2097] Panama considers that Costa Rica has failed to meet the burden of proof with respect to its

[2086] EPPO, Distribution of the pink mealybug in Colombia (2022) (Exhibit CRI-167); EPPO, Distribution of the pink mealybug in Costa Rica (2022) (Exhibit CRI-174).

[2087] SFE, *Information required to assess the risks associated with importing pineapples from Costa Rica into Panama* (2021) (Exhibit CRI-91), pp. 32-33.

[2088] European Union's third-party response to Panel question No. 9, para. 30. See Costa Rica's response to Panel question No. 173, fn 281.

[2089] Costa Rica's second written submission, para. 229. See also Costa Rica's first written submission, para. 788.

[2090] Costa Rica's second written submission, para. 226; Panama's response to Panel question No. 56, para. 162.

[2091] INEC, Pineapple imports into Panama (2010-2020) (Exhibit CRI-77).

[2092] Costa Rica's response to Panel question No. 174, para. 3.130.

[2093] USDA, U.S. fresh pineapple exports (2018-2022) (Exhibit CRI-368).

[2094] Costa Rica's response to Panel question No. 174, para. 3.133.

[2095] Costa Rica's comments on Panama's response to Panel question No. 184, para. 3.312.

[2096] Panama's response to Panel question No. 184, paras. 211 and 214.

[2097] Panama's response to Panel question No. 184, para. 215 (referring to Customs declarations for pineapple imports into Panama (2014-2016) (Exhibit PAN-141); INEC, Imports of fresh or dried pineapples (2020-2022) (Exhibit PAN-143)). Panama notes that it submitted, together with its opening statement at the

claim that Panama imported fresh pineapple from the United States and Colombia after the adoption of Measure 3.[2098] The Panel will now proceed to examine this issue.

7.1009. The INEC and USDA data on pineapple imports into Panama submitted by Costa Rica do not differentiate between fresh and dried pineapple from 2014 onwards.[2099] These data show that, from the adoption of Measure 3 in January 2019 until the establishment of this Panel in September 2021, Panama imported pineapple from the United States in 2019 and 2020 and from Colombia in 2020; however, they do not specify whether it is fresh or dried pineapple. In the Panel's view, the fact that Panama imported fresh pineapple from the United States in the period 2010-2013, as indicated by the INEC data[2100], does not necessarily mean that, in subsequent years, Panama continued to import fresh pineapple from this origin. The Panel considers that, on the basis of the data on pineapple imports submitted by Costa Rica, which do not distinguish between imports of fresh pineapple and dried pineapple for the period 2019-2021, it cannot be concluded that Costa Rica has demonstrated that Panama imported fresh pineapple from the United States and Colombia following the adoption of Measure 3.

7.1010. Furthermore, the Panel observes that three of the four customs declarations submitted by Panama for the period 2020-2021[2101], which account for 93.70% of the total c.i.f. value of pineapple imports from the United States and Colombia during this period, indicate that imports into Panama were of dried or processed pineapple.[2102] The other customs declaration, which concerns a pineapple shipment from the United States in 2020 with a very low c.i.f. value of PAB 363.17[2103], refers simply to "pineapples".[2104] The Panel recalls Panama's assertion that there are no PIR for fresh pineapple from the United States and Colombia[2105] and that, in the absence of PIR, which "is the official document declaring the exporting country eligible to export the product of interest to Panama"[2106], importers cannot submit food import notifications.[2107]

7.1011. Panama does not indicate the basis in its legislation for asserting that, in the absence of PIR, importers cannot submit import notifications.[2108] However, the evidence in the record appears to support Panama's assertion. In particular, Article 28 of Law No. 47 of 1996, which governs the adoption of phytosanitary protection measures, provides that:

> Natural or legal persons wishing to import plants, plant products, and phytosanitary inputs must comply with the requirements established by the [DNSV]. These

second meeting of the Panel, Exhibit PAN-118 to correct the information that had been omitted in Costa Rica's Exhibit CRI-368. (Ibid. para. 213 (referring to USDA, U.S. pineapple exports (2019-2023) (Exhibit PAN-118)).

[2098] Panama's comments on Costa Rica's response to Panel question No. 174, para. 103. It should be noted that Panama's argument has evolved over the course of these proceedings. Initially, Panama asserted that, "[u]nlike with these countries [Colombia and the United States], Panama was unable to conduct a more objective assessment of the risk in relation to Costa Rican pineapples", implying that it had conducted a risk assessment in respect of pineapples from Colombia and the United States and that, consequently, the importation of these pineapples was permitted. (Panama's first written submission, para. 308). Following the first meeting of the Panel, Panama indicated that it had not conducted risk assessments for the importation of pineapples from these two countries and that there were therefore no PIR for these products either. (Panama's response to Panel question No. 55, para. 160).

[2099] Fn 1 in Exhibit CRI-368 indicates that the data on exports of fresh pineapple from the United States relate to "[f]resh or dried" pineapple. See clarification in USDA, U.S. pineapple exports (2019-2023) (Exhibit PAN-118).

[2100] INEC, Pineapple imports into Panama (2010-2020) (Exhibit CRI-77).

[2101] Customs declarations for pineapple imports into Panama (2020-2022) (Exhibit PAN-151). Panama has also submitted customs declarations for pineapple imports into Panama for 2014-2016 (Exhibit PAN-141) and 2022 (Exhibit PAN-151).

[2102] The customs declarations refer to dried/freeze-dried/dehydrated pineapple, pineapple purée and "eezy fruitz - pineapple", which is a dried pineapple snack.

[2103] PAB 1 is equivalent to USD 1. See https://www.inec.gob.pa/archivos/P8061tipocambio2014.pdf (accessed 13 August 2024).

[2104] See the declaration of 18 August 2020 in Customs declarations for pineapple imports into Panama (2020-2022) (Exhibit PAN-151).

[2105] Panama's response to Panel question No. 184, paras. 211 and 214. See also Panama's responses to Panel question No. 177, para. 185, and No. 185, para. 216.

[2106] Panama's response to Panel question No. 184, paras. 211 and 214.

[2107] Panama's response to Panel question No. 184, paras. 211 and 214.

[2108] Panama's response to Panel question No. 184, paras. 211 and 214.

> requirements must be transparent, based on scientifically proven parameters, and published in the Official Gazette.[2109]

7.1012. Furthermore, the Panel notes that Decree-Law No. 11 of 2006 establishing AUPSA provides that AUPSA and the National Directorate of Food Import Standards are responsible for "establishing the sanitary and/or phytosanitary requirements that foodstuffs must meet in for their introduction" into the national territory.[2110]

7.1013. The Panel considers that this piece of Panamanian legislation confirms Panama's position that the importation of a plant product, such as pineapple in the case at hand, is contingent on compliance with the PIR established by the competent Panamanian authorities.

7.1014. There is no evidence in the record of the existence of PIR for fresh pineapple from the United States and Colombia. These PIR, which, if they exist, should be publicly available, as established by the Panamanian regulatory framework[2111], have not been provided by Costa Rica in support of its assertion that the importation of fresh pineapple from these two countries is permitted, nor do they appear on the website where Panama's PIR for food products are available.[2112] Accordingly, it can be assumed that the imports of "pineapples" from the United States with a c.i.f. value of PAB 363.17 in the 2020 customs declaration did not refer to imports of fresh pineapples.

7.1015. The Panel has compared the customs declarations submitted by Panama for the period 2020-2021 with the data on pineapple imports from Panama's INEC database and notes that the c.i.f. values in the customs declarations match those reported by INEC. While it is true that the gross weight values do not match, the fact that the c.i.f. values match is a strong indication that the information contained in the customs declarations is accurate. In this regard, the Panel notes that Costa Rica expresses doubts as to whether the customs declarations submitted by Panama "duly demonstrate that all the pineapple that has entered the Panamanian market since 2014 has been dried pineapple".[2113] Costa Rica cites as an example a discrepancy for 2015 between the quantities of imports reflected in the customs declaration, on the one hand, and in the official INEC data, on the other.[2114] However, Costa Rica does not explain why this discrepancy invalidates the data in the customs declarations on the imported product, nor does it provide any other reasons why the Panel should not consider this evidence.

7.1016. The Panel recalls that the burden of proof in respect of this issue lies with Costa Rica, which is the party asserting that fresh pineapple was imported from the United States into Panama after the adoption of Measure 3. In this regard, the Panel considers that Costa Rica has not demonstrated that Panama imported fresh pineapple from the United States and Colombia after the adoption of Measure 3.

7.1017. A review of the Members' measures described above shows that Peru has not suspended imports of avocados and pineapples from Colombia, even though they are fresh plant products and hosts of the pink mealybug from a country, Colombia, where the pest is present. Similarly, Panama itself allows avocado imports from Colombia, with there being no evidence that Panama has conducted an assessment of the risks associated with the pink mealybug. The Panel therefore considers that Measure 3, insofar as it prevents the importation of fresh pineapples from Costa Rica into Panama, bears no rational and objective relationship to the information derived from the measures applied by Peru and by Panama itself that were identified by Costa Rica.

7.1018. Accordingly, the Panel concludes that Panama did not adopt Measure 3 on the basis of the pertinent information derived from the measures applied by Peru to imports of avocados and pineapples from Colombia, and by Panama itself to imports of avocados from Colombia.

[2109] Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98).
[2110] National Assembly of Panama, Decree-Law No. 11 (2006) (Exhibit CRI-2), Articles 6.4 and 38.1.
[2111] See para. 7.1059 below.
[2112] APA, Advanced search for pineapple import requirements (Exhibit PAN-142).
[2113] Costa Rica's comments on Panama's response to Panel question No. 184, para. 3.312.
[2114] Costa Rica's comments on Panama's response to Panel question No. 184, para. 3.312.

Conclusion on whether Panama adopted Measure 3 on the basis of available pertinent information

7.1019. In the light of the foregoing, the Panel concludes that Measure 3, which inactivates the resolution containing the PIR for Costa Rican pineapples in Panama[2115], bears no rational and objective relationship to, and therefore was not adopted on the basis of, the following information: (a) general information concerning the pink mealybug pest; (b) information on Costa Rica's phytosanitary status in respect of the pink mealybug pest; (c) ISPM 2 and ISPM 20; and (d) the measures applied by Peru and by Panama itself.

7.1020. Accordingly, the Panel finds that Panama has not demonstrated that it adopted Measure 3 on the basis of available pertinent information within the meaning of Article 5.7 of the SPS Agreement.

7.5.1.2.1.3 Conclusion on Article 5.7 of the SPS Agreement

7.1021. In paragraphs 7.962 and 7.1019 above, the Panel found that Panama has not demonstrated that it adopted Measure 3 in a situation of insufficient relevant scientific evidence, or on the basis of available pertinent information, in breach of two of the requirements under Article 5.7. Considering these findings and the fact that the four requirements of Article 5.7 are cumulative[2116], the Panel does not consider it necessary to address the two requirements of Article 5.7 set out in the second sentence, which concern maintaining the measure, in order to resolve this dispute.[2117]

7.1022. In the light of the foregoing, the Panel finds that Measure 3 does not constitute a provisional measure covered by Article 5.7 of the SPS Agreement.

7.5.1.2.2 Claims under Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement

7.1023. As the Panel has found that Measure 3 is not a provisional measure under Article 5.7 of the SPS Agreement, Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement are applicable to this measure. The Panel will therefore proceed with the examination of Costa Rica's claims under Articles 5.1, 5.2, and 5.3, which concern the assessment of risk and the elements to be taken into account in that assessment, and under Article 2.2, relating to the obligation to ensure that the SPS measure is based on scientific principles and is not maintained without sufficient scientific evidence.

7.5.1.2.2.1 Main arguments of the parties

Costa Rica

7.1024. Costa Rica claims that, since Panama has not conducted a risk assessment that provides a scientific basis for Measure 3, Panama has acted inconsistently with the obligation under Article 5.1 of the SPS Agreement to base its phytosanitary measure on an assessment of the risk as appropriate to the circumstances.[2118] Costa Rica considers that the absence of a risk assessment results, in turn, in a breach of Articles 5.2 and 5.3. As a result of the failure to comply with Articles 5.1, 5.2, and 5.3 of the SPS Agreement, Costa Rica claims that Measure 3 is inconsistent with Article 2.2, since it is not based on scientific principles nor is it maintained with sufficient scientific evidence.[2119]

7.1025. Costa Rica argues that Measure 3 was adopted without any scientific basis or underpinning risk analysis, even though Panama referred to a "risk assessment" in its communication of

[2115] See para. 2.16 above.
[2116] See para. 7.110 above.
[2117] These requirements are (a) that Panama should seek to obtain the additional information necessary for a more objective assessment of risk; and (b) that Panama should review the SPS measure accordingly within a reasonable period of time.
[2118] Costa Rica's first written submission, para. 760.
[2119] Costa Rica's first written submission, paras. 759-760.

29 January 2019.[2120] According to Costa Rica, Panama provided no explanation or technical justification for Measure 3.[2121]

7.1026. Costa Rica asserts that it repeatedly requested the PRA prepared by Panama, but there was never a response to its request.[2122] According to Costa Rica, Panama merely indicated that Costa Rica had failed to provide further information on the phytosanitary status of pineapple-producing areas with respect to the pink mealybug[2123], which, in Costa Rica's view, is a clear indication that Panama did not prepare a risk analysis prior to closing the market.[2124] Costa Rica believes that this is confirmed by Panama's communication of 10 March 2021 detailing, for the first time, the information that it allegedly needed to conduct a risk assessment, which shows that Panama had not carried out such an assessment.[2125]

7.1027. Costa Rica submits that Panama's communication of 29 January 2019 does not contain, and is not in itself, the risk assessment[2126], given that (a) it does not qualify as a "scientific process" characterized by "systematic, disciplined and objective enquiry and analysis", (b) it does not contain any reasoning based on scientific grounds, and (c) nor does it contain an analysis of the likelihood of entry, establishment or spread of the pink mealybug pest through imports of fresh pineapples from Costa Rica[2127], within the meaning of Annex A(4) and Article 5.1 of the SPS Agreement. Costa Rica adds that ISPM 11, which sets out the elements to be reflected in any "appropriate" risk assessment to support an SPS measure, confirms that nothing in the communication constitutes a risk assessment. In this regard, Costa Rica asserts that Panama fails to establish any connection between the pest in question (pink mealybug) and the pathway or prohibited product (fresh pineapple from Costa Rica); it does not analyse the likelihood of the pink mealybug being in some way associated with fresh Costa Rican pineapples, which is the basic starting point for determining whether there is any risk of introduction of the pest by means of the pathway in question.[2128]

Panama

7.1028. Panama asserts that it adopted provisional measures, including Measure 3, as a precaution, in response to scientific evidence that called into question its previous conclusions concerning the sanitary risk posed by imports from Costa Rica of the products at issue.[2129] Panama submits that its provisional measures are not inconsistent with Articles 2.2, 5.1, 5.2, and 5.3 of the SPS Agreement, given that it acted strictly within the limits of its rights under Article 5.7 of the SPS Agreement and that provisional measures justified under Article 5.7 are exempt from the basic obligations set forth in Article 2.2.[2130]

7.5.1.2.2.2 Assessment by the Panel

7.1029. The Panel has found that Measure 3 is not a provisional measure under Article 5.7 of the SPS Agreement[2131], which means that Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement are applicable to the Measure. The Panel will therefore proceed with the examination of Costa Rica's claims under Articles 5.1, 5.2, and 5.3, which concern the risk assessment and the elements and factors to be taken into account in that assessment, and under Article 2.2, relating to the obligation

[2120] Costa Rica's first written submission, paras. 745-746 (quoting Note AUPSA-AG-032-2019 (Exhibit CRI-65), para. 1).
[2121] Costa Rica's first written submission, para. 750.
[2122] Costa Rica's first written submission, paras. 747 (quoting Memorandum DSFE-083-2019 (Exhibit CRI-78), para. 3), and 748-749 (quoting Memorandum DSFE-0838-2019 (Exhibit CRI-82); Memorandum DSFE-0849-2019 (Exhibit CRI-83); and Memorandum DSFE-0109-2021 (Exhibit CRI-84)).
[2123] Costa Rica's first written submission, para. 750 (quoting Note DNSV-0112-2021.OIAR (Exhibit CRI-85)).
[2124] Costa Rica's first written submission, para. 751 (referring to Note DNSV-0127-2021 (Exhibit CRI-87)).
[2125] Costa Rica's first written submission, para. 751 (quoting Note DNSV-0177-2021 (Exhibit CRI-88)).
[2126] Costa Rica's first written submission, paras. 753 and 758.
[2127] Costa Rica's first written submission, para. 755 (quoting Appellate Body Report, *EC – Hormones*, para. 187).
[2128] Costa Rica's first written submission, paras. 756 (referring to IPPC, ISPM 11 (Exhibit CRI-142)) and 757.
[2129] Panama's first written submission, para. 166.
[2130] Panama's first written submission, para. 166. See also ibid. paras. 435-436.
[2131] See para. 7.1022 above.

to ensure that the SPS measure is based on scientific principles and is not maintained without sufficient scientific evidence.

Relevant legal standard

7.1030. As mentioned under Measure 1[2132], Article 5.1 of the SPS Agreement requires the Panel to examine two aspects:

a. whether there is a risk assessment[2133], as appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations; and

b. if there is a risk assessment, whether the SPS measure of the Member concerned is based on that risk assessment.[2134]

7.1031. It was also noted that Article 5.2 of the SPS Agreement sets forth elements that must be taken into account when assessing risks. Similarly, Article 5.3 of the SPS Agreement, which is reproduced hereunder, and pursuant to which Costa Rica submits claims with respect to Measure 3, lays down four economic factors to be taken into account in assessing the risk to plant life or health:

> In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

7.1032. The Panel agrees with the interpretation of Articles 5.2 and 5.3 that these provisions shed light on the elements that are of relevance in the assessment of risks foreseen in Article 5.1.[2135] Accordingly, previous panels have considered, in their analysis under Article 5.1, whether Members took into account the elements contained in Articles 5.2 and 5.3.[2136]

7.1033. With respect to Article 2.2, the Panel recalls that a finding of a violation of Articles 5.1, 5.2, and 5.3 may give rise to a rebuttable presumption of inconsistency with Article 2.2.[2137] This is because Articles 5.1, 5.2, and 5.3 of the SPS Agreement constitute a "specific application"[2138] of the obligation under Article 2.2 to ensure that an SPS measure is based on scientific principles and sufficient scientific evidence.

[2132] See para. 7.310 above.

[2133] Annex A(4) to the SPS Agreement defines a "risk assessment" as follows:
The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

[2134] Appellate Body Report, *India – Agricultural Products*, para. 5.8; and Panel Reports, *US – Poultry (China)*, para. 7.173; and *Costa Rica – Avocados (Mexico)*, para. 7.321.

[2135] Panel Reports, *Japan – Apples*, para. 8.230; *Russia – Pigs (EU)*, para. 7.767. Article 5.2 has been found to be inextricably linked to Article 5.1. (Panel Report, *Australia – Apples*, para. 7.211). In the Panel's view, Article 5.3 is also inextricably linked to Article 5.1 since, like Article 5.2, it sets out a number of elements to be taken into account when conducting the relevant risk assessment.

[2136] Panel Reports, *Japan – Apples*, para. 8.232; *US – Poultry (China)*, para. 7.172; *Australia – Apples*, para. 7.211; *US – Animals*, paras. 7.230 and 7.323; and *Costa Rica – Avocados (Mexico)*, paras. 7.340-7.344 and 7.405.

[2137] Appellate Body Report, *India – Agricultural Products*, paras. 5.23-5.24; and Panel Reports, *Russia – Pigs (EU)*, para. 7.627; and *Costa Rica – Avocados (Mexico)*, para. 7.368.

[2138] Appellate Body Reports, *Japan – Agricultural Products II*, para. 82 (quoting Appellate Body Report, *EC – Hormones*, para. 180); *Australia – Apples*, para. 209 (quoting Appellate Body Report, *EC – Hormones*, para. 180).

7.1034. The Panel will now consider Costa Rica's claims under Articles 5.1, 5.2, 5.3, and 2.2 with respect to Measure 3.

Whether Measure 3 is based on a risk assessment in accordance with Article 5.1 of the SPS Agreement

7.1035. Panama has confirmed that Measure 3 is not based on a risk assessment, arguing that it is a provisional measure that was adopted in a situation in which the body of available scientific evidence did not allow an appropriate assessment of the risks to be performed, as required under Article 5.1 and as defined in Annex A to the SPS Agreement.[2139]

7.1036. The Panel considers that, as claimed by Costa Rica, a measure cannot be based on a risk assessment if no such assessment exists. Accordingly, the Panel finds that Measure 3 is inconsistent with Article 5.1 of the SPS Agreement in that it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

Whether Panama took into account the elements and factors listed in Articles 5.2 and 5.3 in the assessment of the risk

7.1037. As mentioned in paragraph 7.1032 above, Articles 5.2 and 5.3 are linked to Article 5.1, in that they shed light on the elements and factors that are of relevance in the assessment of risks foreseen in Article 5.1. Given that, in the case of Measure 3, Panama failed to conduct an assessment of the risk, the Panel finds that Measure 3 is inconsistent with Articles 5.2 and 5.3 of the SPS Agreement, as Panama did not take into account the elements and factors contained therein in the assessment of the risks.

Whether Measure 3 is based on scientific principles and is not maintained without sufficient scientific evidence in accordance with Article 2.2 of the SPS Agreement

7.1038. The Panel recalls that Article 5.1 constitutes a "specific application" of the basic obligations under Article 2.2 of the SPS Agreement.[2140] The Panel shares the view expressed in previous disputes that where a measure is not based on a risk assessment pursuant to Article 5.1 of the SPS Agreement, it can be presumed not to be based on scientific principles or to be maintained without sufficient scientific evidence within the meaning of Article 2.2.[2141] The Panel considers that this presumption can be made in the present case because of its finding that, in the absence of a risk assessment, Measure 3 is inconsistent with Articles 5.1, 5.2, and 5.3.[2142] The Panel further notes that Panama has failed to submit arguments to rebut this presumption.

7.1039. Accordingly, in the light of its finding that Measure 3 is not based on an assessment of the risk, in breach of Articles 5.1, 5.2, and 5.3 of the SPS Agreement, and in the absence of a rebuttal by Panama concerning the presumption of inconsistency with Article 2.2 of the Agreement, the Panel finds that Measure 3 is inconsistent with Article 2.2 because it is not based on scientific principles and is maintained without sufficient scientific evidence.

7.5.1.2.2.3 Conclusion on Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement

7.1040. In the light of the foregoing, the Panel finds that Measure 3 is inconsistent with the following provisions:

[2139] Panama's response to Panel question No. 9, para. 32.

[2140] Appellate Body Reports, *Japan – Agricultural Products II*, para. 82 (quoting Appellate Body Report, *EC – Hormones*, para. 180); *Australia – Apples*, para. 209 (quoting Appellate Body Report, *EC – Hormones*, para. 180).

[2141] Panel Report, *Russia – Pigs (EU)*, para. 7.627. An SPS measure found to be inconsistent with Articles 5.1 and 5.2 has been considered, more generally, to be inconsistent with Article 2.2, giving rise to a rebuttable presumption of inconsistency. (Appellate Body Report, *India – Agricultural Products*, paras. 5.23-5.24).

[2142] See paras. 7.1040 and 7.1036 -7.1037 above.

a. Article 5.1 of the SPS Agreement, because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;

b. Article 5.2 of the SPS Agreement, because, in the absence of a risk assessment, Panama did not take into account the elements enumerated in this provision in the assessment of the risks;

c. Article 5.3 of the SPS Agreement, because, in the absence of a risk assessment, Panama did not take into account the economic factors listed in this provision in the assessment of the risks; and

d. Article 2.2 of the SPS Agreement, because it is not based on scientific principles and is maintained without sufficient scientific evidence.

7.5.1.3 Claims under Article 2.3 of the SPS Agreement

7.5.1.3.1 Main arguments of the parties

7.5.1.3.1.1 Costa Rica

7.1041. Costa Rica claims that Measure 3 is inconsistent with the first and second sentences of Article 2.3 of the SPS Agreement, given that it arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, and it constitutes a disguised restriction on international trade.[2143]

7.1042. Costa Rica submits that the relevant phytosanitary conditions are those relating to the presence of the pink mealybug, and that these conditions are similar in Costa Rica and in other WTO Members that export pineapple and avocado to Panama, such as the United States or Colombia.[2144] Costa Rica notes that it informed Panama and the IPPC of the presence of the pink mealybug in its territory as a quarantine pest, not widely distributed and under official control[2145], and that the pink mealybug is also "present" in other Members such as the United States or Colombia with a limited distribution.[2146] For Costa Rica, this shows that "the 'concomitant risk associated' with the pink mealybug is the same, 'regardless' of the country of origin of the products".[2147]

7.1043. Costa Rica asserts that Measure 3 discriminates against Costa Rica with respect to other Members, such as the United States or Colombia, given that it prohibits the importation of pineapple from Costa Rica, allegedly because the pest is present in Costa Rican territory, yet it permits imports of pineapple from the United States and Colombia without any conditions, despite the fact that the pest's status in the territories of those countries is the same as in Costa Rica.[2148] Costa Rica adds that Panama has closed its market to pineapples from Costa Rica, but has kept it open to avocados from Colombia, which are a main host of the pink mealybug and are at a greater risk of being associated with the pest.[2149] Costa Rica notes that Panama only requires that the official

[2143] Costa Rica's first written submission, para. 880; second written submission, para. 287. See also Costa Rica's first written submission, paras. 884 and 907-908.
[2144] Costa Rica's first written submission, para. 887; second written submission, para. 291.
[2145] Costa Rica's first written submission, para. 889 (quoting Memorandum DSFE-261-2014 (Exhibit CRI-68); Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69)); second written submission, para. 291.
[2146] Costa Rica's first written submission, para. 889 (quoting EPPO, Distribution of the pink mealybug in the United States (2022) (Exhibit CRI-165); EPPO, Distribution of the pink mealybug in Colombia (2022) (Exhibit CRI-167)); second written submission, para. 291.
[2147] Costa Rica's second written submission, para. 291 (quoting Panel Report, *Russia – Pigs (EU)*, paras. 7.1306 and 7.1311).
[2148] Costa Rica's first written submission, para. 893; second written submission, para. 292 (referring to INEC, Pineapple imports into Panama (2010-2020) (Exhibit CR-77)).
[2149] Costa Rica's first written submission, para. 894 (referring to CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), pp. 21 and 30; OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (2018) (Exhibit CRI-70), p. 11; OIRSA*, Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72), pp. 100 and 115; Martínez Rivero (2007) (Exhibit CRI-73), p. 176; and USDA, IICA, *Biological Control of Pink Hibiscus Mealybug Project Manual*

phytosanitary certificate for avocado shipments from Colombia includes an additional declaration specifying that "the shipment is free from *Maconellicoccus hirsutus*".[2150]

7.1044. Costa Rica submits that Panama's measure discriminates arbitrarily or unjustifiably between Costa Rica and other Members, such as the United States or Colombia[2151], because the difference in treatment of pineapple from different origins bears no "rational connection" to the objective Panama is pursuing by applying Measure 3, which is to prevent the introduction of the pink mealybug pest into its territory. For Costa Rica, there is no legitimate "rationale" that explains this discrimination between similar products originating from countries with similar phytosanitary situations, and which therefore pose similar risks in terms of the introduction of the pink mealybug into Panamanian territory.[2152]

7.1045. With regard to the alleged disguised restriction on international trade (second sentence of Article 2.3), Costa Rica submits that the demonstration that Measure 3 discriminates arbitrarily or unjustifiably between Members where identical or similar conditions prevail with respect to the pink mealybug would "necessarily entail a finding that they are applied in a manner which would constitute a disguised restriction on international trade".[2153] Moreover, Costa Rica submits that the fact Panama has not presented any assessment of the risk in support of Measure 3, as required by Article 5.1 of the SPS Agreement, is also a "strong indication" that Panama's measure "is not really concerned with the protection of ... plant life or health", but is instead a disguised restriction on international trade.[2154]

7.5.1.3.1.2 Panama

7.1046. Panama claims that Measure 3 is a provisional measure in accordance with Article 5.7 of the SPS Agreement and, thus, is not inconsistent with Article 2.3 of the Agreement.[2155] Panama submits that Article 5.7 does not require Members to adopt provisional measures on a non-discriminatory basis.[2156] Furthermore, Panama considers that Costa Rica has not demonstrated that Measure 3 is inconsistent with Article 2.3 of the SPS Agreement.[2157]

7.5.1.3.2 Assessment by the Panel

7.1047. Given that the Panel has found that Measure 3 is not a provisional measure covered by Article 5.7[2158], the Panel considers Measure 3 to be subject to the obligations under Articles 2.3 and 5.5.[2159] Accordingly, the Panel will continue with its analysis of Costa Rica's claim under Article 2.3 of the SPS Agreement, as it did with respect to Measure 2[2160], starting with the legal standard applicable to this provision.

(2003) (Exhibit CRI-74), appendix A; and quoting Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164)); second written submission, para. 292.

[2150] Costa Rica's second written submission, para. 292 (quoting Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164)).

[2151] Costa Rica's first written submission, para. 896.

[2152] Costa Rica's first written submission, para. 898 (quoting Panel Report, *Russia – Pigs (EU)*, para. 7.1321, quoting in turn Appellate Body Report, *Brazil – Retreaded Tyres,* paras. 225-226); second written submission, para. 293.

[2153] Costa Rica's first written submission, para. 905 (quoting Panel Reports, *US – Animals*, para. 7.575; *India – Agricultural Products,* para. 7.476; and *Russia – Pigs (EU)*, para. 7.1389); second written submission, para. 296. See also Costa Rica's first written submission, paras. 903 and 906.

[2154] Costa Rica's first written submission, para. 905 (quoting Appellate Body Report, *Australia – Salmon*, para. 166); second written submission, para. 296.

[2155] Panama's first written submission, paras. 19 and 166.

[2156] Panama's first written submission, para. 437.

[2157] Panama's first written submission, para. 443.

[2158] See para. 7.1022 above.

[2159] The Panel recalls that the parties disagree on whether Articles 2.3 and 5.5 apply to a provisional measure covered by Article 5.7. (Panama's first written submission, paras. 165-166; responses to Panel question No. 63, para. 190, and No. 75, para. 210; second written submission, para. 239; and Costa Rica's response to Panel question No. 75, para. 3.62).

[2160] See section 7.4.2.4.1 on the order of analysis applicable to Articles 2.3 and 5.5 of the SPS Agreement.

7.5.1.3.2.1 Relevant legal standard

7.1048. As explained in the context of Measure 2, Article 2.3 of the SPS Agreement contains two different obligations. The first sentence of Article 2.3 requires that SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. The second sentence of Article 2.3 requires that SPS measures shall not be applied in a manner which would constitute a disguised restriction on international trade.[2161]

7.1049. The Panel recalls that, to establish a violation of the first sentence of Article 2.3, Costa Rica must demonstrate three cumulative elements:

a. the measure discriminates between the territories of Members other than Panama, or between Panama's territory and that of another Member;

b. the discrimination is arbitrary or unjustifiable; and

c. identical or similar conditions prevail in the territory of the Members compared.[2162]

7.1050. With respect to the second sentence of Article 2.3, the Panel recalls that a disguised restriction on international trade has been considered to encompass measures that constitute arbitrary or unjustifiable discrimination.[2163]

7.5.1.3.2.2 Whether Measure 3 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement

7.1051. As it did for Measure 2, the Panel will analyse Costa Rica's claim under the first sentence of Article 2.3 of the SPS Agreement by first examining whether the conditions identified by Costa Rica are identical or similar in the Members in question, within the meaning of that provision.[2164]

Whether identical or similar conditions prevail in the territories of the Members in question

7.1052. In order to ascertain whether identical or similar conditions prevail in the territories of the Members in question, the Panel will first examine the relevance of the conditions identified by Costa Rica. Subsequently, the Panel will address the similarity of the conditions it has deemed relevant.

7.1053. Costa Rica submits that the relevant phytosanitary conditions are those relating to the presence of the pink mealybug.[2165] Panama, for its part, does not address the issue of the relevance of the conditions identified by Costa Rica.

7.1054. The Panel agrees with previous panels that both the objective of the measure and the risk it addresses are relevant aspects when it comes to identifying the relevant conditions for the purposes of Article 2.3.[2166] In this respect, the Panel has found that the objective of Measure 3 corresponds to the objective set out in Annex A(1)(a), namely "to protect ... plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests".[2167] With regard to the risk addressed by Measure 3, the Panel recalls that the parties do not

[2161] See paras. 7.717 -7.719 above. See also Panel Reports, *Russia – Pigs (EU)*, para. 7.1296; *India – Agricultural Products*, para. 7.388; and *Costa Rica – Avocados (Mexico)*, para. 7.2144.

[2162] Panel Reports, *Russia – Pigs (EU)*, para. 7.1297; *India – Agricultural Products*, para. 7.389; *US – Poultry (China)*, para. 7.317; *US – Animals*, para. 7.571; and *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111. See paras. 7.711 -7.716 above.

[2163] Panel Report, *India – Agricultural Products*, para. 7.476 (quoting Appellate Body Report, *US – Gasoline*, p. 25). See paras. 7.717-7.719 above.

[2164] See para. 7.724 above.

[2165] Costa Rica's first written submission, para. 887; second written submission, para. 291.

[2166] See para. 7.713 above.

[2167] See para. 7.887 above.

disagree that the relevant risk is the risk of the entry, establishment or spread of the pink mealybug via imports of fresh pineapples from Costa Rica.[2168]

7.1055. The Panel considers, as previous panels did, that the presence of a pest within a territory and the risk associated with that pest are relevant conditions for an analysis under Article 2.3.[2169] The Panel therefore agrees with Costa Rica with respect to the relevance of the conditions relating to the presence of the pink mealybug, given that they are directly linked to the objective of the measure and the risk of introduction, establishment and spread of the pest within Panamanian territory.

7.1056. Costa Rica asserts that the conditions relating to the presence of the pink mealybug are the same in its territory as in the territory of the United States and Colombia because the pest is present with limited distribution in these three countries.[2170] The information in the record confirms Costa Rica's assertion, given that it indicates that the current situation of the pest in Costa Rica, the United States and Colombia is "[p]resent, restricted distribution".[2171]

7.1057. In the light of the foregoing, the Panel finds that the conditions of Costa Rica are similar to those of the United States and Colombia as regards its phytosanitary status with respect to the pink mealybug.

Whether Measure 3 discriminates against fresh pineapples from Costa Rica

7.1058. The Panel will now analyse whether Measure 3 discriminates against fresh pineapples from Costa Rica vis-à-vis pineapples from the United States and Colombia, and avocados from Colombia. In this respect, the Panel recalls that Costa Rica contends that the discrimination lies in the treatment of Costa Rican pineapples, the importation of which is prohibited, in comparison with the treatment granted to pineapples from the United States and Colombia, and to avocados from Colombia, the importation of which is permitted.[2172]

7.1059. Regarding the treatment Panama grants to fresh pineapples from the United States and Colombia, the Panel recalls that, under Article 5.7, it concluded that the evidence in the record seems to support Panama's assertion that the importation of fresh pineapples from the United States and Colombia is not permitted since there are no PIR for these products that would allow them to be imported into Panama.[2173] Moreover, after examining the INEC and USDA data on pineapple imports into Panama submitted by Costa Rica and the customs declarations for 2020-2021 submitted by Panama, the Panel concluded that Costa Rica has failed to demonstrate that Panama imported fresh pineapples from the United States and Colombia after adopting Measure 3.[2174]

7.1060. In the light of the foregoing, the Panel considers that Costa Rica has failed to demonstrate that Panama permits fresh pineapple imports from the United States and Colombia, since it does not find that Panama has adopted the corresponding PIR. Moreover, the Panel recalls that, under Article 5.7, it concluded that Costa Rica has failed to demonstrate that Panama imported fresh pineapples from the United States and Colombia after adopting Measure 3.[2175] Accordingly, the Panel considers that Costa Rica has failed to demonstrate that Measure 3 discriminates against fresh

[2168] See paras. 7.717 -7.719 above.
[2169] It must be stressed that these panels were referring to diseases, not pests. However, the Panel considers that the logic these panels followed also applies in the case of pests, as is the case of Measure 3. (Panel Reports, *Russia – Pigs (EU)*, para. 7.1311; *India – Agricultural Products*, para. 7.460; and *Australia – Salmon (Article 21.5 – Canada)*, para. 7.113).
[2170] Costa Rica's first written submission, para. 889 (referring to EPPO, Distribution of the pink mealybug in the United States (2022) (Exhibit CRI-165); and quoting EPPO, Distribution of the pink mealybug in Colombia (2022) (Exhibit CRI-167)). See also EPPO, Distribution of the pink mealybug in Colombia (2022) (Exhibit CRI-174).
[2171] EPPO, Distribution of the pink mealybug in the United States (2022) (Exhibit CRI-165); EPPO, Distribution of the pink mealybug in Colombia (2022) (Exhibit CRI-167); and EPPO, Distribution of the pink mealybug in Costa Rica (2022) (Exhibit CRI-174)). The EPPO conducted its assessment on the basis of information from 2015 (for Costa Rica and the United States) and 2014 (for Colombia).
[2172] Costa Rica's first written submission, para. 894.
[2173] See paras. 7.1011-7.1014 above.
[2174] See paras. 7.1007-7.1010 and 7.1015 -7.1016 above.
[2175] See para. 7.1016 above.

pineapples from Costa Rica vis-à-vis fresh pineapples from the United States and Colombia by prohibiting imports of the former while permitting imports of the latter countries.

7.1061. Regarding the treatment Panama grants to avocados from Colombia, the Panel recalls that, under Article 5.7, it was noted that Panama adopted the PIR for avocado from Colombia in January 2007 and modified them in December 2009.[2176] The existence of these PIR, and Panama itself, confirm that imports of avocados from Colombia into Panama are permitted.[2177] Accordingly, the Panel considers that Costa Rica has demonstrated that Measure 3 discriminates against fresh pineapples from Costa Rica vis-à-vis avocados from Colombia by prohibiting imports of the former while permitting imports of the latter countries.

7.1062. The Panel therefore concludes that Costa Rica has failed to demonstrate that Measure 3 discriminates against pineapples from Costa Rica vis-à-vis pineapples from the United States and Colombia. Furthermore, the Panel concludes that Costa Rica has demonstrated that Measure 3 discriminates against fresh pineapples from Costa Rica vis-à-vis avocados from Colombia.

7.1063. As the requirements of the first sentence of Article 2.3 are cumulative, this finding ends the Panel's analysis under this claim with respect to pineapples from the United States and Colombia. The Panel will continue its analysis by examining whether Costa Rica has demonstrated that the discriminatory treatment of pineapples from Costa Rica vis-à-vis avocados from Colombia is arbitrary or unjustifiable.

Whether Measure 3 discriminates arbitrarily or unjustifiably

7.1064. Costa Rica asserts that the arbitrariness of Panama's actions is reflected in the fact that when Panama was informed of the presence of the pest in Costa Rica, it did not include a requirement similar to that of the PIR for avocado from Colombia to address the risk of introduction, establishment and spread of the pest via imports of fresh pineapple from Costa Rica.[2178] Costa Rica claims that the treatment granted to pineapple from Costa Rica, compared to avocado from Colombia, is arbitrary because avocados are allowed to enter into Panama, whereas pineapples are not, despite the fact that, in neither case, an assessment of the risk with respect to the pink mealybug has been performed.[2179]

7.1065. Panama claims that the PIR for avocado from Colombia include a mitigation measure for the pink mealybug, unlike the PIR for pineapple from Costa Rica.[2180] Panama also notes that the PIR for avocado are based on a risk assessment[2181], unlike those for pineapples from Costa Rica, with regard to which the information required to assess the risk in question was lacking.[2182] Panama adds that "avocados from Colombia comply with its ALOP on the basis of a risk assessment that is reflected in a bilateral phytosanitary protocol between Colombia and Panama, and the ICA resolution establishing provisions for the registration and management of farms producing fresh fruit for export and the registration of exporters."[2183]

[2176] See para. 7.1002 above (referring to Resolution AUPSA-DINAN-026-2007 (Exhibit PAN-136) and Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164)).

[2177] Panama's first written submission, para. 307.

[2178] Costa Rica's comments on Panama's responses to Panel question No. 188, para. 3.330, and No. 177, para. 3.260.

[2179] Costa Rica's comments on Panama's response to Panel question No. 185, para. 3.318. See also Costa Rica's comments on Panama's response to Panel question No. 176, para. 3.256. In Costa Rica's view, the avocado PIR are not based on a risk assessment of the pink hibiscus mealybug within the meaning of Annex A(4) of the SPS Agreement because the mitigation measures do not address the risk of the pink hibiscus mealybug, but a different pest (*Frankliniella occidentalis*). (Ibid.)

[2180] Panama's response to Panel question No. 95, para. 270. See also Panama's response to Panel question No. 56, para. 163.

[2181] Panama's comments on Costa Rica's response to Panel question No. 180, para. 120.

[2182] Panama's comments on Costa Rica's response to Panel question No. 180, para. 120. Under Article 5.6, Panama reprises this argument by referring to the different situation of avocados from Colombia and pineapples from Costa Rica in terms of the risk they pose. According to Panama, "there is not sufficient scientific evidence to assess, let alone to definitively conclude, that pineapples from Costa Rica and avocados from Colombia are in a similar situation in terms of risk". Panama explains that when it adopted Measure 3, it did not have sufficient information to assess the risk in question, while the avocado PIR are based on a risk assessment. (Panama's comments on Costa Rica's response to Panel question No. 189, paras. 133-134).

[2183] Panama's response to Panel question No. 188, para. 224.

7.1066. The Panel identifies three main issues in the arguments of the parties, which it will now address. These issues concern: (a) the differences in the PIR for avocado from Colombia and for pineapple from Costa Rica in relation to the mitigation measures for the pink mealybug; (b) the existence or not of assessments of the risk of entry, establishment and spread of the pink mealybug via avocado imports from Colombia and pineapple imports from Costa Rica; and (c) compliance or not with Panama's ALOP with respect to imports of these two products.

7.1067. With respect to the first issue, relating to the mitigation measures for the pink mealybug set out in the relevant PIR, the Panel observes that Panama focuses on the fact that, unlike the PIR for pineapple from Costa Rica, the PIR for avocado from Colombia provide for a mitigation measure for the pink mealybug. This measure requires that the shipment has a phytosanitary certificate issued by the Colombian Agricultural Institute (ICA) containing an additional declaration certifying that the shipment is free from pink mealybug.[2184]

7.1068. Panama justifies this difference in the PIR for avocado and the PIR for pineapple on the grounds that, when it adopted the PIR for avocado in 2007, it was aware of the presence of the pest in Colombia since 2003, and considered that the risk of pest transmission was greater in avocado imports from Colombia compared to pineapple imports from Costa Rica. Conversely, Panama notes that, when it adopted the PIR for pineapple from Costa Rica in 2008, it was not aware of the presence of the pest in Costa Rica given that it was notified for the first time several years later, in 2014.[2185]

7.1069. The Panel notes that the reason given by Panama for having included a mitigation measure for the pink mealybug in the PIR for avocado is linked solely to its knowledge of Colombia's phytosanitary status with respect to the pest, and not to other aspects such as detections of the pest in shipments of avocados from Colombia[2186] or the potential higher risk posed by avocado as a main host of the pest.[2187] This fits with Panama's explanation of how it drafts its PIR for foods of plant origin intended for consumption. The Panel recalls that Panama has indicated that, in order to draft these PIR, AUPSA "verified the pests of quarantine concern reported officially by the [NPPOs] of each country of origin and compared them with the list of pests of Panama's NPPO, as well as its ability to follow the pathway"[2188], and that "[t]his verification was Panama's risk analysis, but it was not documented as such."[2189]

7.1070. Panama has confirmed that it was the presence of the pest in Colombia that prompted it to include a mitigation measure for this pest in its PIR for avocado. However, when Panama was notified about the presence of the pest in Costa Rica in May 2014, it did not modify the PIR for pineapple from Costa Rica to include a mitigation measure, as it had done for avocados from Colombia. Panama has reiterated on various occasions that it was the discovery in 2018 of a publication from 2011, which reported the presence of the pest in pineapple in Fiji, together with the presence of the pest in Costa Rica, which cast doubt on its previous conclusions on the risk associated with the pest.[2190] However, as previously mentioned, the publication in question from 2011 is included in the main databases that Panama consulted to draft its PIR, such as those of CABI and EPPO[2191], as is another publication from 2004 that links pineapple to the pink mealybug.[2192] If, as Panama asserts, the reason for including a mitigation measure for the pink mealybug in the PIR for avocado from Colombia in 2007, and subsequently retaining that measure in the 2009 version of the PIR, was that it was aware of the presence of the pest in that country, when it became aware that the pest was

[2184] Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164), Article 3.3.1. In the 2007 version of the PIR, the mitigation measure provided for was slightly different, in that it required Colombia's NPPO to issue a sanitary certificate certifying that the shipment came from production areas and places free from the pink mealybug, among other pests of quarantine concern to Panama. (Resolution AUPSA-DINAN-026-2007 (Exhibit PAN-136), Article 3.2).

[2185] Panama's response to Panel question No. 175, para. 179.

[2186] Panama has explained that the non-conformities that gave rise to the review of the PIR for avocado in 2007 were not related to the pink mealybug, but rather to "frequent interceptions" of another pest in flowers, fruits and plants from Colombia. (Panama's response to Panel question No. 176, para. 180).

[2187] The Panel recalls that, in the CABI Datasheet, avocado is listed as a "Main" host of the pest, while pineapple comes under the category of "Other". (CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71).

[2188] Panama's response to Panel question No. 9, para. 30.

[2189] Panama's response to Panel question No. 9, para. 31.

[2190] Panama's first written submission, para. 259.

[2191] Panama's response to Panel question No. 9, para. 31.

[2192] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71) (referring to D.J. Williams, Mealybugs of Southern Asia (Malaysia: Natural History Museum/Southdene Sdn Bhd, 2004)).

present in Costa Rica in May 2014, it could also have assessed the necessity of including a mitigation measure in its PIR for products from Costa Rica, including pineapple, in accordance with the provisions of the SPS Agreement.[2193]

7.1071. Accordingly, the Panel considers that the fact that Panama permits avocado imports from Colombia while not permitting pineapple imports from Costa Rica is not justified by the existence of a mitigation measure for the pink mealybug with respect to avocado from Colombia, but not with respect to pineapple from Costa Rica.

7.1072. With respect to the second issue, relating to the existence or not of risk assessments, the Panel recalls that, under Article 5.7, it considered that Panama had failed to demonstrate that the measures it applies to avocado imports from Colombia are based on an objective assessment of the risk associated with the pink mealybug.[2194] In turn, Panama has not submitted any risk assessment that formed the basis for its PIR for pineapple from Costa Rica since, as Panama states, its "verif[ication]" of the pests of quarantine concern reported officially by Costa Rica's NPPO, which it subsequently compared with its NPPO's list of pests, was the risk analysis, but was not documented as such.[2195]

7.1073. The Panel therefore considers that the fact Panama permits avocado imports from Colombia while not permitting pineapple imports from Costa Rica cannot be justified by the existence of a risk assessment in the case of the former, but not the latter. Moreover, in response to Panama's argument that it had sufficient information to conduct the risk assessment for avocado, but not for pineapple, the Panel refers to its finding under Article 5.7 that Panama was not in a situation of insufficient relevant scientific evidence that prevented it from conducting the risk assessment in question.[2196]

7.1074. With respect to the third and final issue, relating to compliance with Panama's ALOP[2197], Panama asserts that avocados comply with its ALOP "on the basis of the bilateral phytosanitary protocol between Colombia and Panama, and the ICA resolution establishing provisions for the registration and management of farms producing fresh fruit for export and the registration of exporters".[2198] With respect to pineapple from Costa Rica, Panama asserts that the 2008 PIR complied with its ALOP until a publication indicating that the pink mealybug had been detected in pineapple in Fiji and the presence of the pest in Costa Rica called into question its previous conclusions.[2199] Panama adds that it adopted Measure 3 because it was not possible to assess whether the PIR for pineapple from Costa Rica achieved Panama's ALOP.[2200]

7.1075. The Panel disagrees with Panama that it could not reassess whether the 2008 PIR for pineapple from Costa Rica met its ALOP. As the Panel found under Article 5.7, when Panama adopted Measure 3 in 2019, it had sufficient information to perform a risk assessment that would have allowed it to determine whether the existing PIR still met its ALOP, despite the discovery of the 2011 publication reporting the presence of the pink mealybug in pineapple in Fiji and the presence of the pest in Costa Rica since May 2014. Moreover, the Panel recalls that Panama has not demonstrated that its PIR for avocado from Colombia are based on a risk assessment relating to the pink mealybug.[2201] Accordingly, the fact Panama permits avocado imports from Colombia while not permitting pineapple imports from Costa Rica does not appear to be justified by Panama's assertion

[2193] The Panel does not contend that Panama should have adopted the same mitigation measure in the PIR for pineapple from Costa Rica and in the PIR for avocado from Colombia. As is provided for in the SPS Agreement, this type of measure, as with any other SPS measure, should be based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health. See Article 5.1 of the SPS Agreement.

[2194] See para. 7.1002 above.

[2195] Panama's response to Panel question No. 9, paras. 30-31.

[2196] See paras. 7.961 -7.962 above.

[2197] The Panel recalls that, according to Panama, its ALOP in the area of plant health is to "'prevent and control, in a comprehensive manner' and, therefore, to totally avoid 'the introduction, establishment, and spread of pests of plants and plant products in the territory of the Republic of Panama'". Panama states that its ALOP is set out in Articles 1, 2.2, and 8.42 of Law No. 47 of 9 July1996, is implemented specifically by the applicable PIR, and has not changed since the adoption of Measure 3. (Panama's response to Panel question No. 95, para. 267).

[2198] Panama's response to Panel question No. 188, para. 224.

[2199] Panama's response to Panel question No. 191, para. 225.

[2200] Panama's response to Panel question No. 191, para. 226.

[2201] See para. 7.1002 above.

that, in the case of avocados from Colombia, it was able to determine that the ALOP was met, while this was not possible for pineapple from Costa Rica because it did not have sufficient information.

7.1076. An additional issue raised by Costa Rica is whether the fact that they are different hosts justifies in any way the discriminatory treatment of pineapple from Costa Rica. In this respect, Costa Rica asserts that the fact that pineapple is not considered a main or primary host of the pest, unlike avocado, "means that, technically, avocado has a higher risk of being associated with the pink mealybug".[2202] As mentioned in the context of the claims under Article 5.7, both avocado and pineapple are considered hosts of the pink mealybug.[2203] Some sources classify avocado as a main or primary host of the pink mealybug.[2204] However, the scientific literature on the pest does not distinguish between hosts when addressing issues such as the detection and identification of the pest, spread pathways, and control methods.[2205] It can therefore be argued that, in relation to products from areas with the same phytosanitary status for the pest, avocado poses at least as high risk of being associated with the pest as pineapple does. Accordingly, the foregoing also does not justify a discriminatory treatment to the detriment of pineapple from Costa Rica.

7.1077. In the previous paragraphs, the Panel has determined that: (a) both avocados and pineapples are host fruits of the pest that come from Members where the pest is present, with limited distribution; and (b) their respective PIR have been drafted by AUPSA following the same procedure, which seeks to verify the pests of quarantine concern reported officially by the relevant NPPOs and to compare them with the list of pests of Panama's NPPO, and its ability to follow the pathway. Moreover, it should be recalled that the Panel found under Article 5.7 that Panama had sufficient information to conduct an assessment of the risk in question, accordingly Panama could have assessed whether the PIR for pineapple from Costa Rica still met its ALOP following incidents that, according to Panama, called into question its previous conclusions on the risks associated with the pink mealybug. Accordingly, the Panel finds nothing in the record that justifies Panama's discriminatory treatment of pineapple from Costa Rica compared to avocado from Colombia.

7.1078. In the light of the foregoing, the Panel concludes that the discriminatory treatment under Measure 3 of pineapple from Costa Rica compared to avocado from Colombia, whereby imports of the former are prohibited and imports of the latter are permitted, is arbitrary or unjustifiable given that it bears no rational connection to the stated objective of Measure 3 of protecting plant life and health in Panama's territory from risks arising from the entry, establishment or spread of the pink mealybug.

7.5.1.3.2.3 Conclusion on the first sentence of Article 2.3 of the SPS Agreement

7.1079. In the light of the foregoing, the Panel finds that Costa Rica has demonstrated that Measure 3 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement, because it discriminates arbitrarily or unjustifiably against pineapple from Costa Rica compared to avocado from Colombia.

7.1080. The Panel also finds that Costa Rica has failed to demonstrate that Measure 3 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement because it discriminates arbitrarily and unjustifiably against pineapple from Costa Rica compared to pineapple from the United States and Colombia.

7.5.1.3.2.4 Whether Measure 3 is inconsistent with the second sentence of Article 2.3 of the SPS Agreement

7.1081. Costa Rica claims that Measure 3 discriminates arbitrarily or unjustifiably between Members where identical or similar conditions prevail with respect to the pink mealybug, and that

[2202] Costa Rica's first written submission, para. 894.
[2203] See para. 7.999 above.
[2204] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CR-71), p. 27; and OIRSA, *Contingency plan for an outbreak of pink hibiscus mealybug* (2010) (Exhibit CRI-72), p. 115. The EPPO database does not make this distinction, and both pineapple and avocado appear, categorized as a "Host". (EPPO Global Database, https://gd.eppo.int/taxon/PHENHI/hosts (accessed 13 August 2024).
[2205] See e.g.EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144), pp. 4-5.

this would "necessarily entail a finding that they are applied in a manner which would constitute a disguised restriction on international trade".[2206]

7.1082. For its part, Panama requests the Panel to dismiss Costa Rica's claims under Article 2.3 of the SPS Agreement, since Measure 3 fully complies with the requirements under Article 5.7 of the Agreement.[2207]

7.1083. As noted above, the Panel agrees with the interpretation from previous disputes that a disguised restriction on international trade encompasses measures that constitute arbitrary or unjustifiable discrimination.[2208]

7.1084. The Panel has found that Measure 3 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement because it discriminates arbitrarily or unjustifiably against pineapple from Costa Rica compared to avocado from Colombia.[2209] Accordingly, the Panel finds that Measure 3 is also inconsistent with the second sentence of Article 2.3 of the SPS Agreement.

7.5.1.3.2.5 Conclusion on the second sentence of Article 2.3 of the SPS Agreement

7.1085. In the light of the foregoing, the Panel finds that Costa Rica has demonstrated that Measure 3 is inconsistent with the second sentence of Article 2.3 of the SPS Agreement, because it is applied in a manner which constitutes a disguised restriction on international trade.

7.5.1.4 Claims under Article 5.5 of the SPS Agreement

7.5.1.4.1 Main arguments of the parties

7.1086. Costa Rica claims that Panama acted inconsistently with Article 5.5 of the SPS Agreement by applying distinct ALOPs in different but comparable situations[2210], since these distinctions are arbitrary and unjustifiable[2211], and result in discrimination or a disguised restriction on trade.[2212]

7.1087. Panama submits that Measure 3 is not inconsistent with Article 5.5 of the SPS Agreement because it is a provisional measure covered by Article 5.7 of the Agreement.[2213]

7.5.1.4.2 Assessment by the Panel

7.1088. As explained under section 7.4.2.4.3 concerning Measure 2, the Panel considers its findings under Article 2.3 to be sufficient to allow the DSB to make recommendations or rulings aimed at achieving a satisfactory settlement of the matter.

7.1089. For the reasons set forth in that section, the Panel decides to exercise judicial economy with respect to Costa Rica's claims under Article 5.5 of the SPS Agreement in relation to Measure 3.

7.5.1.5 Claims under Articles 5.6 and 2.2 of the SPS Agreement

7.1090. The Panel observes that the parties disagree on whether Articles 5.6 and 2.2 apply to a provisional measure covered by Article 5.7.[2214] The Panel recalls that it has found that Measure 3 is

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[2206] Costa Rica's second written submission, para. 296 (quoting Panel Report, *US – Animals*, para. 7.575).

[2207] Panama's second written submission, para. 234.

[2208] See Panel Reports, *India – Agricultural Products*, para. 7.476 (quoting Appellate Body Report, *US – Gasoline*, p. 25); *US – Animals*, para. 7.575; and *Russia – Pigs (EU)*, para. 7.1389. See paras. 7.718 -7.720 above.

[2209] See para. 7.1079 above.

[2210] Costa Rica's first written submission, para. 919.

[2211] Costa Rica's first written submission, para. 924.

[2212] Costa Rica's first written submission, paras. 925-929.

[2213] Panama's first written submission, para. 166.

[2214] Panama's first written submission, paras. 165-166 and 436; responses to Panel question No. 63, para. 190, and No. 75, paras. 210 and 212; second written submission, para. 238; and Costa Rica's response to Panel question No. 75, para. 3.62.

not a provisional measure under Article 5.7[2215], and therefore does not considers it necessary to rule on Panama's argument that Articles 5.6 and 2.2 do not apply to provisional measures adopted pursuant to Article 5.7. Accordingly, the Panel will proceed with its analysis of Costa Rica's claims under these provisions.

7.5.1.5.1 Main arguments of the parties

7.5.1.5.1.1 Costa Rica

7.1091. Costa Rica alleges that Measure 3 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP. Costa Rica considers that there are alternative measures that are reasonably available to Panama, that achieve its ALOP, and are significantly less restrictive to trade. Costa Rica also alleges that, consequently, Measure 3 is inconsistent with Article 2.2 of the SPS Agreement, as it is not applied only to the extent necessary to protect plant life or health.[2216]

7.1092. Costa Rica identifies two alternative measures that Panama could have applied to achieve its ALOP against the pink mealybug pest which are significantly less restrictive to trade than a "total prohibition" such as Measure 3.[2217] These two measures consist of: (a) applying the PIR of Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples, which Panama inactivated in January 2019 without any new, unexpected or urgent phytosanitary situation having arisen[2218]; and (b) requiring that shipments of Costa Rican pineapples be certified as free from the pink mealybug, or as originating in areas, places or sites of production free from the pink mealybug.[2219]

7.1093. Costa Rica submits that these alternative measures fulfil the three requirements under footnote 3 to Article 5.6 of the SPS Agreement.[2220]

7.1094. First, Costa Rica argues that the alternative measures are reasonably available taking into account technical and economic feasibility, because Panama has already applied them, and continues to apply them, to pineapples from Costa Rica and to other imported products such as avocados from Colombia and almonds from China.[2221]

7.1095. Second, Costa Rica submits that the alternative measures would achieve Panama's ALOP, even if it were very high, because they provide a high level of protection from the pest, thus preventing its introduction into Panama.[2222] In this regard, Costa Rica notes that the specific certification requirements with respect to the pink mealybug already achieve Panama's ALOP for shipments of products from countries where the pest is present (namely, avocados from Colombia and almonds from China).[2223]

7.1096. Third, according to Costa Rica, the alternative measures are significantly less trade-restrictive than Measure 3, as they would allow Costa Rican pineapples access to the Panamanian market.[2224]

[2215] See para. 7.1022 above.

[2216] Costa Rica's panel request, p. 7; first written submission, para. 848; and second written submission, para. 269.

[2217] Costa Rica's first written submission, para. 853.

[2218] Costa Rica's first written submission, para. 854 (referring to Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66)); second written submission, para. 272.

[2219] Costa Rica's first written submission, para. 866. Costa Rica observes that this is without prejudice to the fact that, in its view, Panama cannot scientifically justify the adoption of a phytosanitary measure in addition to the requirements set out in Resolution AUPSA-DINAN-116-2008. (Ibid.). See also Costa Rica's second written submission, para. 280.

[2220] Costa Rica's first written submission, paras. 858, 865, 869, 873, and 875; second written submission, paras. 272, 279-280, and 284-285.

[2221] Costa Rica's first written submission, paras. 859 and 870; second written submission, paras. 273 and 281.

[2222] Costa Rica's first written submission, para. 860; second written submission, paras. 275-276.

[2223] Costa Rica's first written submission, para. 871; second written submission, para. 283.

[2224] Costa Rica's first written submission, paras. 864 (quoting Panel Report, *Australia – Salmon (Article 21.5 – Canada),* para. 7.151) and 872. See also Costa Rica's second written submission, para. 274. Costa Rica notes that a number of panels have considered that "any measure imposing conditions upon

7.5.1.5.1.2 Panama

7.1097. Panama submits that Measure 3 is exempt from the obligations established under Articles 2.2 and 5.6 of the SPS Agreement, as this measure is a provisional measure covered by Article 5.7 of the SPS Agreement.[2225]

7.1098. Panama asserts that Costa Rica has not demonstrated the feasibility of the alternative measures that it proposes.[2226] Panama considers that the Panel should treat with caution the panel's assertion in *Korea – Radionuclides* that the existing use of a measure, even if in a different context, weighs in favour of a finding of feasibility of that measure.[2227] Panama adds that it cannot assess whether the alternative measures proposed by Costa Rica achieve Panama's ALOP because the scientific evidence is insufficient to perform a risk assessment.[2228]

7.5.1.5.2 Assessment by the Panel

7.5.1.5.2.1 Relevant legal standard

7.1099. In determining whether Measure 3 is inconsistent with Article 5.6, under the legal standard set out above[2229], the Panel will examine whether the alternative measures proposed by Costa Rica comply with the three cumulative requirements of footnote 3 to Article 5.6, namely that they: (a) are reasonably available taking into account technical and economic feasibility; (b) achieve Panama's ALOP; and (c) are significantly less restrictive to trade than Measure 3.

7.1100. The Panel recalls that, in previous disputes, a finding of inconsistency with Article 5.6 was considered to create a rebuttable presumption of inconsistency with Article 2.2.[2230]

7.1101. The Panel shares the assessments of the applicable legal standard under Articles 5.6 and 2.2, described in section 7.3.1.3.2.1 on Measure 1, and will proceed with its assessment on that basis.

7.1102. The Panel will first assess whether Costa Rica has demonstrated the existence of an alternative measure to Measure 3 that meets the three cumulative requirements set out in footnote 3 to Article 5.6 of the SPS Agreement. The Panel will then address Costa Rica's consequential claim under Article 2.2 of the Agreement.

7.5.1.5.2.2 Whether Measure 3 is inconsistent with Article 5.6 of the SPS Agreement

The alternative measures proposed by Costa Rica

7.1103. Costa Rica has presented two alternative measures which it understands to be reasonably available to Panama, would achieve Panama's ALOP, and would be significantly less restrictive to trade than Measure 3.

7.1104. The first alternative measure consists of applying the PIR contained in Resolution AUPSA-DINAN-116-2008, the implementation of which was suspended as a result of the adoption of

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importation, even if stringent, 'would still be significantly less restrictive to trade than an outright prohibition'". (Costa Rica's first written submission, para. 872 (quoting Panel Report, *Russia – Pigs (EU)*, para. 7.829, in turn quoting Panel Reports, *India – Agricultural Products*, para. 7.590; and *Australia – Salmon*, para. 8.182)).

[2225] Panama's first written submission, paras. 166 and 435-436; second written submission, para. 238.

[2226] Panama's comments on Costa Rica's response to Panel question No. 105, para. 21.

[2227] Panama's comments on Costa Rica's response to Panel question No. 105, para. 22.

[2228] Panama's comments on Costa Rica's response to Panel question No. 105, para. 23.

[2229] See section 7.3.1.3.2.1 above.

[2230] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; and Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; and *Russia – Pigs (EU)*, paras. 7.841 and 7.846.

Measure 3.[2231] Costa Rica has confirmed that this first alternative consists of "reactivating the Resolution ... in its entirety"[2232], and not only certain requirements contained in the Resolution.[2233]

7.1105. The second alternative measure consists of imposing specific PIR for the pink mealybug on pineapple imports from Costa Rica.[2234] For example, Costa Rica proposes that Panama could require that shipments of fresh pineapple from Costa Rica (a) be accompanied by an additional declaration certifying that the shipment is free from the pink mealybug, in accordance with ISPM 12[2235]; or (b) be certified as coming from areas, places or sites of production free from the pink mealybug, in accordance with ISPM 4 and ISPM 10.[2236]

7.1106. Panama considers that Costa Rica has not demonstrated the feasibility of the alternative measures to Measure 3 that it proposes because, "in circumstances where the scientific evidence is insufficient to conduct a risk assessment, Panama cannot assess whether these alternatives can achieve the appropriate level of protection with respect to Costa Rican pineapples".[2237]

Whether the alternative measures are reasonably available

7.1107. The Panel recalls that the assessment of whether the alternative measures are reasonably available to the respondent is linked to their technical and economic feasibility.[2238]

First alternative measure: application of Resolution AUPSA-DINAN-116-2008

7.1108. Costa Rica asserts that the first alternative measure is reasonably available taking into account its technical and economic feasibility, as Panama applied this measure for more than 10 years, from 4 July 2008 to 29 January 2019. Therefore, for Costa Rica, this is not an alternative that "is merely theoretical in nature" or one that imposes "prohibitive costs or substantial technical difficulties".[2239] For its part, Panama has not advanced any reason why the application of Resolution AUPSA-DINAN-116-2008 would not be technically or economically feasible, within the meaning of footnote 3 to Article 5.6.

7.1109. The first alternative measure would consist of applying in their entirety the requirements set forth in Resolution AUPSA-DINAN-116-2008. This Resolution requires, *inter alia*, that pineapple shipments be covered by a phytosanitary certificate confirming compliance with the requirements listed therein[2240], including the requirement that the pineapples "come from areas, places or sites subject to inspection" by the NPPO of Costa Rica during the active growth period, harvesting and packing of the food[2241], and that the consignments are free from pests classed as quarantine pests in Panama[2242], and free from live insects of any type.[2243]

[2231] Costa Rica's first written submission, para. 854; second written submission, para. 272.
[2232] Costa Rica's response to Panel question No. 190, para. 3.153.
[2233] The Panel notes that, initially, Costa Rica had referred specifically to the requirements that "every shipment of Costa Rican fresh pineapples to Panama be subject to inspection and/or testing in order to determine that it is free from the quarantine pests specified by Panama" and that "it is free from live insects of any type". (Costa Rica's first written submission, para. 861).
[2234] Costa Rica's first written submission, para. 866; second written submission, para. 280.
[2235] Costa Rica's first written submission, para. 867; second written submission, para. 280.
[2236] Costa Rica's first written submission, para. 868; second written submission, para. 280.
[2237] Panama's comments on Costa Rica's response to Panel question No. 105, para. 23.
[2238] See para. 7.335 above.
[2239] Costa Rica's first written submission, para. 859 (quoting Appellate Body Report, *Colombia – Textiles*, para. 5.74). See also Costa Rica's second written submission, para. 273.
[2240] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 3.
[2241] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 3.3.2.
[2242] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 3.3.3.
[2243] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 5.

7.1110. The Panel recalls that, in previous disputes, the respondent's existing use of the alternative measure, even if in a different context, weighs in favour of a finding of feasibility of that measure.[2244] The Panel also recalls that Panama considers that the Panel should treat this assertion by the panel in *Korea – Radionuclides* with caution, as it was not based on a substantive assessment of the measure at issue and the alternative measure.[2245] According to Panama, an alternative that is technically and economically feasible in one context might not be so in other contexts. Panama adds that the two reports cited by the panel in *Korea – Radionuclides* – namely, *Japan – Apples (Article 21.5 – US) and India – Agricultural products* – also do not support its assertion.[2246]

7.1111. As explained in paragraphs 7.832-7.833 above, the Panel sees no reason not to take into consideration the panel's findings in *Korea – Radionuclides* concerning the use of a measure by the importing country and its implications when analysing the availability of an alternative measure to that Member. In addition, the Panel understands that Panama's central argument is that a measure that is technically and economically feasible in one context may not be so in another. However, Panama has applied the first alternative measure in the same context (namely, to regulate the importation of fresh pineapple from Costa Rica) for more than 10 years, until the adoption of Measure 3 in January 2019, without any evidence that there had been a change in the circumstances relating to the importation of this product.

7.1112. Accordingly, and in the absence of counter-arguments from Panama, the Panel considers that Costa Rica has demonstrated that the first alternative measure was reasonably available to Panama both at the time Measure 3 was adopted and later, during the period it was in force.

Second alternative measure: specific PIR for the pink mealybug

7.1113. Costa Rica notes that Panama already requires "pest-free shipment" or "shipment from pest-free areas, places or sites of production" certification for imports of avocados from Colombia and almonds from China, respectively.[2247] Costa Rica also argues that ISPM 12 provides that phytosanitary certificates may include an additional declaration.[2248] Panama, for its part, has not advanced any reason why the second alternative measure proposed by Costa Rica would not be technically or economically feasible, within the meaning of footnote 3 to Article 5.6.

7.1114. The first example of specific PIR for the pink mealybug relates to the resolution concerning the importation of fresh avocados from Colombia. This resolution establishes that shipments must be covered by a phytosanitary certificate issued by the ICA. This certificate must include, *inter alia*, an additional declaration certifying that "[t]he consignment is free from ... *Maconellicoccus hirsutus*" and of live insects, contaminants and leaves.[2249] The second example of specific PIR for the pink mealybug relates to the resolution concerning the importation of dried almonds from China. This resolution requires that shipments of almonds be covered by a phytosanitary certificate issued by the NPPO of China. That certificate must include an additional declaration specifying, *inter alia*, that "[t]he commodity comes from areas, places or sites of production that have been officially recognized or accredited as free from the pink mealybug (*Maconellicoccus hirsutus*)", and that the commodity is free from pests of quarantine interest for Panama, such as those listed in the resolution.[2250] In connection to these two examples, Costa Rica also refers to the requirement laid down in the

[2244] Panel Report, *Korea – Radionuclides*, para. 7.144 (quoting Panel Reports, *India – Agricultural Products*, paras. 7.541-7.542; and *Japan – Apples (Article 21.5 – US)*, para. 8.187). See also paras. 7.832 - 7.833 above.

[2245] Panama's response to Panel question No. 105, para. 20 (referring to Panel Report, *Korea – Radionuclides*, paras. 7.145-7.149); comments on Costa Rica's response to Panel question No. 105, para. 22.

[2246] Panama's response to Panel question No. 105, paras. 20-22.

[2247] Costa Rica's first written communication, para. 870 (quoting Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164); Resolution AUPSA-DINAN-414-2007 concerning the importation of almonds from China (Exhibit CRI-173)).

[2248] Costa Rica's first written submission, para. 867 (quoting IPPC, ISPM 12 (Exhibit CRI-170), p. 17).

[2249] Resolution AUPSA-DINAN-122-2009 concerning the importation of avocados from Colombia (Exhibit CRI-164), Articles 3, 3.3.1(b), and 3.3.2.

[2250] Resolution AUPSA-DINAN-414-2007 concerning the importation of almonds from China (Exhibit CRI-173), Article 3.1.

resolution inactivated by Panama in January 2019, which requested that the phytosanitary certificate certify that the consignment is free from the pest *Paracoccus marginatus*.[2251]

7.1115. The Panel considers that the examples mentioned by Costa Rica demonstrate that Panama requires phytosanitary certificates issued by the NPPOs of exporting countries in order to ensure that fruits imported into Panama comply with its PIR. Panama also requires that these certificates include specific declarations that shipments are free from a certain pest or come from pest-free areas, places or sites of production. Panama even uses these requirements in relation to the pink mealybug for the importation of host fruits of this pest, such as avocados.[2252] Similarly, Panama has required phytosanitary certificates for the importation of Costa Rican pineapple, albeit it to certify the absence of another pest in the shipment.[2253]

7.1116. The Panel observes that ISPM 12, entitled "Phytosanitary certificates", provides model phytosanitary certificates that may be used for reference purposes. These certificates are used to attest that consignments meet PIR[2254] and may include an additional declaration.[2255] The fact that this measure is envisaged in ISPM 12 is indicative that this type of measure may be feasible for trade in plant products.

7.1117. Accordingly, and in the absence of counter-arguments from Panama, the Panel considers that Costa Rica has demonstrated that the second alternative measure was reasonably available to Panama both at the time Measure 3 was adopted and later, during the period it was in force.

7.1118. Accordingly, the Panel concludes that Costa Rica has demonstrated that the two alternative measures it proposes are reasonably available taking into account technical and economic feasibility, within the meaning of footnote 3 to Article 5.6 of the SPS Agreement.

7.1119. The Panel will now proceed to analyse whether the two alternative measures identified by Costa Rica achieve Panama's ALOP.

Whether the alternative measures achieved Panama's ALOP

7.1120. In accordance with the legal standard described above[2256], the Panel will first identify Panama's ALOP and then compare it with the level of protection that would be achieved through the alternative measures.

Panama's ALOP

7.1121. Panama notes that its ALOP in the area of plant health is to "prevent and control, in a comprehensive manner" and, therefore, to avoid entirely "the introduction, establishment, and spread of pests of plants and plant products in the territory of the Republic of Panama".[2257] According to Panama, this ALOP is set forth in Law No. 47 of 9 July 1996 and is specifically incorporated in the applicable PIR.[2258] Panama confirms that this ALOP applies to imports of fresh pineapple from Costa Rica, and that it has not changed since the adoption of Measure 3.[2259]

[2251] First written communication of Costa Rica, fn 1274 (referring to Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66); SFE, Phytosanitary export certificate for pineapples from Costa Rica (25 January 2019) (Exhibit CRI-168)).

[2252] See EPPO Global Database, https://gd.eppo.int/taxon/PHENHI/hosts (accessed 13 August 2024).

[2253] Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Article 3.3 (which requires certification that the pineapples are free from "*Paracoccus marginatus*").

[2254] IPPC, ISPM 12 (2022) (Exhibit CRI-402), p. 7.

[2255] IPPC, ISPM 12 (2022) (Exhibit CRI-402), pp. 16-17. The following is an example of an additional declaration: 1. The consignment was inspected and found free from _____(name of pest(s) or soil [*to be specified*]). (Ibid. p. 27).

[2256] See also paras. 7.333 and 7.336 above.

[2257] Panama's response to Panel question No. 95, para. 267 (quoting Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98), Articles 1, 2.2, and 8).

[2258] Panama's response to Panel question No. 95, para. 267 (quoting Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98), Articles 1, 2.2, and 8).

[2259] Panama's response to Panel question No. 95, para. 267.

7.1122. Costa Rica does not dispute Panama's definition of its ALOP.[2260] Nevertheless, it asks the Panel, when assessing or determining Panama's ALOP, to consider that Panama's conduct is not compatible with the objective of minimizing negative trade effects, pursuant to Article 5.4 of the SPS Agreement.[2261]

7.1123. The Panel recalls that the ALOP can be understood as an "objective" that SPS measures seek to attain[2262], and that the objective of Measure 3 is to protect Panama from the risk of entry, establishment and spread of the pink mealybug.[2263] The Panel also recalls that the definition of ALOP in Annex A(5) of the SPS Agreement indicates that the ALOP must reflect the "*level* of protection" deemed appropriate by the Member to attain its sanitary or phytosanitary protection objectives.[2264] Bearing in mind that the ALOP is also defined as the "acceptable level of *risk*"[2265], Panama's ALOP relevant to Measure 3 should reflect Panama's acceptable level of risk with respect to the introduction of the pink mealybug into its territory through pineapple imports from Costa Rica.[2266]

7.1124. Panama asserts that its ALOP is set out in Law No. 47 of 1996. This Law states that its provisions "regulate all actions relating to the protection of plants of national agricultural heritage, with the primary objective of preventing and controlling phytosanitary issues in a comprehensive manner and achieving phytosanitary quality in plants and plant products".[2267] The Law also states that one of Panama's fundamental objectives from a phytosanitary perspective is to "prevent the introduction, establishment and spread of pests of plants and plant products".[2268]

7.1125. Given that the ALOP can be understood as an "objective" that the SPS measure seeks to attain[2269], the relevant provisions of the Law in question may inform Panama's relevant ALOP.[2270] However, this must be expressed clearly enough to allow analysis of whether a particular SPS measure reaches this level of protection.[2271]

7.1126. Panama refers to a generic ALOP for preventing the entry, establishment and spread of pests of plants and plant products. In the case of Measure 3, the aim would be to prevent the entry, establishment and spread of the pink mealybug. For its part, Costa Rica considers that Panama's ALOP is to "prevent the introduction of [the pink mealybug] in its territory".[2272]

7.1127. The Panel considers that this definition of Panama's ALOP is consistent with its assertion that it did not have to wait for the risk of the pink mealybug being introduced in its territory to materialize in order to adopt a measure that addressed that risk.[2273] The Panel understands that Panama's ALOP for the pink mealybug is high, given that its aim is to prevent the entry of the pest into its territory, but it is not zero-risk, since Panama permits the importation of products that host

[2260] Costa Rica's response to Panel question No. 189, para. 3.150.

[2261] Costa Rica's first written submission, para. 874; response to Panel question No. 67, para. 3.31. However, given the "hortatory nature" of the provision, Costa Rica does not request the Panel make findings of inconsistency with Article 5.4. (Costa Rica's response to Panel question No. 67, paras. 3.31-3.32.)

[2262] Appellate Body Report, *Australia – Salmon*, para. 200.

[2263] See para. 7.1054 above.

[2264] See para. 7.369 above.

[2265] The note to Annex A(5) of the SPS Agreement states that "[m]any Members otherwise refer to this concept [ALOP] as the 'acceptable level of *risk*'". (italics added)

[2266] The Panel recalls that the risk in question is the risk of the entry, establishment or spread of the pink mealybug through the importation of fresh pineapples from Costa Rica. (See paras. 7.917-7.919 above).

[2267] Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98), Article 1.

[2268] Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98), Article 2.2. When describing its ALOP, Panama says it is to "avoid *entirely* 'the introduction, establishment, and spread of pests of plants and plant products in the territory of the Republic of Panama.'" (Panama's response to Panel question No. 95, para. 267) (emphasis added). The Panel observes that the word "entirely" is not found in the provisions of Law No. 47 that contain Panama's phytosanitary protection objectives.

[2269] Appellate Body Report, *Australia – Salmon*, para. 200.

[2270] It is worth nothing that Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples, which Panama inactivated in January 2019, lists Panama's Law No. 47 among its legal bases. (Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), p. 3).

[2271] See fn 808 above.

[2272] Costa Rica's second written submission, para. 276.

[2273] Panama's second written submission, paras. 160-161. The pink mealybug pest is not present in Panamanian territory. (Panama's first written submission, para. 254). This is confirmed by the CABI database. CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71)).

the pink mealybug from territories where the pest is present, as in the case of avocado imports from Colombia.[2274]

7.1128. In the light of the foregoing, the Panel concludes that Panama's relevant ALOP could be framed as a high, but not zero-risk, level of protection that avoids to the extent possible the introduction of the pink mealybug into Panamanian territory through the importation of Costa Rican pineapple. Accordingly, and taking into account the risk that Panama seeks to address, Panama's ALOP can be defined as the prevention of the entry, establishment and spread of the pink mealybug in its territory.

The level of protection that the alternative measures achieve

7.1129. The Panel will now proceed to assess whether the alternative measures proposed by Costa Rica achieve Panama's ALOP. To that end, the Panel will compare Panama's ALOP with the level of protection that would be achieved by those alternative measures.

First alternative measure: application of Resolution AUPSA-DINAN-116-2008

7.1130. Costa Rica submits that the first alternative measure achieves Panama's ALOP with respect to the pink mealybug, given that:

a. The pink mealybug is not present in pineapple production areas in Costa Rica, which is why the requirements applied previously would be sufficient, since they required, *inter alia*, that every shipment of Costa Rican pineapples to Panama: (i) be inspected and/or tested to determine that they are free from the quarantine pests specified by Panama; and (ii) arrive "free from live insects of any type", which would include the pink mealybug.[2275]

b. Exports of fresh pineapple from Costa Rica to Panama continued as ususal, without Panama reporting any incidence, after Costa Rica informed Panama and the IPPC Secretariat of the presence of the pink mealybug in its territory in May 2014.[2276] Costa Rica adds that, when Measure 3 was adopted in January 2019, there had been no change in its territory with respect to the pink mealybug.[2277]

c. Panama does not apply any PIR relating to the pink mealybug to fresh pineapple imports from the United States or Colombia, despite both countries having reported the presence of this pest in their territories.[2278]

7.1131. Panama responds that it cannot assess whether this alternative measure can achieve its ALOP with respect to Costa Rican pineapples because the scientific evidence is insufficient to perform a risk assessment.[2279]

7.1132. As mentioned above, the level of risk is relevant for determining whether a measure would achieve a Member's ALOP.[2280] In this case, before the adoption of Measure 3, the first alternative measure achieved Panama's ALOP. In order to determine whether this alternative still achieves this ALOP after the adoption of Measure 3, the Panel considers it necessary to examine whether the level of risk in question is the same or whether, on the contrary, it has increased. In the event that the

[2274] Panama's responses to Panel question No. 56, para. 163, and No. 95, para. 270.
[2275] Costa Rica's first written submission, para. 861 (quoting Resolution AUPSA-DINAN-116-2008 concerning the importation of pineapples (Exhibit CRI-66), Articles 3 and 5).
[2276] Costa Rica's first written submission, para. 862 (referring to Memorandum DSFE-261-2014 (Exhibit CRI-68)); Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69); INEC, Pineapple imports into Panama (2010-2020) (Exhibit CRI-77); and SFE, Phytosanitary export certificate for pineapples from Costa Rica (25 January 2019) (Exhibit CRI-168)); and Costa Rica's second written submission, para. 276.
[2277] Costa Rica's first written submission, para. 862.
[2278] Costa Rica's first written submission, para. 863; second written submission, para. 277.
[2279] Panama's comments on Costa Rica's response to Panel question No. 105, para. 23.
[2280] See para. 7.388 above.

level of risk has not changed, this would allow us to conclude that the alternative measure continues to achieve Panama's ALOP as it did before the adoption of Measure 3.

7.1133. The Panel observes that Costa Rica is assuming that the pest is not present in Panamanian territory and that Panama's ALOP is to prevent the entry of the pest into its territory. For Costa Rica, every alternative that has demonstrably prevented the entry of the pest into Panama achieves Panama's ALOP.[2281] The Panel concurs with Costa Rica's assertion, given that the record does not show that there were any changes in Costa Rica's phytosanitary situation that would impact the level of risk posed with respect to the introduction of the pink mealybug into Panama through imports of Costa Rican pineapples.

7.1134. As regards Panama's phytosanitary situation with respect to the pest, the record contains no evidence of any change since the inactivation of the resolution. The pest remains absent in Panamanian territory, meaning that it has not been introduced into Panama[2282], despite more than 10 years[2283] of Costa Rican pineapple imports regulated by the PIR of Resolution AUPSA-DINAN-116-2008. The Panel recalls that, for four and a half years of this period of more than 10 years[2284], pineapples were imported from Costa Rica when Panama already knew that the pink mealybug was present in Costa Rica, with limited distribution, under official control, and without its presence having been detected in pineapple production areas.

7.1135. As regards Costa Rica's phytosanitary situation with respect to the pest, the record also does not contain any evidence of changes since Costa Rica notified Panama and the IPPC Secretariat of the presence of the pest in its territory in May 2014.[2285] The pest continues to be present in its territory, with limited distribution and under official control.[2286] The record contains no evidence that the pest has been introduced to pineapple production areas since May 2014, so such areas are considered free from the pest. As Costa Rica notes, and Panama confirms, the pest has not been detected in shipments of Costa Rican pineapples to Panama.[2287]

7.1136. According to Panama, the PIR of Resolution AUPSA-DINAN-116-2008 preceded the scientific evidence that confirmed that pineapple is a host of the pink mealybug, and the first detection of the pest in Costa Rica.[2288] Panama asserts that these developments called into question its previous conclusion that the phytosanitary requirements of Resolution AUPSA-DINAN-116-2008 were sufficient to meet Panama's ALOP with respect to imports of Costa Rican pineapples[2289], and that this led it to adopt Measure 3.[2290] This seems to indicate that Panama perceived an increased risk as a result of these developments. However, the Panel observes that Panama did not assess the risk despite the fact that, as noted in reference to Article 5.7, it was not in a situation of insufficient relevant scientific evidence.

7.1137. In addition, as the Panel mentioned above in relation to Article 5.7[2291], the two elements that Panama mentions, namely, the presence of the pink mealybug in Costa Rica and the 2011 publication reporting the presence of the pest in pineapple in Fiji, do not constitute new, unexpected or unforeseen situations that required the adoption of measures different from those provided for in Resolution AUPSA-DINAN-116-2008. This conclusion is based on the fact that: (a) Panama had known since 2014 that the pest was present in Costa Rica because Costa Rica notified this fact to

[2281] Costa Rica's response to Panel question No. 189, para. 3.150.

[2282] Panama's first written submission, para. 254 (referring to EPPO, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-144)). See also OIRSA, *Technical report on the current status of the pink hibiscus mealybug in the countries of the OIRSA region* (Exhibit CRI-70), p. 10.

[2283] The Panel considers the period between the approval of the PIR for pineapple from Costa Rica in July 2008 and the adoption of Measure 3 in January 2019.

[2284] From Costa Rica's notification to Panama and the IPPC Secretariat that the pest was present in its territory, in May 2014, until the adoption of Measure 3, in January 2019.

[2285] Panama's response to Panel question No. 6, para. 26. See also Costa Rica's response to Panel question No. 48, paras. 2.132-2.133.

[2286] Costa Rica's response to Panel question No. 48, para. 2.132 (referring to "the latest list of quarantine pests in Costa Rica notified to the IPPC", dated 28 March 2022, contained in SFE, List of regulated pests in Costa Rica (28 March 2022) (Exhibit CRI-76)).

[2287] Costa Rica's response to Panel question No. 189, para. 3.151; Panama's response to Panel question No. 54, para. 158.

[2288] Panama's response to Panel question No. 191, para. 225.

[2289] Panama's response to Panel question No. 191, para. 225.

[2290] Panama's second written submission, paras. 134 and 154.

[2291] See para. 7.994 above.

Panama[2292]; and (b) the 2011 publication was included in the CABI and EPPO datasheets on the pest, which are periodically updated and which Panama consults when preparing its PIR for foods of plant origin[2293], together with a 2004 publication that is also referred to when pineapple is listed as a host of the pest.[2294] In the Panel's view, Panama has failed to demonstrate that the level of risk posed by imports of Costa Rican pineapples had changed as a result of the developments that, according to Panama, called into question its previous conclusions on that risk.

7.1138. In the light of these facts, and in the absence of other elements in the record that indicate the contrary, the Panel does not consider that a change occurred in the level of risk in January 2019 that suggested that the PIR of Resolution AUPSA-DINAN-116-2008 would not have achieved Panama's ALOP.

7.1139. The Panel observes that, according to Costa Rica, imports of fresh pineapple from the United States and Colombia are not subject to any requirements, which "confirms still further" that the first alternative measure achieves Panama's ALOP.[2295] The Panel recalls that, with respect to Articles 5.7 and 2.3, it concluded that Costa Rica has not demonstrated: (a) that Panama imported fresh pineapple from the United States and Colombia after the adoption of Measure 3[2296]; and (b) that Panama permits fresh pineapple imports from the United States and Colombia, since there is no evidence that Panama has adopted the corresponding PIR.[2297] Accordingly, the Panel dismisses the relevance of Costa Rica's arguments related to imports of fresh pineapple from the United States and Colombia for the purposes of determining whether the first alternative measure would achieve Panama's ALOP. Nevertheless, this does not undermine the Panel's previous conclusions on the fact that the application of the PIR of Resolution AUPSA-DINAN-116-2008 would achieve Panama's ALOP, as no change had occurred in Costa Rica's phytosanitary situation that led to a change in the existing level of risk with respect to the introduction of the pink mealybug through imports of Costa Rican pineapples.

7.1140. In the light of the foregoing, the Panel considers that Costa Rica has demonstrated that its first alternative measure would achieve Panama's ALOP with respect to the pink mealybug.

Second alternative measure: specific PIR for the pink mealybug

7.1141. Costa Rica submits that, if shipments of avocado from Colombia and almonds from China achieve Panama's ALOP when they are certified as free from the pink mealybug or as originating in places free from that pest, shipments of pineapple from Costa Rica certified in the same way should also achieve Panama's ALOP.[2298]

7.1142. Panama responds that it cannot assess whether this alternative measure can achieve its ALOP with respect to Costa Rican pineapples because the scientific evidence is insufficient to perform a risk assessment.[2299]

7.1143. The Panel recalls that the relevant ALOP for Measure 3 applies to plants and plant products[2300], so it would be the same in the case of imports of avocado from Colombia and almonds from China. Regarding the level of risk of imports of these products compared to that of imports of pineapple from Costa Rica, the Panel recalls that the risk assessment that Panama asserts it performs in order to prepare its PIR consists of verifying the pests of quarantine concern officially reported by the NPPO of each country of origin and comparing them to the list of pests of Panama's NPPO, as well as verifying the pest's ability to follow the pathway.[2301] The Panel understands that Panama was in a position to carry out this type of assessment for imports of avocado from Colombia, almonds from China and pineapple from Costa Rica.

[2292] Memorandum DSFE-261-2014 (Exhibit CRI-68).
[2293] Panama's response to Panel question No. 9, para. 31.
[2294] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), p. 19.
[2295] Costa Rica's response to Panel question No. 189, para. 3.151. See also Costa Rica's response to Panel question No. 190, para. 3.154.
[2296] See para. 7.1016 above.
[2297] See para. 7.1060 above.
[2298] Costa Rica's first written submission, para. 871; second written submission, para. 283.
[2299] Panama's comments on Costa Rica's response to Panel question No. 105, para. 23.
[2300] See para. 7.1121 above.
[2301] Panama's response to Panel question No. 9, para. 30.

7.1144. Avocado and pineapple are both hosts of the pest[2302], and they come from countries with the same phytosanitary status with respect to the pink mealybug, namely, the pest is present and of limited distribution.[2303] Therefore, they would pose a similar level of risk with respect to the pink mealybug.[2304] In the case of almonds from China, the Panel notes that China's phytosanitary status is the same as that of Costa Rica with respect to the pest.[2305] However, there is nothing in the record that shows that almond is a host of the pest.[2306] Accordingly, imports of almonds from China and pineapples from Costa Rica would not pose a similar risk.

7.1145. The Panel considers that if a specific mitigation measure, such as the additional declaration included in the PIR for avocado from Colombia, meets Panama's ALOP, as Panama itself has confirmed[2307], the inclusion of a similar measure in the PIR for pineapple from Costa Rica should also achieve it, as the two fruits are hosts of the pest from countries where the pest is present with a limited distribution. In the case of avocado from Colombia, the record is silent on whether the pest is present in avocado production areas in Colombia. In any case, irrespective of whether the pest is present in those areas, the fact that the pest is not present in pineapple production areas in Costa Rica reinforces the Panel's conclusion that the inclusion of an additional declaration in the PIR for pineapple from Costa Rica could achieve Panama's ALOP, in the same way that it is achieved in the case of avocado imports from Colombia. Moreover, if, as the Panel believes, applying the PIR of Resolution AUPSA-DINAN-116-2008 achieves Panama's ALOP, applying those same PIR and including a specific mitigation measure for the pink mealybug should achieve it even more comfortably.

7.1146. In the light of the foregoing, the Panel considers that Costa Rica has demonstrated that its second alternative measure would achieve Panama's ALOP with respect to the pink mealybug.

7.1147. Accordingly, the Panel concludes that Costa Rica has demonstrated that the two alternative measures that it has identified would achieve Panama's ALOP.

7.1148. The Panel will now proceed to analyse the third requirement of footnote 3 to Article 5.6, which is to determine whether the alternative measures identified by Costa Rica are significantly less restrictive to trade than Measure 3.

Whether the alternative measures are significantly less restrictive to trade

7.1149. Costa Rica asserts that the first alternative measure is significantly less restrictive to trade than Measure 3 because compliance with the requirements applied previously, including the phytosanitary certificate issued by the NPPO of Costa Rica, would allow "considerably greater access to the market" than Measure 3, which Costa Rica characterizes as "Panama's outright ban".[2308] Costa Rica adds that phytosanitary certificates are the standard phytosanitary measure recommended by the IPPC, as reflected in ISPM 12.[2309] Costa Rica puts forward the same arguments with respect to the second alternative measure.[2310] Panama does not comment on this element of the legal standard.

[2302] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71). See EPPO Global Database, https://gd.eppo.int/taxon/PHENHI/hosts (accessed 13 August 2024).

[2303] EPPO, Distribution of the pink mealybug in Colombia (2022) (Exhibit CRI-167); Report by Costa Rica to the IPPC Secretariat on the pink hibiscus mealybug (2014) (Exhibit CRI-69); and EPPO, Distribution of the pink mealybug in Costa Rica (2022) (Exhibit CRI-174)).

[2304] The Panel recalls that some sources consider avocado a main host, meaning that its level of risk would not be lower than that of pineapple from Costa Rica. (CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71)).

[2305] CABI, Datasheet on the pink hibiscus mealybug (2021) (Exhibit CRI-71), pp. 19 (with respect to pineapple) and 29 (with respect to almond).

[2306] The Panel notes that Panama indicates that "there is a risk of accidental transmission of the pest if hosts of the pest are accidentally transported with shipments of almonds from areas in which the presence of the pest has been confirmed." (Panama's response to Panel question No. 178, para. 186).

[2307] Panama's response to Panel question No. 188, para. 224.

[2308] Costa Rica's first written submission, para. 864 (quoting Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.151).

[2309] Costa Rica's first written submission, para. 864 (quoting IPPC, ISPM 12 (Exhibit CRI-170), p. 7)).

[2310] Costa Rica's first written submission, para. 872; second written submission, para. 282.

7.1150. The Panel recalls that Measure 3 consists of the "inactivation" ("*inhabilitación*") of Resolution AUPSA-DINAN-116-2008 establishing the PIR for pineapple from Costa Rica[2311], which makes it impossible to import Costa Rican pineapples into Panama. As such, the measure represents the highest possible degree of restrictiveness.[2312] As the Panel indicated above in its analysis with respect to Article 5.7, ISPM 11 considers prohibiting the importation of a product as a "measure of last resort", which should be considered in light of the anticipated efficacy, and is applicable in situations where no satisfactory measure to reduce risk to an acceptable level can be found.[2313] This indicates that Measure 3 would be the most restrictive measure that may be applied to pineapple imports.

7.1151. Both applying the PIR that were in force until January 2019 and which require, *inter alia*, a certificate issued by the NPPO of the importing country, and including an additional declaration in the phytosanitary certificate on the absence of the pest in the shipment or the area, place or site of production of the product, are measures that would allow Costa Rican pineapple to be imported.

7.1152. As mentioned above, in order for alternative measures to meet the requirements of footnote 3 to Article 5.6, they must be "significantly" less restrictive to trade.[2314] In the Panel's view, the two alternative measures proposed by Costa Rica would be significantly less restrictive to trade than Measure 3, which prevents the importation of pineapple from Costa Rica. This is confirmed by ISPM 12, which asserts that "[p]hytosanitary certification … *facilitates* international trade in … plant products … by providing an internationally agreed document and related procedures".[2315]

7.1153. Accordingly, the Panel concludes that Costa Rica has demonstrated that the two alternative measures are significantly less restrictive to trade than Measure 3.

7.5.1.5.2.3 Conclusion on Article 5.6 of the SPS Agreement

7.1154. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the alternative measures to Measure 3 that it proposes meet the three cumulative requirements of footnote 3 to Article 5.6, given that they are reasonably available taking into account technical and economic feasibility, they achieve Panama's ALOP, and they are significantly less restrictive to trade.

7.1155. Accordingly, the Panel finds that Measure 3 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP.

7.5.1.5.2.4 Whether Measure 3 is inconsistent with Article 2.2 of the SPS Agreement.

7.1156. The Panel concurs with the view expressed in previous disputes that the finding that a measure is more trade-restrictive than required to achieve the Member's ALOP, in breach of Article 5.6, leads to a rebuttable presumption of inconsistency with the obligation under Article 2.2 to apply the SPS measure only to the extent necessary to protect human, animal or plant life or health.[2316] The Panel considers that this rebuttable presumption can be made in this case because of its finding that Measure 3 is inconsistent with Article 5.6 of the SPS Agreement. Panama has not advanced arguments to rebut this presumption of inconsistency with Article 2.2.

7.1157. Accordingly, in the light of its finding that Measure 3 is inconsistent with Article 5.6 of the SPS Agreement, and in the absence of a rebuttal by Panama of the presumption of inconsistency with Article 2.2 of the SPS Agreement, the Panel finds that Measure 3 is inconsistent with Article 2.2 because it does not apply only to the extent necessary to protect plant life or health.

[2311] See paras. 2.15-2.16above.
[2312] See also fn 911 above.
[2313] See para. 7.996 above.
[2314] See para. 7.337 above.
[2315] IPPC, ISPM 12 (2022) (Exhibit CRI-402), p. 7. (emphasis added)
[2316] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; and Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; and *Russia – Pigs (EU)*, paras. 7.841 and 7.846.

7.5.1.5.2.5 Conclusion on Article 2.2 of the SPS Agreement

7.1158. In the light of the foregoing, the Panel finds that Measure 3 is inconsistent with Article 2.2 because it does not apply only to the extent necessary to protect plant life or health.

7.5.1.6 Claims under Article 3.1 of the SPS Agreement

7.5.1.6.1 Main arguments of the parties

7.5.1.6.1.1 Costa Rica

7.1159. Costa Rica claims that Measure 3 is inconsistent with Article 3.1 of the SPS Agreement because it is not based on ISPM 2 and ISPM 20.[2317] Costa Rica considers that these standards are relevant because Measure 3 is a phytosanitary measure, and in accordance with Annex A(3)(c) to the SPS Agreement, international standards, guidelines or recommendations for plant health are those developed under the auspices of the Secretariat of the IPPC.[2318]

7.1160. Costa Rica asserts that ISPM 2 provides that, in the event of a national review of phytosanitary regulations, requirements or operations, "[f]or existing trade, no new measures should be applied until the revision or new PRA has been completed, unless this is warranted by new or unexpected phytosanitary situations that may necessitate emergency measures".[2319] Costa Rica adds that, according to ISPM 20, "[e]mergency action may be required in a new or unexpected phytosanitary situation, such as the detection of quarantine pests"; and that the prohibition of import "should be used when no alternatives for pest risk management exist", to be resorted to only "[i]n the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".[2320]

7.1161. Costa Rica claims that Panama did not base Measure 3 on these standards, since it adopted a "prohibition on the import of fresh pineapple from Costa Rica".[2321] According to Costa Rica, Measure 3 is not the measure envisaged by ISPM 2 and ISPM 20 for situations such as that of Panama in January 2019 because: (a) trade in pineapple already existed between Costa Rica and Panama; (b) no "new", "unexpected" or "unforeseen" situation had arisen in relation to the trade in fresh pineapple with Costa Rica; and (c) Panama had not reported any "detection", "repeated non-compliance" or "significant non-compliance" in shipments of this product from Costa Rica.[2322] Costa Rica submits that the adoption of an import *prohibition* in cases where the international standard provides for the *continuation* of trade is equivalent to contradicting the international standard, so logically the measure is not based on that international standard.[2323]

7.5.1.6.1.2 Panama

7.1162. Panama submits that Costa Rica cannot establish a violation of Article 3.1 of the SPS Agreement because Article 5.7 requires Members to base their SPS measures on available pertinent information, including that from the relevant international organizations, but does not require Members to base provisional measures on international standards.[2324] For Panama, this is especially the case when scientific information that a Member needs to perform a risk assessment

[2317] Costa Rica's first written submission, para. 836 (referring to ISPM 2 (Exhibit CRI-101); ISPM 20 (Exhibit CRI-161)); second written submission, para. 259.

[2318] Costa Rica's panel request, p. 7; first written submission, paras. 828, 841, and 847; and second written submission, para. 258. See also Costa Rica's first written submission, paras. 834-835; second written submission, para. 259.

[2319] Costa Rica's first written submission, para. 838 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8). See also ibid. para. 837; Costa Rica's second written submission, para. 259.

[2320] Costa Rica's first written submission, para. 840 (quoting IPPC, ISPM 20 (Exhibit CRI-161), pp. 14 and 22-23). See also ibid. para. 839; Costa Rica's second written submission, para. 259.

[2321] Costa Rica's first written submission, paras. 841 and 845.

[2322] Costa Rica's first written submission, paras. 845-846. See also ibid. para. 843; Costa Rica's second written submission, para. 261.

[2323] Costa Rica's first written submission, para. 846. (italics original) See also ibid. para. 842 (quoting Panel Reports, *India – Agricultural Products*, paras. 7.270-7.274; and *Korea – Radionuclides*, para. 7.100, in turn quoting Appellate Body Report, *EC – Sardines*, para 248; and Appellate Body Report, *India – Agricultural Products*, para. 5.111); Costa Rica's second written submission, paras 260-261.

[2324] Panama's first written submission, para. 438.

was not examined in the process that led to the adoption of the international standard or guideline.[2325]

7.5.1.6.2 Assessment by the Panel

7.1163. The Panel recalls that Article 3.1 of the SPS Agreement provides that "Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3".

7.1164. The Panel has found that Measure 3 is not covered by Article 5.7 of the SPS Agreement and, as part of its analysis under that provision, the Panel concluded that Panama did not adopt Measure 3 on the basis of ISPM 2 and ISPM 20.[2326] The Panel has also found that Measure 3 is inconsistent with Articles 5.1, 5.2, 5.3, 2.2, 2.3, and 5.6 of the SPS Agreement.[2327] These findings relate both to the scientific basis for Measure 3 and to the discriminatory nature, necessity and degree of trade-restrictiveness of the measure.

7.1165. Accordingly, the Panel considers that, in the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[2328] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under Article 3.1 with respect to Measure 3, and decides to exercise judicial economy in respect of those claims.

7.5.1.7 Claims under Article 7 and Annex B of the SPS Agreement

7.5.1.7.1 Main arguments of the parties

7.5.1.7.1.1 Costa Rica

7.1166. In its panel request, Costa Rica claims that all the measures at issue are inconsistent with Article 7 and Annex B (1) of the SPS Agreement, "because Panama failed to meet its transparency and publication obligations in relation to each of the measures at issue".[2329]

7.1167. In its first written submission, Costa Rica submits that Panama acted inconsistently with the obligation under Annex (B)(5)(b) or, alternatively, with that under Annex (B)(6)(a). Costa Rica requests the Panel to find that Panama acted inconsistently with Article 7 as a consequence of the inconsistency with Annex B.[2330]

7.1168. Costa Rica argues that its panel request also includes a claim under Article 7 of the SPS Agreement that "may be applied independently of Annex B".[2331] Costa Rica adds that, should the Panel consider that Article 7 may be invoked independently of Annex B, the Panel has all the elements necessary to "find that Panama failed to notify the prohibitions to the WTO".[2332]

[2325] Panama's responses to Panel question No. 71, para. 204, and No. 75, para. 214.
[2326] See para. 7.995 above.
[2327] See paras. 7.1040 (with respect to Articles 5.1, 5.2, 5.3, and 2.2), 7.1085 (with respect to Article 2.3), and 7.1155 (with respect to Article 5.6) above.
[2328] See Articles 3.4, 3.7, 11, and 21.1 of the DSU. The Panel notes that other panels have refrained from making findings with respect to claims under Article 3 after finding that the measure at issue was inconsistent with other provisions of the SPS Agreement, namely Articles 2.2, 2.3, 5.1, 5.5, and 5.6. (Panel Reports, *Australia – Salmon*, para. 8.184; *Costa Rica – Avocados (Mexico)*, para. 7.2285).
[2329] Costa Rica's panel request, p. 7. Costa Rica further asserts that the inconsistency of the measures at issue with Article 7 and Annex B(1) "also gives rise to a violation of Article X:1 of the GATT 1994, since Panama failed to publish laws, regulations and administrative rulings of general application pertaining to requirements, restrictions or prohibitions on imports". (Ibid.)
[2330] Costa Rica's first written submission, para. 507.
[2331] Costa Rica's response to Panel question No. 66, paras. 3.25 and 3.28.
[2332] Costa Rica's response to Panel question No. 106, paras. 2.15-2.17.

7.5.1.7.1.2 Panama

7.1169. Panama notes that Costa Rica's first written submission does not contain any claim under Annex B(1) with respect to Measure 3.[2333]

7.1170. Panama also submits that Costa Rica's claims under Article 7 and Annex B(5)(b) and Annex B(6)(a) of the SPS Agreement are outside the Panel's terms of reference.[2334]

7.5.1.7.2 Assessment by the Panel

7.1171. The Panel recalls that, in its analysis of Costa Rica's claims under Article 7 and Annex B in respect of Measure 1, it has noted that:

a. In its preliminary ruling of 5 April 2023, the Panel found that claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement fall outside the Panel's terms of reference.[2335]

b. Annex B elaborates on the obligations that must be met under Article 7 and, consequently, Annex B and Article 7 are intertwined and must be read together.[2336]

c. In these proceedings, Costa Rica has not advanced any argument to support its claim concerning the publication of the measures at issue under Article 7 and Annex B(1).[2337]

7.1172. Therefore, in the absence of any argument made by Costa Rica, the Panel considers that Costa Rica has failed to demonstrate that Measure 3 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations under these provisions.

7.5.1.7.3 Conclusion on Article 7 and Annex B(1) of the SPS Agreement

7.1173. In the light of the foregoing, the Panel finds that Costa Rica has failed to demonstrate that Measure 3 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement.

7.5.1.8 Claims under Articles 1.1 and 2.1 of the SPS Agreement

7.5.1.8.1 Main arguments of the parties

7.1174. Costa Rica claims that Measure 3 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement, since the measure is inconsistent with the provisions of the SPS Agreement. In the light of all the inconsistencies that, according to Costa Rica, it has demonstrated, Costa Rica requests the Panel to find that Panama is, consequently, acting in a manner inconsistent with the obligations under Articles 1.1 and 2.1 of the SPS Agreement.[2338]

7.1175. Panama submits that Costa Rica was unable to establish its claims under Articles 1.1 and 2.1 because it failed to demonstrate that Measure 3 is inconsistent with the provisions of the SPS Agreement.[2339]

7.5.1.8.2 Assessment by the Panel

7.1176. The Panel recalls the general obligation under Articles 1.1 and 2.1 of the SPS Agreement that any SPS measure must be consistent with the provisions of that Agreement. The Panel also

[2333] Panama's first written submission, para. 33.
[2334] Panama's first written submission, para. 17.
[2335] See para. 7.421 above (referring to the preliminary ruling of the Panel (5 April 2023), para. 5.1(b)).
[2336] See para. 7.423 above (referring to Panel Reports, *India – Agricultural Products*, para. 7.741; and *Russia – Pigs (EU)*, para. 7.1416).
[2337] See paragraph 7.424 above.
[2338] Costa Rica's panel request, p. 6; first written submission, paras. 986-989; and second written submission, paras. 322-323.
[2339] Panama's first written submission, para. 443; second written submission, para. 245.

recalls that previous panels have found a measure at issue to be inconsistent with Articles 1.1 and 2.1 after finding that measure to be inconsistent with any obligation under the SPS Agreement.[2340]

7.1177. The Panel has found that Measure 3 is inconsistent with Articles 5.1, 5.2, 5.3, 2.2, 2.3, and 5.6 of the SPS Agreement.[2341] Accordingly, the Panel finds that Measure 3 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement.

7.5.2 Claims under the GATT 1994 and the Agreement on Agriculture

7.5.2.1 Main arguments of the parties

7.5.2.1.1 Costa Rica

7.1178. Costa Rica claims that Measure 3 is inconsistent with Article I:1 of the GATT 1994. Costa Rica submits that this measure: (a) belongs to the group of "rules and formalities in connection with importation" covered by this Article; (b) provides an advantage to other Members (i.e. the United States and Colombia); (c) affects like products, as it results in discrimination based exclusively on the origin of the products; and (d) the advantage granted to other Members is not accorded immediately and unconditionally to the products from Costa Rica.[2342]

7.1179. Costa Rica also claims that Measure 3 is inconsistent with Article XI:1 of the GATT 1994 because this measure: (a) falls within the broad residual category of "other measures" that may be challenged under Article XI:1 of the GATT 1994; and (b) amounts to an import prohibition, since Panama's decision to inactivate imports of pineapple constitutes "a legal ban on the trade or importation of a specified commodity".[2343]

7.1180. Costa Rica also claims that Measure 3 is inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture. According to Costa Rica, the Agreement on Agriculture applies to Measure 3, as pineapple is an agricultural product classified under Chapter 8 of the Harmonized System. Costa Rica argues that a violation of Article XI:1 of the GATT 1994 implies a violation of the obligation not to resort to quantitative import restrictions or similar border measures on agricultural products, set forth in Article 4.2 and footnote 1 of the Agreement on Agriculture.[2344]

7.5.2.1.2 Panama

7.1181. Panama submits that Costa Rica "has not established its claims" under Articles I:1 and XI:1 of the GATT 1994, and Article 4.2 and footnote 1 of the Agreement on Agriculture.[2345]

7.5.2.2 Assessment by the Panel

7.1182. With respect to the claims under the GATT 1994, the Panel observes that previous panels have recognized that the relationship between the SPS Agreement and the GATT 1994 could lead to circular reasoning that does not contribute to securing a positive solution to the dispute. These panels have considered that any findings of inconsistency with GATT 1994 provisions would also require an examination of whether the measure was justified under Article XX(b) of the GATT 1994, which refers to measures necessary to protect human, animal or plant life or health.[2346] The Panel agrees with this reasoning and recalls that the SPS Agreement elaborates on Article XX(b) of the GATT 1994.[2347]

[2340] See para7.430 above.

[2341] See paras. 7.1040 (with respect to Articles 5.1, 5.2, 5.3, and 2.2), 7.1085 (with respect to Article 2.3), and 7.1155 (with respect to Article 5.6) above.

[2342] Costa Rica's first written submission, paras. 1128-1136; second written submission, paras. 567-573.

[2343] Costa Rica's first written submission, paras. 1237-1241; second written submission, paras. 574-577.

[2344] Costa Rica's first written submission, paras. 1242-1246; second written submission, paras. 578-582.

[2345] Panama's second written submission, para. 246. See also Panama's first written submission, para. 443.

[2346] Panel Reports, *Australia – Salmon*, para. 7.19; *US – Poultry (China)*, para. 7.481; *US – Animals*, para. 7.730; and *Costa Rica – Avocados (Mexico)*, para. 7.2318.

[2347] See fn 953 above.

7.1183. Furthermore, the Panel recalls that it has found that Measure 3 is inconsistent with Articles 5.1, 5.2, 5.3, 2.2, 2.3, and 5.6 of the SPS Agreement.[2348] These findings relate both to the scientific basis for Measure 3 and to the discriminatory nature, necessity and degree of trade-restrictiveness of the measure.

7.1184. The Panel considers that, in the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[2349] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the GATT 1994, and decides to exercise judicial economy in respect of those claims.[2350]

7.1185. With respect to the claims under the Agreement on Agriculture, the Panel notes that, according to Costa Rica, the inconsistency of Measure 3 with Article 4.2 and footnote 1 of the Agreement on Agriculture stems from its inconsistency with Article XI:1 of the GATT 1994. The Panel recalls that it has decided to exercise judicial economy in respect of Costa Rica's claim under the GATT 1994. Furthermore, the Panel has addressed the issue of the trade-restrictiveness of Measure 3 in relation to Article 5.6 of the SPS Agreement. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[2351] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the Agreement on Agriculture, and decides to exercise judicial economy in respect of those claims.[2352]

7.6 Measure concerning the importation of plantains and bananas (Measure 4)

7.1186. The Panel will now proceed to examine Costa Rica's claims in respect of Measure 4. As indicated in the section on the order of analysis, the Panel will begin its analysis by examining Costa Rica's claims under the SPS Agreement. First, the Panel will examine the applicability of that Agreement to Measure 4 and, if applicable, will continue with its analysis of the claims under the relevant provisions of the SPS Agreement. If necessary, the Panel will subsequently address the claims under the GATT 1994 and the Agreement on Agriculture.

[2348] See paras. 7.1040 (with respect to Articles 5.1, 5.2, 5.3, and 2.2), 7.1085 (with respect to Article 2.3), 7.1155 (with respect to Article 5.6), and 7.1158 (with respect to Article 2.2) above.

[2349] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[2350] In previous disputes in which measures were challenged under the SPS Agreement and the GATT 1994, panels applied the principle of judicial economy with respect to the claims under the GATT 1994 after having found inconsistencies with the provisions of the SPS Agreement. See e.g. Panel Reports, *EC – Hormones (Canada)*, para. 8.275; *EC – Hormones (US)*, para. 8.272; *Australia – Salmon*, para. 8.185; *Japan – Apples*, para. 8.328; *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 6.3429; *India – Agricultural Products*, para. 7.803; *US – Animals*, paras. 7.731-7.732; and *Costa Rica – Avocados (Mexico)*, para. 7.2319.

[2351] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[2352] The panel in *Japan – Apples*, in which measures were challenged under the SPS Agreement and the Agreement on Agriculture, applied the principle of judicial economy with respect to claims under the Agreement on Agriculture after having found inconsistencies with the provisions of the SPS Agreement. (See Panel Report, *Japan – Apples*, para 8.332). The panel in *US – Poultry (China)*, in which measures were challenged under the SPS Agreement, the GATT 1994 and the Agreement on Agriculture, applied the principle of judicial economy with respect to claims under the Agreement on Agriculture after having found inconsistencies with the provisions of the SPS Agreement and the GATT 1994. In particular, that panel noted that it had resolved the aspects of the dispute related to the "restrictions". (See Panel Report, *US – Poultry (China)*, paras 7.69 and 7.485-7.487).

7.6.1 Claims under the SPS Agreement

7.6.1.1 Whether Measure 4 is a sanitary or phytosanitary measure that falls within the scope of the SPS Agreement

7.6.1.1.1 Main arguments of the parties

7.6.1.1.1.1 Costa Rica

7.1187. Costa Rica submits that Measure 4 falls within the scope of the SPS Agreement because it is an SPS measure within the meaning of Annex A(1)(a) to the Agreement and it affects international trade within the meaning of Article 1.1.[2353]

7.1188. Regarding the objective of Measure 4, Costa Rica asserts that an objective reading of the notes sent by Panama on 10 and 25 October 2019 reveals that the PIR for plantain and banana from Costa Rica were being inactivated due to a "technical review process" of the relevant resolutions (including, in the case of plantains, the approval of packing plants) that would culminate in the approval of new requirements.[2354] Costa Rica submits, therefore, that the objective of Measure 4 is to protect plant life and health in Panama from potential phytosanitary risks.[2355]

7.1189. Costa Rica claims that, following the adoption of Measure 4, Panama gave two new reasons to justify the measure.[2356] The first reason was the national state of alert prompted by the fungus *Fusarium oxysporum* f. sp. *cubense* Tropical Race 4 (Foc TR4). Panama notified this reason to Costa Rica two months after communicating the measure.[2357] The second reason, which only concerns bananas, was the detection of residues of the pesticide chlorpyrifos in banana samples in levels higher than the MRL established in Panamanian law. Panama notified this reason to Costa Rica one year and four months after communicating the measure.[2358] Costa Rica emphasizes that these reasons pre-dated the adoption of Measure 4, so Panama could have mentioned them in its notes of October 2019 informing Costa Rica of the measure, and yet it did not.[2359]

7.1190. Costa Rica asserts that knowing the reason for an SPS measure at the time of its adoption is of critical importance, especially when there has been no risk assessment (which, if performed, would have enabled the measure's objective to be identified).[2360] Costa Rica submits that a Member must not be allowed to adopt an SPS measure on phytosanitary grounds and then present additional reasons over time. For Costa Rica, this way of acting undermines the rights and expectations of exporting countries in a manner inconsistent with the object and purpose of the SPS Agreement.[2361]

[2353] Costa Rica's first written submission, para. 998. See also ibid. paras. 1003 and 1015.

[2354] Costa Rica's first written submission, paras. 1000 and 1007 (quoting Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97)).

[2355] Costa Rica's first written submission, paras. 1000-1001. In support of its argument that Measure 4 is a phytosanitary measure, Costa Rica refers to the titles and texts of the resolutions that contained the PIR for plantain and banana from Costa Rica and the notes from October 2019 by which AUPSA informed Costa Rica that it was inactivating those resolutions due to an alleged technical review process. (Ibid. (quoting Note AUPSA-AG-392-2019 (Exhibit CRI-95); Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-97); and Resolution AUPSA DINAN 019 2012 concerning the importation of bananas (Exhibit CRI-98))).

[2356] Costa Rica's first written submission, paras. 1006 and 1008. For Costa Rica, one of the fundamental problems regarding Measure 4 is the constantly changing reasons put forward by Panama to explain it. (Costa Rica's second written submission, para. 326).

[2357] Costa Rica's first written submission, para. 1004 (quoting Note DM-N-1352-2019 (Exhibit CRI-103)). See also Costa Rica's response to Panel question No. 57, para. 2.143.

[2358] Costa Rica's first written submission, para. 1005 (quoting Note DNSV-0113-2021-OIAR (Exhibit CRI-109)).

[2359] Costa Rica's first written submission, para. 1008; second written submission, paras. 327-328. See also Costa Rica's opening statement at the first Panel meeting, para. 58; response to Panel question No. 57, paras. 2.141 and 2.147.

[2360] Costa Rica's response to Panel question No. 204, para. 3.178.

[2361] Costa Rica's opening statement at the first meeting of the Panel, para. 59; response to Panel question 57, paras. 2.146 and 2.148. Costa Rica's second written submission, paras. 330 and 332; comments on Panama's response to Panel question No. 200, para. 3.384. Costa Rica submits that a Member cannot close the market today and explain why tomorrow. (Costa Rica's second written submission, para. 330).

7.1191. Costa Rica requests the Panel to take into account, in its examination of Measure 4, how the measure was originally notified to Costa Rica, and not the reasons given by Panama *a posteriori*.[2362] For Costa Rica, the explanation of the reasons given subsequently constitutes an *ex post facto* justification or rationalization of the measure.[2363] Costa Rica considers that such rationalizations should be rejected, in line with the practice of previous panels.[2364] Costa Rica submits that it does not see, and Panama did not explain, the relationship between the various reasons, namely, the Foc TR4 pest, the approval of packing plants, and an alleged failure to comply with the MRL for the pesticide chlorpyrifos.[2365]

7.1192. In relation to what Panama refers to as the "context" of Measure 4, Costa Rica asserts that, although the objective of a measure may be understood from the circumstances relating to its application, these circumstances should be objective and unambiguous and not leave any doubt as to the objective of the measure. For Costa Rica, this is not the case in this dispute.[2366] According to Costa Rica, Panama cannot reasonably argue that Costa Rica should have understood from the "context" that the market closure was due to Foc TR4, given that:

a. this pest is absent in Costa Rica[2367];

b. the pest "does not prevent and has not prevented" the trade in plantain and banana fruit, because the fruit are not the main transmission pathway of Foc TR4[2368];

c. Panama's measures and actions related to Foc TR4, set out in its Resolutions OAL-001-ADM-2015, OAL-102-ADM-2019, and OAL-106-ADM-2019, did not indicate that Panama would stop trade in plantains and bananas. Costa Rica adds that in 2015, pursuant to Resolution OAL-001-ADM-2015, Panama had already declared Foc TR4 a quarantine pest in Panama, and the provisions of both that Resolution and Resolution OAL-102-ADM-2019 only prohibit the entry into the country of plants, reproductive material, and plant material from areas where the pest has been reported[2369];

d. from the time that Panama declared Foc TR4 a quarantine pest in its territory (in January 2015) until it communicated Measure 4 to Costa Rica (in October 2019), Costa Rica exported plantain and banana to Panama as usual, including on 21 September 2019 - days *after* Panama declared the national state of alert due to Foc TR4[2370]; and

[2362] Costa Rica's second written submission, para. 332. See also Costa Rica's first written submission, para. 1011.

[2363] Costa Rica's first written submission, para. 1006. Costa Rica emphasizes that it does not refer to *ex post* events, and does not dispute the chronology of the events. (Costa Rica's response to Panel question No. 57, para. 2.147; second written submission, paras. 330-331).

[2364] Costa Rica's first written submission, paras. 1007 and 1009 (quoting Panel Reports, *Japan – Alcoholic Beverages II*, para. 6.25 (iii); *Chile – Price Band System*, para. 7.139; and *Ukraine – Passenger Cars*, para. 7.82). See also ibid. para. 1011. Costa Rica understands that the elements that allegedly led to the adoption of a measure must be present and considered when adopting that measure, and it is not acceptable that they emerge and/or are communicated *ex post facto*. (Costa Rica's response to Panel question No. 204, para. 3.178).

[2365] Costa Rica's opening statement at the first meeting of the Panel, para. 58.

[2366] Costa Rica's comments on Panama's response to Panel question No. 200, para. 3.385. See also Costa Rica's first written submission, para. 1007; response to Panel question No. 200, para. 3.164.

[2367] Costa Rica's response to Panel question No. 57, para. 2.144; comments on Panama's response to Panel question No. 206, para. 3.405.

[2368] Costa Rica's response to Panel question No. 57, para. 2.144; comments on Panama's response to Panel question No. 206, para. 3.405.

[2369] Costa Rica's response to Panel question No. 215, para. 3.207; comments on Panama's response to Panel question No. 206, paras. 3.406 and 3.408 (referring to Ministry of Agricultural Development of Panama, Resolution OAL-001-ADM-2015 (Exhibit PAN-116); Ministry of Agricultural Development of Panama, Resolution OAL-001-ADM-2015 (Exhibit PAN-116); Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibits CRI-104, PAN-112); and Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73)). See also Costa Rica's response to Panel question No. 215, paras. 3.207-3.208.

[2370] Costa Rica's response to Panel question No. 215, para. 3.208; comments on Costa Rica's response to Panel question No. 206, para. 3.406. (emphasis original) Costa Rica notes that on 21 September 2019 - after Panama had declared the national state of alert due to Foc TR4 - Costa Rica exported 22,080 kg of plantains to Panama. According to Costa Rica, this fact demonstrates that the market closure in October 2019

e. OIRSA's recommendations of July 2019 regarding Foc TR4 do not include "generalized prohibitions on the trade in Musaceae fruit[2371]".[2372]

7.1193. However, should the Panel decide to take into account the reasons given by Panama after the adoption of Measure 4, Costa Rica submits that this measure would continue to be covered by Annex A(1) of the SPS Agreement.[2373] According to Costa Rica, if Measure 4 had been adopted because of Panama's national state of alert due to Foc TR4, this measure would be an SPS measure applied to protect plant (plantains and bananas) life or health within the territory of Panama from risks arising from the entry, establishment or spread of the pest in question, within the meaning of Annex A(1)(a). If the measure had been adopted because of the alleged detection of chlorpyrifos residues, Costa Rica considers that this measure would be an SPS Measure applied to protect human life or health within the territory of Panama from risks arising from contaminants in foods, within the meaning of Annex A(1)(b).[2374]

7.1194. With regard to the impact on international trade, Costa Rica submits that Measure 4 affects international trade in the most direct way possible by prohibiting the entry of Costa Rican plantains and bananas into the Panamanian market.[2375]

7.6.1.1.1.2 Panama

7.1195. Panama does not dispute that Measure 4 is an SPS measure in accordance with the definition in Annex A(1) and Article 1.1 of the SPS Agreement, to which the SPS Agreement applies.

7.1196. However, Panama submits that the PIR for Costa Rican plantains and bananas were temporarily inactivated to mitigate the risk of Foc TR4, on the basis of evidence that indicated the possibility of a risk of transmission of the pest through the importation of fresh plantain and banana fruit, but which was insufficient to perform a risk assessment.[2376] Panama asserts that Foc TR4 was the only reason it gave Costa Rica for adopting Measure 4[2377], and that it is not an *ex post facto* rationalization of the measure.[2378]

7.1197. Panama asserts that, in seeking to identify the objective of a measure, a panel must take account of all evidence put before it and not only the first of a series of communications between the parties, and that the purpose of a measure may be manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure.[2379] Panama is of the view that the justification for a measure should be accepted provided that the reasoning is based on evidence in the record before the start of the dispute - as, according to Panama, is the case here, unlike previous proceedings.[2380]

7.1198. Panama notes that its communications to Costa Rica in October 2019 notify actions (announce that a PIR review has been initiated), but do not provide the reasons for these actions (do not state why the review was initiated).[2381] Panama asserts that the SPS Agreement does not

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was not in response to Foc TR4. (Costa Rica's second written submission, para. 331 (referring to SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191))).

[2371] The Panel recalls that *Musaceae* include plantains and bananas. (See e.g. OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), p. xi).

[2372] Costa Rica's comments on Panama's response to Panel question No. 206, para. 3.407.

[2373] Costa Rica's first written submission, para. 1012.

[2374] Costa Rica's first written submission, para. 1013.

[2375] Costa Rica's first written submission, para. 1002. In this regard, Costa Rica notes that a number of panels have found that an import ban affects international trade. (Costa Rica's first written submission, paras. 1002 and 1014 (referring to Panel Reports, *Russia – Pigs (EU)*, paras. 7.235-7.236; *US – Animals,* para. 7.44; *India – Agricultural Products*, para. 7.157; *EC – Hormones (Canada)*, para. 8.26; and *EC – Hormones (US)*, para. 8.23)).

[2376] Panama's response to Panel question No. 199, para. 255.

[2377] Panama's second written submission, paras. 195 and 198.

[2378] Panama's first written submission, paras. 382-387; response to Panel question No. 202, para. 266.

[2379] Panama's second written submission, paras. 192-193 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.144; A*ustralia – Apples*, para. 172) and 194. Panama asserts that Costa Rica focuses on the first of a chain of communications and ignores the circumstances surrounding the application of the measure. (Panama's responses to Panel question No. 60, para. 170, and No. 90, para. 249; second written submission, para. 199).

[2380] Panama's first written submission, para. 387; response to Panel question No. 202, paras. 264-267.

[2381] Panama's second written submission, para. 196.

require that the objective of an SPS measure be identified at the same time that the measure is notified to the affected Member.[2382]

7.1199. Panama submits that the circumstances relating to the application of Measure 4 are firmly anchored in the evidence in the record, which makes it clear that the risk of introduction of Foc TR4 into Panama triggered the review of the relevant PIR, and that the risk was present when the measure was adopted.[2383] Panama lists the following events which, in its view, led to the imposition of Measure 4:

a. the notification of the suspected presence of Foc TR4 in Colombia on 25 June 2019;

b. the issuance of a regional alert by OIRSA on 10 July 2019;

c. the confirmation of the presence of Foc TR4 in Colombia on 8 August 2019;

d. the issuance of a national alert by Panama in response to the risk of introduction of Foc TR4, and the establishment of an action plan on 12 September 2019; and

e. the establishment of a Technical Support Commission to prevent the entry of Foc TR4 into Panama on 1 October 2019.[2384]

7.1200. According to Panama, its authorities did not mention Foc TR4 in their notes of October 2019 because it should have been "absolutely clear" to Costa Rica that the relevant PIR were being inactivated in the "context" of the confirmed presence of Foc TR4 in the region[2385] and the regional and national alerts due to Foc TR4.[2386] Panama also submits that it explicitly clarified to Costa Rica that Foc TR4 was the reason for adopting Measure 4 well before the establishment of the Panel, and Costa Rica expressly acknowledged this and sought to engage with the Panamanian authorities.[2387]

7.1201. Lastly, with respect to the detection of chlorpyrifos, Panama clarifies that this event was not a reason for the adoption or maintenance of Measure 4.[2388]

7.6.1.1.2 Assessment by the Panel

7.6.1.1.2.1 Relevant legal standard

7.1202. The Panel will next examine whether, in accordance with the legal standard described in section 7.3.1.1.2.1 above, the SPS Agreement is applicable to Measure 4. In particular, the Panel will consider whether, as set out in Articles 1.1 and 1.2 of the Agreement, Measure 4: (a) constitutes an SPS measure in accordance with the definition given in Annex A to the SPS Agreement; and (b) may, directly or indirectly, affect international trade.

[2382] Panama's comments on Costa Rica's response to Panel question No. 202, para. 151.

[2383] Panama's first written submission, paras. 380 and 386; response to Panel question No. 90, paras. 249-250.

[2384] Panama's first written submission, para. 382; response to Panel question No. 193, para. 233. Panama notes that Costa Rica is one of the main banana producers in the region and a member State of OIRSA, and that it was aware of the developments that preceded the inactivation of the relevant PIR. (Panama's first written submission, paras. 382-383; response to Panel question No. 60, para. 167).

[2385] Panama's response to Panel question No. 60, para. 166; second written submission, para. 197. See also Panama's first written submission, paras. 357-358 (quoting Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibits CRI-104, PAN-112); and Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73)).

[2386] Panama's response to Panel question No. 60, para. 168.

[2387] Panama's first written submission, para. 384; responses to Panel question No. 60, para. 169, and No. 90, para. 251; and second written submission, para. 198. See also Panama's opening statement at the first meeting of the Panel, para. 11.

[2388] Panama's response to Panel question No. 60, para. 171.

7.6.1.1.2.2 Whether Measure 4 constitutes an SPS measure within the meaning of Annex A(1) to the SPS Agreement

7.1203. As mentioned in the descriptive part, Measure 4 consists of the inactivation of the resolutions containing the PIR for Costa Rican plantains and bananas.[2389] Taking into account the legal standard described above, the task of this Panel is to determine whether Measure 4 has been applied to achieve at least one of the objectives listed in paragraphs (a)-(d) of Annex A(1) to the SPS Agreement.[2390]

7.1204. The Panel recalls that Panama has not contested Costa Rica's assertions that Measure 4 constitutes an SPS measure adopted to protect plant life or health in Panama within the meaning of Annex A(1)(a) of the SPS Agreement. However, the parties disagree over whether this measure was adopted to protect plant life or health due to: (a) a technical review process of the PIR for plantain and banana from Costa Rica, and the need for plantain packing plants to be approved, as argued by Costa Rica; or (b) the risk of introduction[2391] of Foc TR4 within the territory of Panama, as argued by Panama.

7.1205. The Panel observes that Costa Rica determines the objective of Measure 4 on the basis of the notes through which Panama informed it of the measure.[2392] Panama, for its part, requests the Panel to take into consideration additional factual elements which, in its view, "are *inextricably* part of the circumstances surrounding the application of the measure" and which, contrary to Costa Rica's claim, should not be considered "an *ex post* rationalization"[2393]. These elements include the presence of Foc TR4 in Colombia, OIRSA's phytosanitary alert due to Foc TR4 and Panama's Foc TR4 resolutions.[2394] Panama also refers to communications regarding Measure 4 that Costa Rica sent after the adoption of this measure.[2395]

7.1206. The Panel recalls that it agrees with the approach taken in previous disputes regarding the determination of the objective of a measure. The Panel recalls that it has been found that "the purpose of a measure is to be ascertained on the basis of objective considerations"[2396], and that scrutiny of the circumstances must reveal "a clear and objective relationship between that measure and the specific purposes enumerated in Annex A(1)".[2397] In this respect, it has been noted that this may be ascertained not only from the objectives of the measure as expressed by the respondent, but also from the text and structure of the measure, its surrounding regulatory context, and the way in which it is designed and applied.[2398] Panels have considered a wide range of factual elements, both before and after the adoption of the measure at issue, in order to determine its objective.[2399]

7.1207. Accordingly, the Panel will begin its assessment by examining the text of the notes through which Panama notified Measure 4 to Costa Rica in order to determine whether, as Costa Rica claims, the text of the notes itself indicates the reason why Panama adopted the measure.[2400]

[2389] See section 2.1.5.1 above.

[2390] See para. 7.62 above. See also Appellate Body Report, *Australia – Apples*, para. 172.

[2391] The Panel observes that the parties and the exhibits in the record refer both to the risk of *entry* of Foc TR4 and the risk of *introduction* (which includes entry and establishment) of this pest. (See e.g. Costa Rica's first written submission, paras. 1048 and 1069; Panama's first written submission, paras. 357, 361-362, and 365; Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibit CRI-104, PAN-112); and Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73)).

[2392] Costa Rica's first written submission, para. 1001.

[2393] Panama's first written submission, paras. 382 and 386.

[2394] The reference to "Panama's Foc TR4 Resolutions" in this report is to Resolutions Nos. OAL-001-ADM-2015, No. OAL-102-ADM-2019 and No. OAL-106-ADM-2019 discussed below.

[2395] Panama's first written submission, para. 384.

[2396] Appellate Body Report, *Australia – Apples*, para. 172.

[2397] Appellate Body Report, *Australia – Apples*, para. 173.

[2398] Appellate Body Report, *Australia – Apples*, paras 172-173. See Panel Reports, *US – Animals*, para. 7.31; *India – Agricultural Products*, para. 7.139; *Russia – Pigs (EU)*, paras. 7.193-7.194; *Korea – Radionuclides*, para. 7.25; and *Costa Rica – Avocados (Mexico)*, paras. 7.77, 7.87 and 7.202.

[2399] See paras. 7.63 -7.65 above.

[2400] Costa Rica's first written submission, para. 1007.

The notes through which Panama informed Costa Rica of Measure 4

7.1208. As noted above[2401], Panama informed Costa Rica of Measure 4 in October 2019 through Notes AUPSA-AG-392-2019 (concerning plantains) and AUPSA-AG-424-2019 (concerning bananas).[2402]

7.1209. Note AUPSA-AG-392-2019 of 10 October 2019 (concerning plantains) reads, in the relevant part, as follows:

> [W]e hereby take the opportunity to inform you that we have initiated a technical review process of the published resolutions where we have noted that Article 3, paragraph 3.2 of Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (*Musa paradisiaca)* from Costa Rica establishes the following:
>
> > "Plantains (*Musa paradisiaca*) must come from areas or places of production and packing plants subject to inspection and registration by the [NPPO] of the country of origin, and packing plants approved by [AUPSA]".
>
> In view of the above, and taking into account that the Authority has not carried out the approval of packing plants, the requirements for the exportation of plantains originating in Costa Rica to ... Panama have been temporarily inactivated until the NPPO (Plant Health - MIDA) reviews Resolution AUPSA-DINAN-106-2009 and determines the actions to be taken.[2403]

7.1210. For its part, Note AUPSA-AG-424-2019 of 25 October 2019 (concerning bananas) reads, in the relevant part, as follows:

> [W]e hereby take the opportunity to inform you that we have initiated a technical review process of Resolution AUPSA-DINAN-019-2012 concerning the importation of banana (*Musa* spp.) fruit originating in Costa Rica.
>
> In this regard, we inform you that the Authority has temporarily inactivated the requirements for the importation of bananas from Costa Rica to Panama until the NPPO of Panama (Plant Health - MIDA) reviews the resolution and determines the actions to be taken.[2404]

7.1211. In the Panel's view, contrary to what Panama asserts[2405], the text of these two notes refers explicitly to the reason for the inactivation of the resolutions containing the PIR for Costa Rican plantains and bananas. Note AUPSA-AG-392-2019 states that what triggered the adoption of this measure was the fact that the Panamanian authorities undertook a technical review of the resolution containing the PIR for Costa Rican plantains and realized that one of the PIR had not been fulfilled, namely, that packing plants be approved by AUPSA.[2406] In the Panel's view, the expressions "in view of the above" and "taking into account" relate the adoption of Measure 4 to the review of the relevant resolution and the lack of approval of the plantain packing plants. With respect to Note AUPSA-AG-424-2019, the text of the Note itself also expressly indicates that the inactivation of the relevant resolution is due to the initiation of a process for the technical review of that resolution. The adverbial locution "in this regard" in this Note serves to relate the adoption of Measure 4 to the review of the relevant resolution.

[2401] See section 2.1.5 above.
[2402] Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97).
[2403] Note AUPSA-AG-392-2019 (Exhibit CRI-95). (emphasis omitted)
[2404] Note AUPSA-AG-424-2019 (Exhibit CRI-97).
[2405] The Panel recalls that, according to Panama, the notifications of Measure 4 announce *actions* (announce that a PIR review has been initiated), but do not provide the *reasons* for these actions. (Panama's second written submission, para. 196). (italics original)
[2406] The Panel observes that in Note AUPSA-AG-392-2019, AUPSA makes clear reference to the basis for this requirement, which is Article 3, paragraph 3.2 of Resolution AUPSA-DINAN-106-2009. (See Note AUPSA-AG-392-2019 (Exhibit CRI-95); and Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96)).

7.1212. The notes through which Panama informed Costa Rica of Measure 4 merely notify the above and do not mention any specific pest, such as Foc TR4, nor do they refer to any event that may be related to that pest or the management of the concomitant risk. As noted, the only documents referred to in the notes of October 2019 are Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains and Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas. These Resolutions include the requirement that the consignment be free from live insects of any type, as well as other biological, chemical and physical contaminants, including soil.[2407] Resolution AUPSA-DINAN-106-2009 also requires that the phytosanitary certificate include an additional declaration certifying that the fruit have been subject to a specific fruit fly quarantine treatment.[2408] Neither of these two Resolutions mentions any specific requirements related to Foc TR4. In the absence of any reference to this pest in the PIR and the notes through which their inactivation was notified, it is not plausible to interpret Measure 4 as being related to a change in Panama's risk management of this pest.

7.1213. Therefore, the Panel considers that the notes through which Panama informed Costa Rica of Measure 4 indicate that the adoption of this measure 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 is of the view that the objective of Measure 4 is to protect against the risks that Panama sought to address through this review and approval.

7.1214. Having examined the notes through which Panama informed Costa Rica of Measure 4 and having concluded that these notes detail the reason for the adoption of the measure, the Panel will proceed to assess whether, as Panama claims, some evidence in the record shows that the objective of Measure 4 is to protect against the risk of introduction of Foc TR4.

Evidence which, according to Panama, demonstrates that the objective of Measure 4 was to protect against the risk of introduction of Foc TR4

7.1215. The Panel will now assess the factual elements which, according to Panama, demonstrate that the objective of Measure 4 is to protect against the risk of entry of Foc TR4.[2409]

7.1216. Panama identifies the following elements:

a. Events prior to the adoption of Measure 4 that Panama qualifies as "context"[2410]:

   i. On 25 June 2019, the ICA declared the phytosanitary quarantine of a farm in Colombian territory due to the presence of symptoms associated with Foc TR4.[2411]

[2407] See Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3.3; Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98), Article 3.3.

[2408] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3.5.1.

[2409] The parties do not disagree on the chronology of the events mentioned in this section, but they express opposing views on whether Foc TR4 constitutes an *ex post facto* rationalization of the measure. As to the disputes referred to by Costa Rica in relation to the *ex post facto* rationalizations rejected by previous panels, the Panel observes that the circumstances in these disputes differ from those in this case. In *Japan – Alcoholic Beverages II*, the rationalization that the panel considered to be *ex post facto* to the adoption of the challenged measure was submitted by the respondent, Japan, during the panel proceedings as part of its argument. (Panel Report, *Japan – Alcoholic Beverages II*, paras. 6.24-6.25 and 6.34). With respect to *Chile – Price Band System* and *Ukraine – Passenger Cars*, the findings in question were made under Article 3.1 of the Agreement on Safeguards, which, as was interpreted, required that the existence of unforeseen developments, within the meaning of Article XIX: 1 of the GATT 1994, be demonstrated in the published report of the investigating authorities. In both disputes, the complainants argued during the proceedings that there had been unforeseen developments, but such developments were not identified in the report of the investigating authority. (Panel Reports, *Chile – Price Band System*, para. 7.134; *Ukraine – Passenger Cars*, para. 7.67).

[2410] See Panama's first written submission, paras. 380-382; response to Panel question No. 60, paras. 166-167; and second written submission, para. 197.

[2411] OIRSA, "Phytosanitary alert to exclude and prevent fusarium wilt in bananas and plantains in the OIRSA region" (2019) (Exhibit CRI-186), p.1 (referring to Resolution No. 00008573 of 25 June 2019 "declaring the phytosanitary quarantine of the finca Don Marce, located in the Riohacha Municipality of the Department of La Guajira".)

ii. On 10 July 2019, OIRSA issued a phytosanitary alert for the exclusion and prevention of Foc TR4 in the OIRSA region, in which it suggested a number of actions that its member States could take.[2412]

iii. On 8 August 2019, after confirming the presence of Foc TR4 in Colombia, the ICA announced that it would declare a state of phytosanitary emergency in the national territory due to the presence of Foc TR4.[2413]

iv. On 12 September 2019, Panama issued Resolution OAL-102-ADM-2019 declaring "a state of national alert due to the risk of introduction of [Foc TR4] as a dangerous quarantine pest" in Panama.[2414]

v. On 1 October 2019, Panama issued Resolution OAL-106-ADM-2019 establishing the Technical Support Commission to prevent the entry of Foc TR4 into its territory, "to protect and safeguard banana and plantain plantations".[2415]

b. Communications subsequent to the adoption of Measure 4:

i. communication from the Minister of Trade and Industry of Panama to the Minister of Foreign Trade of Costa Rica, dated 18 December 2019[2416];

ii. communication from the DNSV to the SFE of 22 February 2021[2417];

iii. communication from the DNSV to the SFE of 1 March 2021[2418]; and

iv. communication from the DNSV to the SFE of 13 March 2021.[2419]

7.1217. With regard to the events related to Foc TR4 in Colombia, namely, the declaration of the phytosanitary quarantine of a farm in Colombia due to the suspected presence of Foc TR4 in June 2019, and the subsequent confirmation of the presence of this pest in Colombia and the declaration of a state of phytosanitary emergency in August 2019, the Panel does not consider that these events are in themselves indicative of the objective of Measure 4, adopted in October 2019. In the Panel's view, the adoption of Measure 4, which relates to imports of plantains and bananas from Costa Rica, does not appear to be linked to these events, which concern the phytosanitary status of Foc TR4 in another country, Colombia.

7.1218. With regard to OIRSA's phytosanitary alert of July 2019, the Panel observes that OIRSA refers to the suspected presence of Foc TR4 in Colombia, and warns the countries of the region to establish phytosanitary measures for the prevention and exclusion of this pest. OIRSA suggests a number of actions for immediate implementation at points of entry. These actions focus on (a) the inspection of luggage, cargo, packages, mail, and passengers from countries where the pest is present; (b) the treatment of means of transport with disinfectant solution and the placement of disinfectant mats; (c) requesting travellers and transporters not to bring *Musaceae* into the country; and (d) international waste management measures.[2420] The Panel fails to see how the OIRSA alert and the actions suggested by that institution to prevent the introduction of Foc TR4 indicate a link

[2412] OIRSA, "Phytosanitary alert to exclude and prevent fusarium wilt in bananas and plantains in the OIRSA region" (2019) (Exhibit CRI-186).

[2413] "Colombia confirms presence of Fusarium TR4 in banana plantations in La Guajira" (8 August 2019), *BananoTecnia* (Exhibit CRI-185); and G. Jackson, "Panamá Disease Tropical Race 4, Banana - Colombia (Magdalena)" (2022), *Pestnet* (Exhibit PAN-64). See also ICA Resolution No. 11912 of 9 August 2019, "declaring a state of phytosanitary emergency in the national territory due to the presence of the disease known as Musaceae Wilt Foc TR4", referred to in Exhibit CRI-185, available at: https://members.wto.org/crnattachments/2019/SPS/COL/19_4563_00_s.pdf (accessed 13 August 2024).

[2414] Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibits CRI-104, PAN-112), Article 1. The Resolution entered into force on 23 September 2019. (Ibid. Article 6).

[2415] Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73).

[2416] Note DM-N-1352-2019 (Exhibit CRI-103).

[2417] Note DNSV-0113-2021-OIAR (Exhibit CRI-109).

[2418] Note DNSV-0129-2021 (Exhibit CRI-111).

[2419] Note DNSV-0207-2021 (Exhibit CRI-112).

[2420] OIRSA, "Phytosanitary alert to exclude and prevent fusarium wilt in bananas and plantains in the OIRSA region" (2019) (Exhibit CRI-186).

between the adoption of Measure 4 and the risk of entry of Foc TR4 into Panama. In particular, the Panel recalls that none of OIRSA's recommendations are to suspend the importation of plantain and banana fruit - including from territories where the pest is present - and that Measure 4 results in the inability to import plantain and banana fruit from Costa Rica, where the pest is not present.

7.1219. The statements made by some OIRSA members[2421] and other members of the region also do not support Panama's position that Costa Rica should have been "absolutely clear" that a measure such as Measure 4, which prevents the importation of bananas and plantains from a territory where Foc TR4 is not present, was adopted in the "context" of the confirmed presence of Foc TR4 in the region[2422] and regional alerts due to Foc TR4.[2423] In this regard, the Panel notes that, at a meeting of the agricultural authorities of Belize, Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, and Peru, held in Quito on 5 August 2019, it was recognized that the threat of the possible entry of Foc TR4 into Latin America and the Caribbean was a matter of "high priority". The participating countries at that meeting issued a declaration which included decisions to prevent the introduction of Foc TR4 to American crops, including: (a) a "recommendation to ensure Musaceae (banana plants) from outside Latin American and Caribbean countries are imported only in 'extremely necessary' cases, in glass containers and with a guarantee of being free from the fungus"; and (b) the decision that studies, diagnostics, and surveillance and quarantine measures, as well as technical and financial cooperation, should be strengthened.[2424] This declaration does not refer to the need to prevent the importation of plantain and banana fruit from territories where Foc TR4 is not present.[2425]

7.1220. With respect to the Resolutions on Foc TR4 issued by Panama, as mentioned above, Panama refers to Resolution OAL-102-ADM-2019 of 12 September 2019 and Resolution OAL-106-ADM-2019 of 1 October 2019.[2426] Costa Rica also considers Resolution OAL-001-ADM-2015 of 6 January 2015 to be relevant, through which Panama had already declared Foc TR4 a quarantine pest in its territory in 2015.[2427]

7.1221. The Panel observes that, in these proceedings, Panama first asserted that it banned imports of plantains and bananas of all origins pursuant to the declaration of the state of alert in Resolution OAL-102-ADM-2019.[2428] However, Panama later asserted that the specific legal basis on which measures were adopted to mitigate the entry of Foc TR4 into Panama was Resolution OAL-106-ADM-2019. Panama indicates that this Resolution "establishes a Technical Support Commission to prevent the entry of Foc TR4 into Panama, to protect and safeguard banana and plantain production, and to adopt *any* measure that ensures the national territory remains free from Foc TR4".[2429]

7.1222. Costa Rica, for its part, contends that Panama has not submitted any government or official decisions that prohibit imports of plantain and banana fruit of all origins.[2430] For Costa Rica, Measure 4 is not consistent with Panama's own legislation.[2431] Costa Rica asserts that Resolution OAL-102-ADM-2019 reflects the findings of a risk analysis, and that it follows from that Resolution that Panama considers plants, reproductive material and plant material as pathways for the transmission of Foc TR4, and prohibits their entry when they come from areas where the pest

[2421] Belize, Costa Rica, the Dominican Republic, Guatemala, Mexico, Nicaragua, and Panama.
[2422] See Panama's response to Panel question No. 60, para. 166; second written submission, para. 197.
[2423] Panama's response to Panel question No. 60, para. 168.
[2424] EFEAgro, "Latin America on alert due to a fungus that affects bananas" (9 August 2019) (Exhibit PAN-65), referring to the Regional Declaration of Agricultural Authorities on Foc TR4.
[2425] The Panel observes that the report on the Declaration is consistent with OIRSA's July 2019 recommendations. See para. 7.1218 above.
[2426] See para. 7.1220 above.
[2427] Costa Rica's response to Panel question No. 215, para. 3.207; comments on Panama's response to Panel question No. 206, para. 3.406 (referring to Ministry of Agricultural Development of Panama, Resolution OAL-001-ADM-2015 (Exhibit PAN-116)).
[2428] Panama's response to Panel question No. 61, para. 174 (referring to Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibit CRI-104, PAN-112)). See also Note DNSV-0129-2021 (Exhibit CRI-111).
[2429] Panama's response to Panel question No. 193, para. 228. (italics original) See Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73), Articles 1 and 4(14).
[2430] Costa Rica's comments on Panama's response to Panel question No. 197, para. 3.372.
[2431] Costa Rica's first written submission, para. 1071; second written submission, para. 355 (d); and response to Panel question No. 211, para. 3.196.

has been reported.[2432] Costa Rica notes that none of Panama's three resolutions concerning Foc TR4 mentioned above established that Panama should stop the trade in plantain and banana fruit due to the threat of entry of Foc TR4, which is what Panama did with respect to Costa Rican plantains and bananas by inactivating the PIR for these products.[2433]

7.1223. With respect to Panama's three Resolutions concerning Foc TR4, the Panel observes the following:

a. Pursuant to Resolution OAL-001-ADM-2015, of 6 January 2015, Panama declared Foc TR4 a quarantine pest in the national territory, and prohibited "the entry into the country of plants, reproductive material (shoots, rhizomes and meristem cultures) and plant material (such as leaves, bark and tissue) of Musaceae and Heliconia from areas where the pest has been reported".[2434] The Resolution also stated that the DNSV and the Executive Directorate of Agricultural Quarantine (DECA) would adopt "all phytosanitary and quarantine measures necessary to prevent the introduction of the pest into the national territory", including: (i) requiring certification of the absence of the pest in shipments containing plant material from areas "not reported to have" Foc TR4; (ii) inspecting and sampling shipments at points of entry to verify their phytosanitary status; (iii) destroying or returning the consignment in the event that Foc TR4 is detected; and (iv) carrying out inspections at origin when deemed appropriate.[2435]

b. Pursuant to Resolution OAL-102-ADM-2019, of 12 September 2019, Panama declared a "state of national alert due to the risk of introduction of [Foc TR4], a dangerous quarantine pest, into the national territory"; and prohibited "the entry into the country of plants, reproductive material … and plant material … of Musaceae and Heliconia from areas where the pest has been reported", in line with the provisions of Resolution OAL-001-ADM-2015 of 6 January 2015.[2436] In addition, Panama established "an action plan for the prevention of the introduction of [Foc TR4], [to] be developed by the [DNSV], in coordination with [DECA], by adopting all necessary phytosanitary and quarantine measures".[2437] The Panel notes that this Resolution makes reference to Panama's concern due to the presence of Foc TR4 in Colombia.[2438]

c. Pursuant to Resolution OAL-106-ADM-2019, of 1 October 2019, Panama created the Technical Support Commission "to prevent the entry of [Foc TR4] into the Republic of Panama, in order to protect and safeguard banana and plantain plantations". This Commission was responsible for implementing a number of measures, including (a) training and disseminating information on Foc TR4 to State entities, producers and the general population, and at airports; (b) inspecting parcels and mail; (c) establishing risk profiles for the selective inspection of passengers; (d) including, in passengers' goods declarations, information on the entry of plantain and banana plant material; (e) treating means of transport with disinfectant solution; (f) rolling out the use of disinfectant mats; (g) launching a communication and disclosure programme, to encourage travellers, crews and transporters not to bring in plantain and banana products and by-products; (h) checking international waste; (i) monitoring shipments from countries with Foc TR4; (j) carrying out patrols to detect plantain and banana plant material; and (k) detecting organic plant material at airport exit points.[2439] It was also established that the

[2432] Costa Rica's response to Panel question No. 211, para. 3.196.
[2433] Costa Rica's comments on Panama's response to Panel question No. 206, paras. 3.406 and 3.408.
[2434] Ministry of Agricultural Development of Panama, Resolution OAL-001-ADM-2015 (Exhibit PAN-116), Articles 1 and 2.
[2435] Ministry of Agricultural Development of Panama, Resolution OAL-001-ADM-2015 (Exhibit PAN-116), Article 3.
[2436] Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibits CRI-104, PAN-112), eighth recital and Articles 1 and 2.
[2437] Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibits CRI-104, PAN-112), Article 3.
[2438] Ministry of Agricultural Development of Panama, Resolution OAL-102-ADM-2019 (Exhibits CRI-104, PAN-112), sixth recital.
[2439] Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73), Article 4, paras. 1-13.

Commission could adopt "any other measure that ensures the national territory remains free from [Foc TR4]".[2440]

7.1224. On the basis of the foregoing, the Panel observes that Resolutions OAL-001-ADM-2015 and OAL-102-ADM-2019 explicitly establish a prohibition on the importation of *plant material* from areas where Foc TR4 has been reported, the intended use of which would be sowing or planting (in particular, plants, reproductive material, and plant material). However, these Resolutions include no requirements relating to plantain and banana *fruit*. It should also be noted that Resolution OAL-106-ADM-2019 indicates that the pest is spread through the movement of planting material, soil, tools, vehicles, and water[2441], and does not mention spread by fruit. Accordingly, the Resolutions in the record do not stipulate inactivating the resolutions containing the PIR for *fresh* plantain and banana or otherwise prevent the importation of such fruit as a measure to prevent the entry of Foc TR4.

7.1225. As mentioned above, Resolution OAL-001-ADM-2015 states that the DNSV and DECA would also adopt other necessary phytosanitary and quarantine measures to prevent the introduction of the pest into the national territory, and Resolution OAL-106-ADM-2019 grants the Technical Support Commission the power to implement *any* other measure that ensures Panamanian territory remains free from Foc TR4. However, the Panel finds no evidence in the record that demonstrates that Panama's adoption of Measure 4 was a result of the DNSV and DECA or the Commission exercising their powers to adopt and implement measures to prevent the introduction of Foc TR4 into Panama. In addition, the record does not include the "action plan for the prevention of the introduction of [Foc TR4], [to] be developed by the [DNSV], in coordination with [DECA]", provided for in Resolution OAL-102-ADM-2019. Therefore, nothing in the record shows that Measure 4 was adopted as part of the implementation of that plan.

7.1226. In connection with its argument that it banned imports of plantains and bananas of all origins, Panama provides the notes through which it notified the suspension of the PIR for plantain from Ecuador and Guatemala on 10 October 2019, the same day that AUPSA informed the SFE of the inactivation of the resolution concerning the importation of plantains from Costa Rica.[2442] The Panel observes that these notes contain, in essence, the same language as the notes through which Panama notified Measure 4[2443], thus they do not support Panama's argument that the objective of Measure 4 was to protect against the risk of introduction of Foc TR4 into Panama.[2444]

[2440] Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73), Article 4, para. 14.

[2441] Ministry of Agricultural Development of Panama, Resolution OAL-106-ADM-2019 (Exhibit PAN-73), fourth recital.

[2442] Panama's response to Panel question No. 193, para. 229 (referring to Note AUPSA-AG-395-2019 (Exhibit PAN-145); Note AUPSA-AG-398-2019 (Exhibit PAN-146)).

[2443] See the discussion of the notes through which Panama notified Measure 4 in paras. 7.1208-7.1213 above. Note AUPSA-AG-395-2019, sent to AGROCALIDAD of Ecuador, indicates that AUPSA had "initiated a process for the technical review of the published resolutions", during which it transpired that the relevant resolution establishes that plantains must come from "areas or places of production and packing plants subject to inspection and registration by the [NPPO] of the country of origin, and packing plants approved by [AUPSA]". AUPSA added in this Note that, taking into account that it had not approved the plantain packing plants, it had proceeded to "temporar[il]y inactivat[e] … the requirements" for the importation of plantains (*Musa paradisiaca*) originating in Ecuador. Note AUPSA-AG-398-2019 to the Ministry of Agriculture, Livestock and Food of Guatemala states that AUPSA had "initiated a process for the technical review" of the relevant resolution and "had temporarily inactivated the requirements" for the importation of plantains originating in Guatemala. (Note AUPSA-AG-395-2019 (Exhibit PAN-145); Note AUPSA-AG-398-2019 (Exhibit PAN-146)).

[2444] Panama also submits import data which, in its view, "demonstrate the non-discriminatory nature of the temporary suspension of imports of fresh bananas and plantains". (Panama's response to Panel question No. 193, para. 230 (referring to Trade Map - Import data for (fresh or dried) plantains and bananas imported by Panama (Exhibit PAN-147)). Costa Rica, for its part, provides trade data and press articles which, in its view, demonstrate that Panama continued to import fresh plantains from other countries. (Costa Rica's comments on Panama's response to Panel question No. 197, para. 3.372). See also ibid. paras. 3.345-3.346 (referring to INEC, Dashboard, Plantain imports from the United States to Canada (Exhibit CRI-401); INEC, Dashboard, available at: https://www.inec.gob.pa/DASHBOARDS/Comercio/ImportacionesporPaises; and Press notes on Peruvian banana exports (2023) (Exhibit CRI-407)). The Panel considers that the issue of whether Panama has applied the same measure to plantains and bananas of *all* origins touches on issues of discrimination, and it does not consider that resolving this issue will help to determine the objective of Measure 4 applied to Costa Rica.

7.1227. In the light of all of the above, the Panel considers that the events and actions that Panama qualifies as "context", namely, the events related to the presence of Foc TR4 in Colombia, OIRSA's alert, and Panama's resolutions concerning Foc TR4, together with Costa Rica's phytosanitary status with respect to Foc TR4, 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.

7.1228. As for the communications sent by Panama to Costa Rica following the adoption of Measure 4, the Panel recalls that, according to Panama, these communications clarified the reason for the measure. Panama adds that Costa Rica explicitly recognized the reason for the adoption of the measure and gave a commitment to the Panamanian authorities to carry out the necessary steps to comply with the approval procedure for plantain and banana packing plants.[2445] According to Panama, Costa Rica recognized "the serious economic consequences that [Foc TR4] may cause to banana and plantain production", and "sought to assure Panama that 'Costa Rica is making its best efforts to prevent the introduction of Foc TR4'"[2446]. For Costa Rica, while Panama mentioned its concern about Foc TR4 for the first time on 18 December 2019 (two months after the adoption of the measure), this concern was linked to the need for packing plants to be approved, and the Costa Rican authorities did not understand that Foc TR4 was the reason for the adoption of Measure 4. Costa Rica adds that, on 22 February 2021, Panama also mentioned the alleged non-compliance with the MRL for chlorpyrifos, which left the Costa Rican authorities "totally confused" about the reason for the measure.[2447]

7.1229. The Panel observes that Panama's communication to Costa Rica of 18 December 2019, sent two months after the adoption of Measure 4 and after Panama had received two communications from Costa Rica, including a note from the Minister of Foreign Trade, is the first in which Panama mentions Foc TR4.[2448] In this communication, Panama's Minister of Trade and Industry indicated that he had been informed by the relevant Panamanian authorities that Panama had declared "a national state of alert due to the risk of introduction of [Foc TR4]" on 12 September 2019. The Minister added that, "[i]n the light of this emergency situation, it became evident from the relevant controls that the phytosanitary requirements for bananas and plantains must be separated, resulting in their inactivation during the review and updating process".[2449] The Minister also mentioned that he hoped the new requirements would be in force in January 2020 and that a risk analysis would need to be carried out, including the assessment of "processing plants and establishments, which had never been performed before in Costa Rican establishments".[2450]

7.1230. In its subsequent communications dated 22 February, 1 March, and 13 March 2021, Panama referred to OIRSA's phytosanitary alert due to Foc TR4, the presence of Foc TR4 in Colombia and the alert issued by the ICA, Panama's declaration of a phytosanitary alert due to Foc TR4, Panama's prevention action plan, and the creation of its Technical Support Commission to prevent the entry of Foc TR4.[2451] After summarizing these events, in its communication of 22 February 2021, Panama asserted that it had instituted the "review process of 'phytosanitary and safety policies'" for the development and implementation of the action plan to prevent the entry of Foc TR4.[2452] Panama also mentioned its Note AUPSA-AG-392-2019 of 10 October 2019, indicating that this Note stated that the packing plants for the export of plantains from Costa Rica "do not have inspection reports

[2445] Panama's first written submission, para. 384; responses to Panel question No. 60, para. 169, and No. 90, para. 251; and second written submission, para. 198. See also Panama's response to Panel question No. 206, paras. 274-275; comments on Costa Rica's response to Panel question No. 205, para. 162. Panama refers to Note DM-N-1352-2019 (Exhibit CRI-103); Note DNSV-0113-2021-OIAR (Exhibit CRI-109); Note DNSV-0129-2021 (Exhibit CRI-111); and Note DNSV-0207-2021 (Exhibit CRI-112) issued by its authorities, as well as Memorandum DSFE-0079-2020 (Exhibit CRI-105) from the SFE of Costa Rica.

[2446] Panama's first written submission, para. 384 (quoting Memorandum DSFE-0079-2020 (Exhibit CRI-105)).

[2447] Costa Rica's response to Panel question No. 205, paras. 3.181-3.183.

[2448] Memorandum DSFE-0909-2019 (Exhibit CRI-99); Note DM-COR-CAE-0615-2019 (Exhibit CRI-102).

[2449] Note DM-1352-2019 (Exhibit CRI-103), p. 1.

[2450] Note DM-N-1352-2019 (Exhibit CRI-103), p. 2.

[2451] Note DNSV-0113-2021-OIAR (Exhibit CRI-109), p. 1; Note DNSV-0129-2021 (Exhibit CRI-111), p. 1; and Note DNSV-0207-2021 (Exhibit CRI-112), p. 1.

[2452] Note DNSV-0113-2021-OIAR (Exhibit CRI-109). Similarly, in Note DNSV-0129-2021 (Exhibit CRI-111) and Note DNSV-0207-2021 (Exhibit CRI-112), Panama indicated that it was continuing with the review of the phytosanitary policy concerning the importation of plantains and bananas, and with the development of the action plan on Foc TR4. In these Notes, Panama also mentioned its geographical position and "the condition of being a transit and transhipment country in the service of international trade". (Ibid.)

from the NPPO of Costa Rica, nor has AUPSA received notification of their approval and registration".[2453]

7.1231. For the Panel, mere references in these communications to events and actions that Panama qualifies as "context", even if they preceded the adoption of Measure 4, do not explain how Measure 4 is linked to the objective of protecting against the risk of introduction of Foc TR4. The Panel considers that the content of these subsequent submissions is consistent with the objective stated in the notes through which Panama notified Measure 4. In particular, the Panel observes that Panama again referred to the need to assess Costa Rican packing plants and review the PIR for plantain and banana. Panama did not ask Costa Rica at any point for information on Foc TR4; Costa Rica provided such information in August 2021 on its own initiative, after Panama had mentioned Foc TR4 in its communications of December 2019 and of 2021.[2454]

7.1232. Similarly, the Panel notes that Panama has not provided additional evidence regarding the application of Measure 4 that links it to the objective of protecting against the risk of introduction of Foc TR4.

7.1233. For the Panel, 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.

7.1234. In conclusion, the Panel considers 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. This finding is without prejudice to Panama's intention to protect plantains and bananas in its territory from the introduction of this pest.

Whether the objective of Measure 4 corresponds to one of those listed in Annex A(1)

7.1235. The Panel has found that, as communicated to Costa Rica in the notes of October 2019, the reason why Panama adopted Measure 4 was the initiation of the review of the resolutions containing the PIR for Costa Rican plantains and bananas and the approval of plantain packing plants. In this regard, the Panel considers that the objective of Measure 4 is to protect against the risks that Panama sought to address through this review and approval.

7.1236. The Panel will now examine whether the objective that it determined is pursued by Measure 4 corresponds to any of those listed in Annex A(1) of the SPS Agreement. In this regard, the Panel observes that the notes through which Panama notified Measure 4 in October 2019 do not specifically mention what it seeks to protect, nor from what risk. However, the Panel observes that both notes from October 2019 are addressed to the SFE (State *Phytosanitary* Service of Costa Rica) and mention that the Panamanian body responsible for the review of the inactivated resolutions is its national *plant* protection organization, namely Plant Health - MIDA. This is the same authority that sent the SFE three communications relating to Measure 4 after its adoption.[2455] Furthermore, the Panel observes that the resolutions in question establish the PIR (*phytosanitary* import

[2453] Note DNSV-0113-2021-OIAR (Exhibit CRI-109).

[2454] In its memorandum of 6 August 2021, Costa Rica indicated specifically that there had been "no change in the phytosanitary status of [its] country, where the pest [Foc TR4] is absent", and that since 2013 "it carries out activities to prevent the introduction of this pest, in accordance with the provisions of international standards and without interrupting trade with those countries whose pest status is also absent". (Memorandum DSFE-0533-2021 (Exhibit CRI-113), p. 1). (underlining original). In addition, it should be noted that, in its communication of 22 February 2021, after referring to Note AUPSA-AG-392-2019, Panama clarified that the "technical procedure" referred to covered "*all aspects* associated with the level of protection required to safeguard Musaceae production activities" in Panama (Nota DNSV-0113-2021-OIAR (Exhibit CRI-109) (italics added)). The Panel understands that the technical procedure corresponds to the technical review and it is indicated that the review has a general objective of protecting plantains and bananas, without this objective being specifically related to Foc TR4.

[2455] See Note DNSV-0113-2021-OIAR (Exhibit CRI-109); Note DNSV-0129-2021 (Exhibit CRI-111); and Note DNSV-0207-2021 (Exhibit CRI-112). The fourth communication sent by Panama also refers to the plant health authority. (Note DM-AG-1352-2019 (Exhibit CRI-103)).

requirements) for plantains and bananas from Costa Rica.[2456] Moreover, as mentioned above, in its communication of 22 February 2021, after referring to Note AUPSA-AG-392-2019, Panama clarified that the "technical procedure" referred to covered "all aspects associated with the level of protection required *to safeguard Musaceae production activities*" in Panama.[2457] The foregoing frames Measure 4 in the context of plant health protection, and, specifically, the protection of plantains and bananas in Panama. The Panel further notes that the resolutions indicate, *inter alia*, that AUPSA's main objective is to protect human health and the animal and plant heritage of the country, and that the country, place and site of production must have been recognized as areas free from pests of quarantine interest. Therefore, in the Panel's view, the measure is related to protection against pests that may affect plantains and bananas.

7.1237. In the light of the foregoing, the Panel considers that Measure 4 was applied with the objective of protecting plantains and bananas within the territory of Panama from risks arising from the entry, establishment or spread of pests. Therefore, the Panel finds that the objective of Measure 4 is aligned with the objective set forth in Annex A(1)(a).

7.1238. With regard to the type of measure, the Panel considers that Measure 4, which consists of inactivating the resolution containing the PIR for plantain and banana, makes it impossible to import these products. Therefore, in the Panel's view, Measure 4 could qualify as a requirement for the purposes of Annex A(1).[2458] In any event, the Panel recalls that, although it is not specifically included in the list under Annex A(1), a measure may be considered an SPS measure if it is applied to achieve one of the objectives listed in that provision.[2459] Measure 4 meets this requirement and, therefore, may be considered an SPS measure within the meaning of Annex A(1) to the SPS Agreement.

7.6.1.1.2.3 Whether Measure 4 may, directly or indirectly, affect international trade

7.1239. The Panel considers that, owing to the type of measure, and as explained above[2460], Measure 4 directly affects international trade by making it impossible to import Costa Rican plantains and bananas into Panama as a result of the inactivation of the resolutions containing the PIR for these products.

7.6.1.1.3 Conclusion on the applicability of the SPS Agreement to Measure 4

7.1240. Having determined that Measure 4 constitutes an SPS measure within the meaning of Annex A(1)(a) to the SPS Agreement and that it directly affects international trade within the meaning of Article 1.1 of the SPS Agreement, the Panel finds that the SPS Agreement applies to this measure.

7.1241. Accordingly, the Panel will now examine Costa Rica's claims under the SPS Agreement with respect to Measure 4, starting with those related to the measure's scientific basis under Articles 5.1, 5.2, 5.3, 2.2, and 5.7 of the Agreement.

7.6.1.2 Claims under Articles 5.1, 5.2, 5.3, 2.2, and 5.7 of the SPS Agreement

7.1242. Costa Rica claims that Measure 4 is inconsistent with Articles 5.1, 5.2, and 5.3 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health. Costa Rica claims that, accordingly, Measure 4 is also inconsistent with Article 2.2 of the SPS Agreement, given that it is not based on scientific principles and is maintained without sufficient scientific evidence.[2461] Costa Rica also contends that Measure 4 is not

[2456] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), second and fifth recitals; Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98), second and fifth recitals.
[2457] Note DNSV-0113-2021-OIAR (Exhibit CRI-109). (italics added)
[2458] See fn 310 above.
[2459] Appellate Body Report, *Australia – Apples*, paras. 175-176.
[2460] See para. 7.73 above.
[2461] Costa Rica's panel request, p. 6; first written submission, paras. 994 and 1016.

covered by Article 5.7 of the SPS Agreement, since it does not comply with the requirements of this provision.[2462]

7.1243. For its part, Panama asserts that Costa Rica has failed to establish a *prima facie* case that Panama does not meet the four requirements under Article 5.7 of the SPS Agreement. Panama requests the Panel to conclude that Measure 4 is a provisional measure covered by Article 5.7 and that, consequently, Panama has not acted inconsistently with Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement.[2463]

7.1244. As with Measures 1 and 3, the Panel will first examine whether Panama has demonstrated that Measure 4 constitutes a provisional measure under Article 5.7 of the SPS Agreement. The Panel recalls that, in the event that Measure 4 were covered by the exemption under Article 5.7, the obligations under Articles 2.2, 5.1, 5.2, and 5.3 would not be applicable to the measure.[2464] If need be, the Panel will then examine the claims under Articles 5.1, 5.2, and 2.2.

7.6.1.2.1 Whether Measure 4 is an SPS measure covered by Article 5.7 of the SPS Agreement

7.6.1.2.1.1 Main arguments of the parties

Costa Rica

7.1245. Costa Rica submits that Panama has failed to demonstrate that each of the four cumulative requirements of Article 5.7 has been met pursuant to the burden of proof that it bears.[2465]

7.1246. With regard to the *first requirement* of Article 5.7, Costa Rica submits that Panama has failed to demonstrate that, when Panama adopted Measure 4 in October 2019, it was in a situation where there was insufficient relevant scientific evidence to enable it to conduct a sufficiently objective assessment of the risk to the life or health of plantains and bananas.[2466]

7.1247. Costa Rica submits that "the technical review process" related to Resolution AUPSA-DINAN-106-2009 concerning plantains (including "approvals for [plantain] packing plants") and Resolution AUPSA-DINAN-019-2012 concerning bananas is the matter in respect of which it should be determined whether there was, in October 2019, "some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment".[2467] In this regard, Costa Rica maintains that, in October 2019, there was no evidentiary basis indicating the possible existence of a risk associated with this technical review.[2468] Costa Rica asserts that imports of a product cannot be prohibited only because a technical review process for the PIR has been initiated.[2469] Costa Rica considers that Panama was not in a situation "where little, or no, reliable evidence was available on the subject matter at issue".[2470] According to Costa Rica, Panama had data on historical trade in plantains and bananas with Costa Rica and knew that Panama (like other countries) had imported these fruit from Costa Rica without any phytosanitary risk having arisen.[2471] Costa Rica adds that, while plantain packing plants should have been approved, the lack of approval

[2462] Costa Rica's first written submission, para. 1035.
[2463] Panama's first written submission, paras. 166 and 434-436. See also Panama's second written submission, paras. 234-236.
[2464] See fn 1851 above.
[2465] Costa Rica's second written submission, para. 370.
[2466] Costa Rica's second written submission, para. 349. See also Costa Rica's first written submission, para. 1045.
[2467] Costa Rica's first written submission, para. 1040 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678; Note AUPSA-AG-392-2019 (Exhibit CRI-95); and referring to Note AUPSA-AG-424-2019 (Exhibit CRI-97)).
[2468] Costa Rica's first written submission, para. 1040.
[2469] Costa Rica's first written submission, para. 1041.
[2470] Costa Rica's first written submission, para. 1042 (quoting Panel Report, *Japan – Apples*, para. 8.219).
[2471] Costa Rica's first written submission, para. 1042. Costa Rica asserts that Panama had been importing bananas from Costa Rica as ususal since 2000. (Ibid. para. 1044 (referring to INEC, Banana imports into Panama (2000) (Exhibit CRI-114))).

did not indicate the possible existence of a risk in respect of imports of plantains and had never constituted a reason for Panama to prevent the entry of Costa Rican plantains into its market.[2472]

7.1248. Should the Panel consider that the reason for Measure 4 is to prevent the introduction of Foc TR4 into Panama, Costa Rica claims that Panama had sufficient scientific evidence to perform a risk assessment at the time of the adoption of Measure 4.[2473] Costa Rica asserts that Foc is one of the most studied pests in the world and that Panama had all the evidence necessary to analyse whether there was a potential risk of introduction of Foc TR4 through plantains and bananas from Costa Rica.[2474] According to Costa Rica, not only did Panama have all the necessary evidence on the pest and its status as absent in Costa Rica, but it also had OIRSA's PRA for Foc TR4, which is a risk assessment performed by a relevant international organization that would have enabled it to comply with Article 5.1 of the SPS Agreement "very easily".[2475] Costa Rica argues that OIRSA's PRA was carried out on the basis of "very extensive" scientific literature, has a very low level of uncertainty, and is therefore widely recommended for consideration as a substantiated reference for decision-making. For Costa Rica, this PRA is not invalidated by the statement that the possibility of a link between Foc TR4 and banana fruit should be further explored.[2476]

7.1249. Regarding the *second requirement* of Article 5.7, Costa Rica submits that Measure 4 was not based on the pertinent information available at the time of its adoption.[2477]

7.1250. Costa Rica maintains that the "pertinent information" that Panama had in October 2019 showed the absence of any risk associated with imports of plantains and bananas from Costa Rica that might justify closing the market during the technical review of the PIR.[2478] Accordingly, in Costa Rica's view, Measure 4 bears no "rational and objective relationship" to the pertinent information available to Panama in October 2019.[2479]

7.1251. Regarding the technical review of the PIR, Costa Rica asserts that Panama had the following pertinent information:

a. Information on historical trade in plantains and bananas with Costa Rica, including the fact that all exports had been accompanied by an official phytosanitary export certificate confirming that shipments had been inspected and/or tested to ensure they were free from the quarantine pests specified by Panama.[2480] According to Costa Rica, Panama failed to identify any new or unexpected situation with respect to imports of plantains and bananas from Costa Rica or any change in Costa Rica's phytosanitary status in relation to these crops.[2481]

b. Pertinent information from relevant international organizations, namely ISPM 2 and 20 developed under the auspices of the IPPC Secretariat.2482 Costa Rica claims that Panama ignored ISPM 2, because despite the fact that there was already trade in plantains and bananas with Costa Rica and that no new or unexpected situation had arisen, it imposed a prohibition on imports.2483 Costa Rica also claims that Panama failed to take into account ISPM 20 because, when it applied Measure 4, Panama had no evidence of any "new or unforeseen" situation, nor had it reported any "detection", "repeated

[2472] Costa Rica's first written submission, para. 1043.
[2473] Costa Rica's first written submission, paras. 1048 and 1050.
[2474] Costa Rica's opening statement at the first meeting of the Panel, para. 62.
[2475] Costa Rica's second written submission, para. 348. See also Costa Rica's opening statement at the first meeting of the Panel, para. 63; response to Panel question No. 59, para. 2.158.
[2476] Costa Rica's response to Panel question No. 59, paras. 2.156-2.157 (quoting OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123)). See also Costa Rica's second written submission, paras. 346-347.
[2477] Costa Rica's first written submission, paras. 1065-1066; second written submission, para. 350.
[2478] Costa Rica's first written submission, para. 1054. Costa Rica also asserts that the pertinent information "did not indicate the existence of a phytosanitary risk" and did not justify closing the market even on a provisional basis. (Ibid. para. 1065).
[2479] Costa Rica's first written submission, para. 1065; second written submission, para. 356.
[2480] Costa Rica's first written submission, para. 1055 (referring to SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019) (Exhibit CRI-190); SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191)).
[2481] Costa Rica's first written submission, para. 1056.
[2482] Costa Rica's first written submission, paras. 1058 and 1061.
[2483] Costa Rica's first written submission, para. 1059 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8, section 1.1.3).

non-compliance", or "significant non-compliance" with respect to imports of plantains and bananas from Costa Rica that would warrant emergency action, the withdrawal of permits or an import prohibition.[2484]

c. Pertinent information from the measures applied by other Members, in particular the European Union[2485] and the United States[2486], since these Members do not stop trade while they review their PIR.[2487]

7.1252. In the event that Measure 4 were considered to have been adopted to address the risk of introduction of Foc TR4, Costa Rica submits that Panama had no objective basis to prohibit imports of plantains and bananas from Costa Rica on account of Foc TR4 in October 2019[2488], and that it had the following information:

a. The history of trade showing that, before adopting Measure 4, Panama had imported plantains and bananas from Costa Rica as usual.[2489]

b. ISPM 2 and 20, which do not provide for the closure of the market unless there is a new or unforeseen situation justifying an emergency measure. According to Costa Rica, no such situation had arisen with respect to Costa Rica's phytosanitary status in October 2019.[2490]

c. Numerous OIRSA studies on Foc TR4, such as its contingency plan and its PRA for Foc TR4, which indicated, without exception, that plantain and banana fruit are not a significant pathway for the transmission of the pest.[2491]

d. The information indicating that the pest is absent from the territory of Costa Rica.[2492]

e. The measures of other Members - in particular the United States and the countries of the OIRSA region (such as Nicaragua, Honduras, the Dominican Republic, Guatemala, and Costa Rica) - which confirm that Foc TR4 is not a pest that warrants an import prohibition on plantain and banana *fruit*, but only on propagative material, plant parts and soil *from countries where the pest is present*.[2493]

[2484] Costa Rica's first written submission, para. 1060 (quoting IPPC, ISPM 20 (Exhibit CRI-161), pp. 22-23).

[2485] See Costa Rica's first written submission, para. 1063 (referring to Draft Commission Implementing Regulation (EU) …/… amending Implementing Regulation (EU) 2019/2072 (Exhibit CRI-193); European Commission, Citrus fruit chart: orange imports (Exhibit CRI-194)).

[2486] See Costa Rica's first written submission, para. 1063 (referring to APHIS, USDA, Federal Order DA-2017-34 (Exhibit CRI-195); J. Kramer, "Fresh Blueberry Supplies Expand as U.S. Consumers Develop a Taste for Year-Round Blueberries", United States Department of Agriculture (USDA) (7 December 2020) (Exhibit CRI-196)).

[2487] Costa Rica's first written submission, paras. 1062 and 1064.

[2488] Costa Rica's second written submission, para. 352.

[2489] Costa Rica's second written submission, para. 352. See also Costa Rica's first written submission, para. 1055.

[2490] According to Costa Rica, Panama had not reported any detection, repeated non-compliance, or significant non-compliance with respect to imports of plantains and bananas from Costa Rica. See Costa Rica's first written submission, paras. 1067-1068; second written submission, para. 354 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8; IPPC, ISPM 20 (Exhibit CRI-161), p. 22).

[2491] Costa Rica's first written submission, para. 1069; second written submission, para. 351 (referring to the following OIRSA studies: OIRSA, *Contingency plan for an outbreak of Foc TR4 in a country of the OIRSA region* (2013) (Exhibit CRI-124); OIRSA, *Contingency plan for an outbreak of Foc TR4 in a country of the OIRSA region* (2017) (Exhibit CRI-187); OIRSA, *Pest Risk Analysis for Foc TR4* (2018) (Exhibit CRI-188); OIRSA, *Pest Risk Analysis for Foc TR4* (December 2018) (Exhibit CRI-189); and OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123)).

[2492] Costa Rica's first written submission, para. 1069; second written submission, para. 351. For Costa Rica, the fact that there may have been some uncertainty as to the "degree of association between the pest and the fruit" was of no relevance to Costa Rica, since Foc TR4 is not present in its territory. (Ibid. para. 352).

[2493] Costa Rica's first written submission, paras. 1070-1071 (quoting APHIS, USDA, Federal Order DA-2021-10 (Exhibit CRI-197); Institute for Agricultural and Livestock Protection and Health of Nicaragua, Executive Resolution No. 054-2019 (Exhibit CRI-198); State Secretariat for Agriculture and Livestock of Honduras, Decision No. 287-2016 (Exhibit CRI-199); Ministry of Agriculture of the Dominican Republic, Resolution No. RES-MA-2019-43 (Exhibit CRI-200); Ministry of Agriculture, Livestock and Food of Guatemala,

7.1253. With respect to the *third requirement* of Article 5.7, Costa Rica claims that Panama did not identify any insufficiency of information in its communications of October and December 2019.[2494] Costa Rica asserts that it tried unsuccessfully to coordinate inspection visits to its packing plants.[2495] Costa Rica adds that, until 22 February 2021, Panama did not respond to its communications or request additional information to put an end to the closure of the market. Furthermore, Costa Rica claims that, on this date, Panama had also failed to respond to the requests to coordinate visits and had not identified the necessary additional information.[2496]

7.1254. Costa Rica submits that, even assuming that the measure's *raison d'être* was Foc TR4, Panama did not seek to obtain necessary additional information in respect of this pest.[2497] Costa Rica adds that Panama has not explained what it has done since October 2019 in terms of seeking to obtain additional information on the risk of Foc TR4 in plantain and banana fruit[2498], and that it is not even in a position to identify deficiencies in information clearly and coherently.[2499] Moreover, Costa Rica asserts that Panama's communications demonstrate that it never requested any type of information from Costa Rica, either on its packing plants or on Foc TR4.[2500] Costa Rica submits that Panama could have taken into account the PRA for Foc TR4 that OIRSA published in October 2019.[2501] Costa Rica asserts that, in a communication to Panama, it referred to this PRA, proactively offered information to Panama, and explained all the measures that Costa Rica had been implementing for years with respect to Foc TR4, including those recommended and supported by OIRSA.[2502]

7.1255. With regard to the *fourth requirement* of Article 5.7, Costa Rica claims that Panama has not reviewed its measure within "a reasonable period of time"[2503] because of its "inaction without justification" for one year and 11 months, from the adoption of Measure 4 in October 2019 until 27 September 2021, the date of the establishment of the Panel.[2504]

7.1256. Costa Rica submits that Panama did not proceed with appropriate dispatch in its technical review process for the PIR. For Costa Rica, the COVID-19 pandemic may explain certain delays in on-site inspections of packing plants, but it cannot justify Panama changing its narrative with respect to the reasons for closing the market, or its complete silence in response to Costa Rica's communications for more than a year.[2505] Costa Rica asserts that Panama has had no difficulty in obtaining the information necessary for a technical review of its PIR and that Costa Rica has done everything to facilitate the approval procedure for packing plants.[2506]

Ministerial Decision No. 260-2019 (Exhibit CRI-201); and SFE, Resolution No. 004-2017-NR-SFE (Exhibit CRI-116)). See also Costa Rica's opening statement at the first meeting of the Panel, para. 65; second written submission, para. 355(a)-(c). (italics original)

[2494] Costa Rica's first written submission, paras. 1077 and 1079 (quoting Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97); and Note DM-N-1352-2019 (Exhibit CRI-103)).

[2495] Costa Rica's first written submission, para. 1080; second written submission, para. 359 (referring to Memorandum DSFE-0079-2020 (Exhibit CRI-105); Memorandum DFSE-0080-2020 (Exhibit CRI-106); and Memorandum DSFE-0110-2021 (Exhibit CRI-108)).

[2496] Costa Rica's first written submission, paras. 1080-1081 (referring to Note DNSV-0113-2021-OIAR (Exhibit CRI-109)).

[2497] Costa Rica's first written submission, paras. 1084, 1086, and 1088.

[2498] Costa Rica's second written submission, para. 359.

[2499] Costa Rica's second written submission, para. 361.

[2500] Costa Rica's second written submission, para. 360 (quoting Panama's response to Panel question No. 5, p. 14, and, in particular, Panama's assertion that it requested Costa Rica to provide "information on the development of Foc TR4 and verified information on banana and plantain processing plants or establishments in Costa Rica").

[2501] Costa Rica's first written submission, para. 1085; response to Panel question No. 79, para. 3.98 (quoting OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), p. xii). For Costa Rica, OIRSA's 2018 and 2019 PRA demonstrate that Panama did not have to make any effort to obtain additional information necessary for a more objective assessment of the risk of Foc TR4. (Costa Rica's response to Panel question No. 79, para. 3.96). See also Costa Rica's response to Panel question No. 79, para. 3.99.

[2502] Costa Rica's response to Panel question No. 79, fn 359 (quoting Memorandum DSFE-0533-2021 (Exhibit CRI-113)).

[2503] Costa Rica's first written submission, para. 1101.

[2504] Costa Rica's first written submission, para. 1102; second written submission, para. 369.

[2505] Costa Rica's first written submission, paras. 1100 and 1102. See also ibid. paras. 1092-1099 (in which Costa Rica provides its account of the communications it exchanged with Panama after having been notified of Measure 4).

[2506] Costa Rica's first written submission, para. 1101.

7.1257. Costa Rica further submits that, even if Foc TR4 was the reason for Measure 4, Panama did not review its measure within a reasonable period of time.[2507] According to Costa Rica, Panama had no difficulty in obtaining the necessary additional information because it had extensive general information on Foc TR4. Costa Rica adds that, almost from the moment the measure was adopted, Panama had available to it a full and revised PRA conducted by a regional organization for plant and animal health of which Panama is a party.[2508] Costa Rica considers that Panama could have reviewed Measure 4 immediately, in the light of this PRA.[2509] Costa Rica adds that it provided Panama with information, without Panama having requested it, to dispel any doubt as to the seriousness with which Costa Rica manages the risks associated with Foc TR4.[2510] Costa Rica reiterates that it was not the COVID-19 pandemic, but Panama's inaction, that prevented the verification and approval of Costa Rican packing plants.[2511]

Panama

7.1258. Panama submits that Costa Rica has failed to discharge its burden of demonstrating that Article 5.7 does not apply to Measure 4.[2512]

7.1259. Concerning the *first requirement* of Article 5.7, Panama submits that Costa Rica failed to demonstrate that, when Panama adopted Measure 4, the relevant scientific evidence was sufficient to conduct an assessment of the risk of transmission of Foc TR4 in bananas and plantains.[2513] Panama argues that the scientific evidence indicates the possible existence of a risk of Foc TR4 infecting banana and plantain fruit, but concludes that more sampling and research are required to determine the probability of the risk materializing.[2514]

7.1260. Panama argues that OIRSA has confirmed that there is insufficient scientific information regarding the risk of transmission of Foc TR4 in plantain and banana fruit and that further studies are needed to determine the degree of association between the fruit and the pest as a contaminant.[2515] Panama identifies other scientific evidence that, in its view, is along the same lines, such as the scientific opinion of the European Food Safety Authority (EFSA) of December 2021.[2516] Panama notes that the scientific evidence in this study - which demonstrates that Foc TR4 can invade the peduncle via the xylem vascular bundle causing discolouration - called into question previous scientific evidence that had dismissed the spread of Foc TR4 through banana fruit. Panama asserts

[2507] Costa Rica's first written submission, para. 1103.

[2508] Costa Rica's first written submission, para. 1104; response to Panel question No. 81, paras. 3.116-3.117.

[2509] Costa Rica's first written submission, para. 1104 (referring to OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123); OIRSA, *Pest Risk Analysis for Foc TR4* (2018) (Exhibit CRI-188); and OIRSA, *Pest Risk Analysis for Foc TR4* (December 2018) (Exhibit CRI-189)).

[2510] Costa Rica's second written submission, para. 368 (referring to Memorandum DSFE-0533-2021 (Exhibit CRI-113) and its annexes (see Exhibits CRI-116, CRI-118, CRI-119, CRI-120 to CRI-124, and CRI-360 to CRI-382)).

[2511] Costa Rica's opening statement at the first meeting of the Panel, para. 68; second written submission, paras. 364-366 and 369 (quoting Memorandum DSFE-0079-2020 (Exhibit CRI-105); Memorandum DFSE-0080-2020 (Exhibit CRI-106); Memorandum DSFE-0348-2020 (Exhibit CRI-107); and Memorandum DSFE-0110-2021 (Exhibit CRI-108)).

[2512] Panama's opening statement at the first meeting of the Panel, para. 39; second written submission, para. 233.

[2513] Panama's first written submission, para. 397; second written submission, para. 201. It should be noted that Panama considers that "plantains *are* bananas", and that it sometimes refers only to "bananas" rather than "plantains and bananas". (See Panama's response to Panel question No. 62, para. 177).

[2514] Panama's second written submission, para. 202. For Panama, this is a typical example of the situation envisaged in Article 5.7 because there is some evidentiary basis indicating the possible existence of a risk, but not enough to perform a risk assessment. (Panama's first written submission, para. 396; opening statement at the first meeting of the Panel, para. 51; and second written submission, paras. 204 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678) and 212).

[2515] Panama's first written submission, para. 394 (quoting OIRSA, *Pest Risk Analysis for Foc TR4* (2018) (Exhibit CRI-188), p. 118; OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), p. 122); opening statement at the first meeting of the Panel, para. 49.

[2516] See Panama's first written submission, para. 395 (quoting EFSA, Panel on Plant Health, "Scientific opinion on the pest categorisation of *Fusarium oxysporum f. sp. cubense* Tropical Race 4" (2022) (Exhibit PAN-59), pp. 9 and 11; Bai et al. (2020) (Exhibit PAN-75), p. 315); opening statement at the first meeting of the Panel, para. 50; and second written submission, paras. 202-203. Panama asserts that further studies are needed in relation to "[t]he ability of Foc TR4 to further colonise the xylem of the clusters and of the fingers" in order to assess this risk. (Panama's second written submission, para. 212).

that this subsequent scientific evidence prompted its authorities to review their previous conclusions on the risk of transmission of Foc TR4 in plantains and bananas once the entry of Foc TR4 into the region had been confirmed.[2517]

7.1261. Panama submits that, in assessing the risk of entry and establishment of Foc TR4, OIRSA's PRA proceeds under the assumption that the cleaning and packing processes applied in exporting countries are sufficient to achieve the ALOP reflected in the PRA.[2518] Panama asserts that it was not prepared to proceed on the basis of such assumptions given the "highly restrictive" ALOP that Panama has adopted, bearing in mind that Foc TR4 is "an *existential threat*" to plantain and banana production.[2519] According to Panama, as a result of this, it initiated a review process of the PIR for Costa Rican plantain and banana, and then insisted on the on-site verification of phytosanitary conditions in establishments for these fruit.[2520]

7.1262. Regarding the *second requirement* of Article 5.7, Panama submits that Costa Rica has failed to demonstrate that Measure 4 was not adopted on the basis of available pertinent information within the meaning of this provision.[2521] Panama notes that the measure was based on the "pertinent information" available at the time of its adoption, namely (a) the scientific evidence indicating the possible existence of a risk of Foc TR4 in plantain and banana fruit, and (b) the absence of verified information on phytosanitary conditions in Costa Rican plantain and banana establishments, since these establishments had never been approved by the Panamanian authorities.[2522]

7.1263. Panama submits that ISPM 2 and 20, identified by Costa Rica, do not constitute "pertinent information" within the meaning of Article 5.7 because they are generic standards that do not address the phytosanitary risk of Foc TR4 in plantain and banana fruit.[2523] Panama adds that it was not required to wait for Foc TR4 to be detected in its territory before temporarily suspending imports of plantains and bananas.[2524] According to Panama, this interpretation would deny it the right to adopt a higher ALOP than that reflected in the ISPM and would go against the scientific consensus that preventive measures are the most effective in relation to Foc TR4.[2525]

7.1264. Panama also asserts that OIRSA - in line with other scientific evidence - has indicated that there is evidence recognizing the possibility of a risk of Foc TR4 in banana and plantain fruit, but notes that further studies are needed to determine the degree of association between the fruit and the pest as a contaminant.[2526] In addition, Panama submits that the measures identified by Costa Rica do not indicate that banana and plantain fruit are not a pathway for the spread of Foc TR4.[2527] Panama adds that the fact that other Members have taken measures based on an ALOP lower than that of Panama does not deny Panama its right to adopt a provisional measure grounded in some evidentiary basis indicating the possible existence of a risk, but not enough to perform a

[2517] Panama's second written submission, para. 204 (quoting EFSA, Panel on Plant Health, "Scientific opinion on the pest categorisation of *Fusarium oxysporum f. sp. cubense* Tropical Race 4" (2022) (Exhibit PAN-59), p. 9).

[2518] Panama's second written submission, para. 210.

[2519] See Panama's closing statement at the first meeting of the Panel, para. 9. (italics original) Panama asserts that Foc TR4 is the "most serious threat to banana and plantain production". (Panama's second written submission, para. 188; opening statement at the second meeting of the Panel, para. 38).

[2520] Panama's second written submission, para. 211; response to Panel question No. 216, para. 301.

[2521] Panama's first written submission, para. 408; second written submission, para. 220.

[2522] Panama's first written submission, para. 398; opening statement at the first meeting of the Panel, para. 51; and second written submission, para. 213.

[2523] Panama's first written submission, para. 401; opening statement at the first meeting of the Panel, para. 54.

[2524] Panama notes that it would be absurd for ISPM 20 to constitute pertinent information for the purposes of Article 5.7, considering that Foc TR4 represents the greatest threat to current banana production and that, "[o]nce you see it, it is too late, and it has likely already spread outside that zone without being recognized". (Panama's first written submission, para. 403; opening statement at the first meeting of the Panel, para. 54).

[2525] Panama's first written submission, para. 402.

[2526] Panama's first written submission, para. 404 (quoting OIRSA, *Pest Risk Analysis for Foc TR4* (2018) (Exhibit CRI-188), p. 118; OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), p. 122). According to Panama, OIRSA has not stated that plantain and banana fruit are not a pathway for the spread of Foc TR4. (Panama's opening statement at the first meeting of the Panel, para. 55).

[2527] Panama's first written submission, para. 406 (quoting APHIS, USDA, Federal Order DA-2021-10 (Exhibit CRI-197)). According to Panama, the measures of Nicaragua, the Dominican Republic, Guatemala, and Costa Rica are silent on the subject, while the United States measure explicitly considers the fruit not to be a "significant" pathway for Foc TR4. (Ibid.)

risk assessment.[2528] Panama asserts that Costa Rica makes the erroneous assumption that a Member's ALOP is irrelevant in determining the provisional measure to be adopted.[2529] Panama maintains that, in the light of its experience with another Foc variant, it has established a higher ALOP that requires it to conduct, as part of its risk assessment, certain investigations that differ from the parameters considered and investigations carried out by OIRSA and other Members.[2530] According to Panama, its ALOP requires on-site verification of phytosanitary conditions in plantain and banana establishments in Costa Rica.[2531]

7.1265. Regarding the *third requirement* of Article 5.7, Panama submits that Costa Rica has failed to demonstrate that Panama did not attempt to obtain the additional information necessary for a more objective assessment of the risk in question.[2532] Panama asserts that it sought to obtain this information by requesting information verified by the Panamanian authorities on phytosanitary conditions in plantain and banana establishments in Costa Rica.[2533] According to Panama, as confirmed by OIRSA[2534], this information is pertinent to conducting an assessment of the risk of Foc TR4 in bananas and plantains from Costa Rica.[2535] Panama asserts that, in its note of 18 December 2019, it clearly communicated the necessary information to Costa Rica. Panama adds that it reminded Costa Rica that the relevant PIR needed to be reviewed and amended owing to Panama's national alert for Foc TR4, and that the requirements in force provided for the assessment of packing plants or establishments. Panama maintains that it expressed its willingness to conduct verification visits in 2020[2536] and that Costa Rica acknowledged Panama's attempt to obtain additional information and sought, at least initially, to facilitate those efforts.[2537] Panama asserts that its efforts to obtain the necessary additional information were frustrated by sanitary measures to contain the COVID-19 pandemic, both in Panama and in Costa Rica.[2538]

7.1266. In respect of the *fourth requirement* of Article 5.7, Panama submits that Costa Rica has failed to establish that Panama did not review Measure 4 within "a reasonable period of time".[2539] For Panama, the relevant question is whether it was possible for its authorities to conduct on-site verification of Costa Rican plantain and banana establishments between 30 January 2020, when Costa Rica confirmed that it was ready to take the necessary steps to comply with the approval procedure for packing plants for both products, and 27 September 2021, when this Panel was established. Panama submits that it is clear from the record that the circumstances related to the COVID-19 pandemic made it impossible to coordinate, schedule, and conduct on-site verification visits during the period in question.[2540] For Panama, in such circumstances, there was no delay in

[2528] Panama's first written submission, para. 406 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678).

[2529] Panama's second written submission, para. 217.

[2530] Panama's second written submission, paras. 218-219 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, para. 685).

[2531] Panama's second written submission, para. 219.

[2532] Panama's first written submission, paras. 409 and 420; second written submission, para. 221.

[2533] Panama's first written submission, para. 410; opening statement at the first meeting of the Panel, para. 56.

[2534] Panama asserts that OIRSA accepts that information on existing phytosanitary conditions in banana plants is pertinent to a risk assessment regarding the probability of transmission of Foc TR4 from an exporting country through the pathway of banana fruit. Panama refers to OIRSA's statements that the implementation of processes to ensure that food is free from physical, chemical, and biological contamination means that fresh bananas for export pose a very low risk of establishment of the pest; and the fact that fresh fruit for export generally undergoes a washing and conditioning process also results in there being a very low risk of the pest spreading. However, according to Panama, OIRSA relies on an assumption about relevant phytosanitary conditions that Panama is not prepared to accept. (Panama's second written submission, paras. 224-225.)

[2535] Panama's closing statement at the first meeting of the Panel, para. 12.

[2536] Panama's first written submission, para. 411 (referring to Note DM-N-1352-2019 (Exhibit CRI-103)).

[2537] Panama's first written submission, para. 412; opening statement at the first meeting of the Panel, para. 57 (quoting Memorandum DSFE-0079-2020 (Exhibit CRI-105)).

[2538] Panama's first written submission, paras. 413 (quoting Memorandum DSFE-0348-2020 (Exhibit CRI-107)) and 414; opening statement at the first meeting of the Panel, para. 58. See also Panama's second written submission, paras. 230-231.

[2539] Panama's first written submission, para. 432; second written submission, paras. 227 and 232.

[2540] Panama's second written submission, para. 229 (referring to Memorandum DSFE-0079-2020 (Exhibit CRI-105); Panama's second written submission, paras. 76-80). See also Panama's first written submission, paras. 423 and 430; opening statement at the first meeting of the Panel, para. 59. Panama argues that, from December 2019, it signalled its willingness to conduct the necessary verification visits to the relevant Costa Rican establishments in 2020, but that the COVID-19 pandemic prevented those visits. (Panama's first written submission, paras. 424-428 (referring to Note DM-N-1352-2019 (Exhibit CRI-103))).

responding to or reviewing Costa Rica's communications of 30 January and 6 May 2020.[2541] Panama adds that the importing Member cannot be considered to have failed to comply with the requirement under Article 5.7 to review the provisional measure within a reasonable period of time as long as it lacks the information necessary for a more objective assessment of risk because the exporting Member has refused to provide it.[2542]

7.6.1.2.1.2 Assessment by the Panel

Relevant legal standard

7.1267. As noted above, for an SPS measure to be considered covered by Article 5.7, the Member adopting the measure must meet four cumulative requirements: adopt the measure (a) in cases where "relevant scientific evidence is insufficient"; and (b) "on the basis of available pertinent information"; (c) "seek to obtain the additional information necessary for a more objective assessment of risk"; and (d) "review the … measure accordingly within a reasonable period of time".[2543]

7.1268. As with Measures 1 and 3, the Panel will first examine whether Panama adopted the measure in a situation of insufficient relevant scientific evidence.

Whether Panama adopted Measure 4 in a situation where relevant scientific evidence was insufficient

7.1269. The Panel notes that Costa Rica presents two lines of argument, contending that Panama changed its narrative with respect to the objective of Measure 4. Costa Rica's main line of argument revolves around the technical review of the PIR for plantain and banana as the reason for Measure 4. However, Costa Rica has also developed another line of argument in the event that the Panel considers that the adoption of Measure 4 is linked to the risk of introduction of Foc TR4 into Panamanian territory, as claimed by Panama.

7.1270. With regard to there being a situation of insufficient relevant scientific evidence, Costa Rica maintains that the technical review of the PIR is the matter in respect of which it should be determined whether there was, in October 2019, "some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment". In this regard, Costa Rica submits that there was no evidentiary basis indicating the possible existence of a risk associated with the technical review of the PIR.[2544] Costa Rica considers that imports of a product cannot be prohibited only because a technical review process for the PIR has been initiated.[2545]

7.1271. Should the Panel consider that the reason for Measure 4 is Foc TR4, Costa Rica claims that Panama had sufficient scientific evidence to perform a risk assessment when it adopted the measure[2546], since Foc is one of the most studied pests in the world[2547], and OIRSA had prepared a PRA for Foc TR4.[2548]

7.1272. For its part, Panama focuses on the alleged insufficiency of scientific evidence concerning the potential risk of Foc TR4 infecting plantain and banana fruit that, in its view, triggered the review of the PIR.[2549] Panama also indicates that it needed information verified by the Panamanian authorities on the phytosanitary conditions in plantain and banana establishments in Costa Rica.[2550]

[2541] Panama's response to Panel question No. 11, para. 58.
[2542] Panama's response to Panel question No. 81, paras. 243-245.
[2543] See para. 7.109 above (referring to Appellate Body Reports, *Japan – Agricultural Products II*, para. 89; *US/Canada – Continued Suspension*, para. 676; *Japan – Apples*, para. 176; and *Korea – Radionuclides*, para. 5107).
[2544] Costa Rica's first written submission, para. 1040.
[2545] Costa Rica's first written submission, para. 1041.
[2546] Costa Rica's first written submission, paras. 1048 and 1050.
[2547] Costa Rica's opening statement at the first meeting of the Panel, para. 62.
[2548] Costa Rica's second written submission, para. 348. See also Costa Rica's opening statement at the first meeting of the Panel, para. 63; response to Panel question No. 59, para. 2.158.
[2549] Panama's first written submission, para. 380.
[2550] Panama's first written submission, para. 410; opening statement at the first meeting of the Panel, para. 56.

7.1273. The Panel recalls that Article 5.7 covers situations where deficiencies in the body of scientific evidence do not allow, in quantitative or qualitative terms, a Member to perform an adequate assessment of risks.[2551] Moreover, the provision refers to the goal of performing "a more objective assessment of risk". Therefore, the risk that the Member is seeking to address has an impact on the assessment that the Member must undertake and the information necessary for that purpose.

7.1274. In this respect, the Panel recalls that the risk that the Member imposing the measure is seeking to address also forms part of the determination of the objective of the measure. The Panel also recalls its finding in paragraph 7.1213 above that, as communicated to Costa Rica in the notes of October 2019, the reason why Panama adopted Measure 4 was the initiation of the review of the resolutions containing the PIR for Costa Rican plantains and bananas and the approval of plantain packing plants. In this regard, the Panel considered that the objective of Measure 4 is to protect against the risks that Panama sought to address through this review and approval. In the Panel's view, 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 into Panamanian territory. In view of these findings on the objective of Measure 4, the Panel will focus its analysis under Article 5.7 on the objective of phytosanitary protection against the risks that Panama was seeking to address through the review of the relevant resolutions and the approval of plantain packing plants. Accordingly, the Panel will not address the parties' arguments regarding the risk of introduction of Foc TR4 into Panamanian territory.

7.1275. The Panel notes that Panama does not identify any deficiencies in the scientific evidence regarding the technical review process for the PIR. As explained below, in its argumentation, Panama links the absence of information verified by its authorities on packing plants in Costa Rica with the risk of introduction of Foc TR4. Thus, Panama's entire argumentation under Article 5.7 revolves around Foc TR4, and the exclusion of arguments related to Foc TR4 covers all of Panama's arguments under Article 5.7. In this regard, the Panel recalls that, in Note AUPSA-AG-392-2019 informing Costa Rica of Measure 4 concerning plantains, Panama mentions that, when the technical review process for the PIR was initiated, it was noted that AUPSA had not carried out the approvals of packing plants provided for in the inactivated resolution.[2552] Subsequently, Panama also referred to the need to approve banana packing plants.[2553] However, in the course of these proceedings, Panama asserted that the lack of approval of the plants by its authorities was worrying in the light of the national state of alert for Foc TR4, its corresponding high ALOP, and the fact that it shares a border with Costa Rica.[2554] Panama added that its "highly restrictive ALOP" for Foc TR4 did not allow it to proceed on the basis of assumptions that cleaning and packing processes in exporting countries were sufficient.[2555]

7.1276. Panama has not presented arguments to rebut Costa Rica's claim that there was no situation of insufficient relevant scientific evidence with respect to the technical review of the PIR, should the Panel not accept that the reason for Measure 4 was Foc TR4.

7.1277. In this context, in the absence of arguments by Panama that rebut Costa Rica's claim that there was no situation of insufficient relevant scientific evidence with respect to the technical review of the PIR, the Panel will assess whether Costa Rica discharged its burden of proof under Article 5.7. As noted above, the Panel considers that Costa Rica, in raising the inapplicability of Article 5.7 in its panel request, must discharge its initial burden of demonstrating that Measure 4 is not covered by

[2551] Appellate Body Reports, *Japan – Apples*, para. 179; and *US/Canada – Continued Suspension*, paras. 674 and 677.

[2552] Note AUPSA-AG-392-2019 (Exhibit CRI-95).

[2553] Note DM-N-1352-2019 (Exhibit CRI-103). The Panel notes that the requirement of approval for packing plants is established explicitly only in the resolution concerning the importation of plantains, not the one concerning the importation of bananas. Panama asserts that it may require the inspection and approval of both plantain and banana plants, since the Panamanian regulatory framework empowers the Panamanian authorities to take measures, including preventive measures, to mitigate phytosanitary risk. (Panama's response to Panel question No. 62, paras. 180-184). Despite indicating that the approval of banana packing plants did not appear to have a legal basis, Costa Rica expressed its readiness to facilitate the approval of plants for both products. (See Memorandum DSFE-0079-2020 (Exhibit CRI-105); Memorandum DFSE-0080-2020 (Exhibit CRI-106); and Costa Rica's second written submission, para. 367).

[2554] Panama's first written submission, para. 361. See also Panama's response to Panel question No. 60, para. 172.

[2555] Panama's second written submission, paras. 210-211.

Article 5.7. Costa Rica must therefore demonstrate that Measure 4 fails to meet at least one of the cumulative requirements set out in Article 5.7.[2556]

7.1278. The Panel will now proceed to address Costa Rica's arguments as to whether Panama had sufficient relevant scientific evidence related to the technical review of the resolutions containing the PIR for plantain and banana.

7.1279. Costa Rica submits that, in October 2019, Panama was not in a situation of insufficient relevant scientific evidence, given that it had data on historical trade in plantains and bananas with Costa Rica. According to Costa Rica, Panama knew that, like other countries, it had imported these fruit from Costa Rica without any phytosanitary risk having arisen.[2557] Concerning the information on historical trade in plantains and bananas with Costa Rica, Costa Rica asserts that Panama knew that all exports from Costa Rica were accompanied by an official phytosanitary export certificate confirming that shipments had been inspected and/or tested to ensure they were free from the quarantine pests specified by Panama.[2558]

7.1280. Costa Rica provides trade data from Panama's INEC showing that there were imports of fresh plantains from Costa Rica into Panama in 2014 and 2019[2559], and of fresh bananas in 2000 and the period 2017-2019.[2560] The Panel agrees with Costa Rica that prior imports of plantains and bananas, including in the years immediately preceding the adoption of Measure 4, provide pertinent information on the risks that such imports pose. In particular, in accordance with the applicable PIR[2561], Costa Rica submitted phytosanitary certificates that included information on the exporter and the place of origin, among other details, and certified that the products "have been inspected … and are considered to be free from the quarantine pests specified by [Panama] and to conform with the current phytosanitary requirements of [Panama], … and they are deemed to be practically free from other pests".[2562]

7.1281. Costa Rica considers that it should be determined whether, in respect of the technical review of the PIR, there was, in October 2019, "some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment".[2563] In this regard, Costa Rica maintains that, in October 2019, there was no evidentiary basis indicating the possible existence of a risk associated with this review. Costa Rica submits that the review of phytosanitary policies does not give rise to the emergence of phytosanitary risks, and that imports of a product cannot be prohibited only because a technical review process for the PIR has been initiated.[2564] The Panel understands Costa Rica's position to be that, in the absence of any new scientific evidence related to the risk associated with the importation of Costa Rican plantains and bananas, there is no situation of insufficient relevant scientific evidence.

7.1282. The Panel notes that, according to Panama, when AUPSA was developing the PIR for plantain and banana, it performed a verification of the pests of quarantine concern notified by the

[2556] See para. 7.121 above.

[2557] Costa Rica's first written submission, para. 1042. Costa Rica asserts that Panama had been importing bananas from Costa Rica as usual since 2000. (Ibid. para. 1044 (referring to INEC, Banana imports into Panama (2000) (Exhibit CRI-114))). See also Costa Rica's second written submission, para. 352 (referring to INEC, Plantain imports into Panama (2014) (Exhibit CRI-117); INEC, Plantain imports into Panama (2019-2020) (Exhibit CRI-143); and INEC, Banana imports into Panama (2017-2020) (Exhibit CRI-115)).

[2558] Costa Rica's first written submission, para. 1055 (referring to SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019) (Exhibit CRI-190); SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191)).

[2559] INEC, Plantain imports into Panama (2014) (Exhibit CRI-117); INEC, Plantain imports into Panama (2019-2020) (Exhibit CRI-143).

[2560] INEC, Banana imports into Panama (2000) (Exhibit CRI-114); INEC, Banana imports into Panama (2017-2020) (Exhibit CRI-115).

[2561] See Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3; Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98), Article 3.

[2562] SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019) (Exhibit CRI-190); SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191). The phytosanitary certificate for plantains includes an additional declaration certifying that, according to the results of a laboratory analysis, "[i]n Costa Rica, no fruit flies have been reported in green Musaceae".

[2563] Costa Rica's first written submission, para. 1040 (quoting Appellate Body Report, *Canada – Continued Suspension*, para. 678).

[2564] Costa Rica's first written submission, paras. 1040-1041.

NPPOs of countries of origin, which "was Panama's risk analysis, but it was not documented as such".[2565] Therefore, prior to the imposition of Measure 4, the importation of the products concerned was authorized in accordance with the PIR established on the basis of a pest verification that Panama considers to be a risk assessment sufficient to achieve its ALOP.

7.1283. In these circumstances, the Panel understands that, as maintained by Costa Rica, for the scientific evidence that Panama considered sufficient to become insufficient to perform a risk assessment, there must be some new scientific evidence that calls into question what was previously known about the risk concerned. The Panel considers that, in the absence of any change in the body of relevant scientific evidence available to Panama in this case, it cannot be maintained that the situation of this relevant scientific evidence has shifted from a state of sufficiency to one of insufficiency. In any event, the Panel recalls that the evolution of scientific evidence does not necessarily imply that the relevant scientific evidence that had so far been sufficient becomes insufficient; rather, it may be an indication that the existing risk assessment should be reviewed or that a new assessment should be undertaken.[2566]

7.1284. Costa Rica refers to ISPM 2 in asserting that, although countries may undertake "a national review of phytosanitary regulations, requirements or operations", "[f]or existing trade, no new measures should be applied until the revision or new PRA has been completed, unless this is warranted by new or unexpected phytosanitary situations that may necessitate emergency measures".[2567]

7.1285. In the Panel's view, by referring to this guidance from ISPM 2, Costa Rica is proposing that new measures may be applied: (a) when a new or revised PRA has been completed, or (b) when there are new or unexpected phytosanitary situations that may necessitate emergency measures. In the context of the IPPC and the ISPM, emergency measures are applied as a matter of urgency in new or unexpected phytosanitary situations and may or may not be provisional measures.[2568] Accordingly, the ISPM also support the proposition that, if a risk assessment is not conducted, there must be a change in the situation for a new measure, whether provisional or not, to be adopted.

7.1286. The Panel recalls that the ISPM that may provide context for ISPM 2 link the adoption of emergency measures or actions to prior detection of a pest.[2569] There is no evidence in the record of any new or unexpected phytosanitary situations having arisen with respect to the importation of Costa Rican plantains and bananas. Panama provides no argument or evidence regarding the detection of pests (whether Foc TR4 or another pest) in Costa Rican plantain and banana shipments in relation to the adoption of Measure 4. Even taking into account that detections at origin may constitute a new or unexpected phytosanitary situation[2570], Panama does not assert that Costa Rica's phytosanitary status in respect of a pest of quarantine concern that affects plantains or bananas (whether Foc TR4 or another pest) changed in such a way as to result in the adoption of Measure 4. In addition, bearing in mind that new or unexpected situations may not be limited to a detection[2571], the Panel notes that Panama does not put forward any argument or evidence regarding the existence of new or unexpected situations associated with the importation of Costa Rican plantains and bananas.[2572]

7.1287. The only detection in shipments of the products concerned that Panama mentions is of the pesticide chlorpyrifos at levels above the relevant MRL, in a shipment of Costa Rican bananas on

[2565] Panama's response to Panel question No. 9, paras. 30-31.
[2566] See para. 7.136 above.
[2567] Costa Rica's first written submission, para. 1041 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8, section 1.1.3).
[2568] The 2018 version of ISPM 5 in the record defines an "emergency measure" as "[a] phytosanitary measure established as a matter of urgency in a new or unexpected phytosanitary situation. An emergency measure may or may not be a provisional measure." (IPPC, ISPM 5 (Exhibit CRI-75), p. 17).
[2569] See paras. 7.989-7.992 above.
[2570] According to ISPM 2, a change in the phytosanitary situation in an area may constitute grounds for initiating a new PRA, although it is not indicated that such a change would justify an emergency measure. (IPPC, ISPM 2 (Exhibit CRI-101), p. 8, sections 1.1.2 and 1.1.3).
[2571] See para. 7.993 above.
[2572] The Panel recalls that Panama asserts only that it could not wait until it had intercepted Foc TR4, considering that the pest represents the *greatest* threat to current banana production. (Panama's opening statement at the first meeting of the Panel, para. 54). (italics original)

26 September 2019.[2573] According to Panama, this detection "raised new concerns about phytosanitary conditions for banana production in Costa Rica".[2574] Nevertheless, Panama confirmed that the detection of chlorpyrifos in Costa Rican bananas during the national alert for Foc TR4 did not prompt the adoption of Measure 4, and that, therefore, in its analysis under Article 5.7, the Panel should not consider whether the scientific evidence was insufficient with respect to the risks associated with chlorpyrifos in Costa Rican bananas.[2575] The Panel also notes that a violation of the relevant MRL constitutes a breach of safety requirements and does not concern the sufficiency of relevant scientific evidence for an assessment of the risk of entry, establishment or spread of pests or diseases and of the associated potential biological and economic consequences.[2576]

7.1288. For the foregoing reasons, the Panel considers that there is no evidence in the record that a new or unexpected phytosanitary situation occurred with respect to the importation of plantains and bananas originating in Costa Rica in the context of the process of review of the relevant resolutions.

7.1289. In addition to arguing that, in the absence of new or unexpected phytosanitary situations, there was no risk related to the importation of Costa Rican plantains and bananas, Costa Rica claims that the lack of approval of plantain packing plants also did not indicate the possible existence of a risk in respect of plantain imports. Costa Rica adds that the absence of this approval had never constituted a reason for Panama to prevent the entry of Costa Rican plantains into its market.[2577]

7.1290. In this regard, the Panel observes that, as is apparent from Panama's communication to Costa Rica of 10 October 2019, Panama became aware of a failure to comply with a requirement of the regulations in force prior to the adoption of Measure 4.[2578] According to the requirement in question, it must be stated, on the phytosanitary certificate accompanying imports of Costa Rican plantains, that the plantains come from areas and places of production and packing plants subject to inspection and registration by the NPPO of the country of origin and *approval of packing plants by AUPSA*.[2579] As mentioned above, the importation of the products concerned into Panama was authorized in accordance with the PIR established on the basis of a pest verification that Panama considers to be a risk assessment sufficient to achieve its ALOP.[2580] Furthermore, as Costa Rica observes, the lack of approval of packing plants had not previously prevented the importation of Costa Rican plantains and bananas in accordance with the applicable PIR, and, in October 2019, no new or unexpected phytosanitary situation had arisen in relation to any pest in plantains and bananas from Costa Rica. Therefore, in the Panel's view, the fact that Panama noticed a failure by its own authorities to comply with this requirement does not in itself demonstrate that the relevant scientific evidence was insufficient to conduct an assessment of the risks to plant life or health within the meaning of Article 5.1 of the SPS Agreement.

Conclusion on whether Panama adopted Measure 4 in a situation in which the relevant scientific evidence was insufficient

7.1291. In view of the foregoing, the Panel concludes that Costa Rica has demonstrated, and Panama has failed to rebut, that, when Measure 4 was adopted in October 2019, there was no situation of insufficient relevant scientific evidence concerning the risks that Panama was seeking to address through the review of the resolutions containing the PIR for Costa Rican plantains and bananas and the approval of plantain packing plants.

[2573] Note DNSV-0113-2021-OIAR (Exhibit CRI-109).
[2574] Panama's first written submission, paras. 361-362; response to Panel question No. 60, para. 172.
[2575] Panama's response to Panel question No. 198, para. 252.
[2576] Since the objective of Measure 4 is to protect plantains and bananas within the territory of Panama from risks arising from the entry, establishment or spread of pests, in the Panel's view, the relevant risk assessment is the one defined in the first sentence of Annex A(4) to the SPS Agreement, namely "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences".
[2577] Costa Rica's first written submission, para. 1043.
[2578] Note AUPSA-AG-392-2019 (Exhibit CRI-95).
[2579] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3.2. (italics added)
[2580] See para. 7.1282above.

7.1292. Accordingly, the Panel finds that Costa Rica discharged its burden of demonstrating that Measure 4 does not meet at least one of the cumulative requirements set out in Article 5.7 and has therefore demonstrated that Measure 4 does not constitute a provisional measure under Article 5.7 of the SPS Agreement.

7.6.1.2.1.3 Conclusion on Article 5.7 of the SPS Agreement

7.1293. In the light of the foregoing, the Panel finds that Measure 4 does not constitute a provisional measure under Article 5.7 of the SPS Agreement, because Costa Rica has demonstrated, and Panama has failed to rebut, that Panama did not adopt Measure 4 in a situation of insufficient relevant scientific evidence.

7.6.1.3 Claims under Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement

7.1294. Given that the Panel has found that Measure 4 is not a provisional measure under Article 5.7 of the SPS Agreement, Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement are applicable to this measure. As a result, the Panel will proceed to examine Costa Rica's claims under Articles 5.1, 5.2, and 5.3, which concern the assessment of risk and the elements and aspects to be taken into account in such assessments, and Article 2.2, which requires that an SPS measure be based on scientific principles and not be maintained without sufficient scientific evidence.

7.6.1.3.1 Main arguments of the parties

7.6.1.3.1.1 Costa Rica

7.1295. Costa Rica claims that Measure 4 is inconsistent with Articles 5.1, 5.2, and 5.3 of the SPS Agreement, given that it is not based on a risk assessment, and, consequently, that it is also inconsistent with Article 2.2, as it is not based on scientific principles and is maintained without sufficient scientific evidence.[2581]

7.1296. Costa Rica submits that Panama has not carried out a risk assessment, within the meaning of Annex A(4) to the SPS Agreement, that provides a scientific basis for Measure 4, thus Panama has acted in a manner inconsistent with the obligation set out in Article 5.1 of the SPS Agreement to base its measure on an assessment of the risks, as appropriate to the circumstances.[2582]

7.1297. Costa Rica argues that, in the communications through which Panama informed it of the adoption of Measure 4, Panama made no reference to any risk assessment that would sufficiently warrant or reasonably support this measure.[2583] According to Costa Rica, the content of these communications does not constitute, in itself, a "risk assessment" within the meaning of Annex A(4) to the SPS Agreement[2584], since merely referring to the initiation of a process for the technical review of the resolutions does not qualify as a "scientific process" characterized by "systematic, disciplined and objective enquiry and analysis".[2585] Costa Rica adds that there is absolutely no reasoning based on scientific grounds, nor any analysis of probabilities with respect to the entry, establishment or spread of pests through the importation plantains or bananas from Costa Rica.[2586]

7.1298. Costa Rica adds that Panama has expressly recognized that Measure 4 is not based on a risk assessment.[2587] According to Costa Rica, Panama closed its market without having any scientific or technical basis that would provide grounds for such a closure for the duration of an alleged

[2581] Costa Rica's panel request, p. 6; first written submission, para. 1016.
[2582] Costa Rica's first written submission, para. 1033.
[2583] Costa Rica's first written submission, para. 1022 (quoting Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97); and Panel Report, *US – Poultry (China)*, para. 7.180, which in turn quotes Appellate Body Report, *EC – Hormones*, paras. 193-194)).
[2584] Costa Rica's first written submission, para. 1023.
[2585] Costa Rica's first written submission, para. 1023 (quoting Appellate Body Report, *EC – Hormones*, para. 187).
[2586] Costa Rica's first written submission, para. 1023.
[2587] Costa Rica's second written submission, para. 338 (quoting Panama's response to Panel question No. 9, para. 32).

technical review of the phytosanitary regulations, and without there existing any new or unexpected risk with respect to imports of plantains and bananas from Costa Rica.[2588]

7.1299. Costa Rica maintains that, as a consequence of having acted in a manner inconsistent with Article 5.1, Panama has acted in a manner inconsistent with Articles 5.2 and 5.3. Furthermore, as a consequence of failing to comply with the provisions of Articles 5.1, 5.2, and 5.3, Costa Rica claims that Measure 4 is inconsistent with Article 2.2, given that it is neither based on scientific principles nor maintained with sufficient scientific evidence.[2589]

7.6.1.3.1.2 Panama

7.1300. Panama asserts that it adopted provisional measures, including Measure 4, as a precaution, in response to scientific evidence that called into question its earlier conclusions with regard to the health risk posed by imports of the products at issue from Costa Rica.[2590] Panama submits that its provisional measures are not inconsistent with Articles 2.2, 5.1, 5.2, and 5.3 of the SPS Agreement, given that it acted strictly within the limits of its rights under Article 5.7 of the SPS Agreement, and that provisional measures under Article 5.7 are exempt from the basic obligations set forth in Article 2.2.[2591]

7.6.1.3.2 Assessment by the Panel

7.6.1.3.2.1 Relevant legal standard

7.1301. As mentioned in the context of Measure 1[2592], Article 5.1 of the SPS Agreement requires the Panel to consider two aspects:

a. whether there exists a risk assessment, as appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations; and

b. if there is a risk assessment, whether the SPS measure of the Member concerned is based on that risk assessment.

7.1302. The Panel recalls that Articles 5.2 and 5.3 shed light on the elements and factors that are of relevance to the assessment of risks foreseen in Article 5.1; accordingly, these elements and factors have been assessed as part of the analysis under that provision.[2593] Furthermore, the Panel recalls that a finding of a violation of Articles 5.1, 5.2, and 5.3 may give rise to a refutable presumption of inconsistency with Article 2.2.[2594]

7.1303. The Panel will next examine Costa Rica's claims under Articles 5.1, 5.2, 5.3, and 2.2 with respect to Measure 4.

7.6.1.3.2.2 Whether Measure 4 is based on a risk assessment in accordance with Article 5.1 of the SPS Agreement

7.1304. Panama has confirmed that Measure 4 is not based on a risk assessment, arguing that it is a provisional measure adopted in a situation where the body of available scientific evidence did not

[2588] Costa Rica's first written submission, para. 1025.
[2589] Costa Rica's first written submission, paras. 1026 (quoting Panel Report, *Russia – Pigs (EU),* paras. 7.713 and 7.770) and 1033.
[2590] Panama's first written submission, para. 166.
[2591] Panama's first written submission, para. 166. See also ibid. paras. 435-436.
[2592] See para. 7.310 above.
[2593] Panel Reports, *Japan – Apples*, para. 8.230; and *Australia – Apples*, para. 7.211 (with respect to Article 5.2); and *US – Animals*, para. 7.323; and *Costa Rica – Avocados (Mexico)*, para. 7.405 (with respect to Article 5.3). See also paras. 7.1031-7.1032 above.
[2594] Appellate Body Report, *India – Agricultural Products*, paras. 5.23-5.24; and Panel Reports, *Russia – Pigs (EU)*, para. 7.627; and *Costa Rica – Avocados (Mexico)*, para. 7.368.

allow an appropriate assessment of the risks to be performed, as required by Article 5.1 and as defined in Annex A to the SPS Agreement.[2595]

7.1305. The Panel considers that, as Costa Rica asserts, a measure cannot be based on a risk assessment if no such assessment exists. The Panel therefore finds that Measure 4 is inconsistent with Article 5.1 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

7.6.1.3.2.3 Whether Panama took into account the elements and factors enumerated in Articles 5.2 and 5.3 of the SPS Agreement when assessing the risk

7.1306. As mentioned above, Articles 5.2 and 5.3 are linked to Article 5.1, as they shed light on the elements and factors that are of relevance to the assessment of risks foreseen in Article 5.1.[2596] In the absence of a risk assessment, the Panel finds that Measure 4 is inconsistent with Articles 5.2 and 5.3 of the SPS Agreement because Panama did not take into account the elements and factors set out therein when assessing the risks.

7.6.1.3.2.4 Whether Measure 4 is based on scientific principles and is not maintained without sufficient scientific evidence in accordance with Article 2.2 of the SPS Agreement

7.1307. As mentioned above, Article 5.1 constitutes a "specific application" of the basic obligations contained in Article 2.2 of the SPS Agreement.[2597] The Panel agrees with what has been said in previous disputes to the effect that it may be presumed that a measure that is not based on a risk assessment pursuant to Article 5.1 of the SPS Agreement is not based on scientific principles or is maintained without sufficient scientific evidence within the meaning of Article 2.2.[2598] The Panel considers that this presumption arises in the present case, as a result of its finding that, in the absence of a risk assessment, Measure 4 is inconsistent with Articles 5.1, 5.2, and 5.3.[2599] Furthermore, the Panel observes that Panama has not presented any arguments to refute this presumption.

7.1308. Accordingly, in the light of its finding that Measure 4 is not based on a risk assessment, in breach of Articles 5.1, 5.2, and 5.3 of the SPS Agreement, and given that Panama has failed to refute the presumption of inconsistency with Article 2.2 of the Agreement, the Panel finds that Measure 4 is inconsistent with Article 2.2 because it is not based on scientific principles and is maintained without sufficient scientific evidence.

7.6.1.3.3 Conclusion on Articles 5.1, 5.2, 5.3, and 2.2 of the SPS Agreement

7.1309. In the light of the above, the Panel finds that Measure 4 is inconsistent with the following provisions of the SPS Agreement:

a. Article 5.1, because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;

b. Article 5.2, because, in the absence of a risk assessment, Panama did not take into account the elements set out in this provision in the assessment of risks;

[2595] Panama's response to Panel question No. 9, para. 32.

[2596] Panel Reports, *Japan – Apples*, para. 8.230; and *Australia – Apples*, para. 7.211 (with respect to Article 5.2); and *US – Animals*, para. 7.323; and *Costa Rica – Avocados (Mexico)*, para. 7.405 (with respect to Article 5.3). See para. 7.1032 above.

[2597] Appellate Body Reports, *Japan – Agricultural Products II*, para. 82 (quoting Appellate Body Report, *EC – Hormones*, para. 180); *Australia – Apples*, para. 209 (quoting Appellate Body Report, *EC – Hormones*, para. 180).

[2598] Panel Report, *Russia – Pigs (EU)*, para. 7.627. An SPS measure found to be inconsistent with Articles 5.1 and 5.2 is held to be inconsistent with Article 2.2. (Appellate Body Report, *India – Agricultural Products*, para. 5.23).

[2599] See paras. 7.1305-7.1306 above.

c. Article 5.3, because, in the absence of a risk assessment, Panama did not take into account the elements set out in this provision in assessing the risks; and

d. Article 2.2, because it is not based on scientific principles and is maintained without sufficient scientific evidence.

7.6.1.4 Claims under Articles 5.6 and 2.2

7.1310. The Panel observes that the parties disagree on whether Articles 5.6 and 2.2 are applicable to a provisional measure covered by Article 5.7.[2600] The Panel recalls that it has found that Measure 4 does not constitute a provisional measure covered by Article 5.7[2601], therefore it does not consider it necessary to rule on Panama's argument that Articles 5.6 and 2.2 are not applicable to provisional measures adopted in accordance with Article 5.7. Accordingly, the Panel will proceed with its analysis of Costa Rica's claims under these provisions.

7.6.1.4.1 Main arguments of the parties

7.6.1.4.1.1 Costa Rica

7.1311. Costa Rica claims that Measure 4, whether it is considered to have been imposed as a result of a technical review of the PIR[2602] or because of Foc TR4[2603], is inconsistent with Article 5.6 of the SPS Agreement, given that it is more trade-restrictive than required. Costa Rica considers that, consequently, Measure 4 is also inconsistent with Article 2.2 because it is not applied only to the extent necessary to protect plant life or health.[2604]

7.1312. In either scenario, Costa Rica points out that the alternative measure consists of applying the PIR for plantain and banana from Costa Rica provided for in Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012, which were temporarily inactivated in October 2019.[2605] Costa Rica maintains that this alternative measure could apply "as a substitute" for Measure 4, and that it is sufficient to achieve Panama's ALOP.[2606]

7.1313. Assuming that the reason for Measure 4 is the technical review of the PIR, Costa Rica asserts that the premise for applying an SPS measure is the existence of a specific risk[2607], and that no new or unforeseen phytosanitary situation had arisen that would indicate the existence of a risk associated with imports of plantains and bananas from Costa Rica.[2608] According to Costa Rica, applying the PIR provided for in the relevant resolutions is the alternative recommended in ISPM 2 and ISPM 20 when phytosanitary policies are being examined or revised, in the absence of new or unexpected events.[2609]

7.1314. Costa Rica maintains that the alternative measure meets the three cumulative requirements in footnote 3 to Article 5.6 of the SPS Agreement.[2610]

[2600] Panama's first written submission, paras. 165-166 and 436; responses to Panel question No. 63, para. 190, and No. 75, paras. 210 and 212; second written submission, para. 238; and Costa Rica's response to Panel question No. 75, para. 3.62.

[2601] See para. 7.1293 above.

[2602] Costa Rica's first written submission, para. 1133.

[2603] Costa Rica's first written submission, para. 1146; second written submission, para. 383.

[2604] Costa Rica's panel request, p. 7; first written submission, para. 1130; and second written submission, para. 381.

[2605] Costa Rica's first written submission, paras. 1134 (with respect to the technical review of the PIR) and 1147 (with respect to Foc TR4).

[2606] Costa Rica's first written submission, para. 1135 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 159; Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.1819); second written submission, para. 383.

[2607] Costa Rica refers to the definition of an SPS measure in Annex A(1). (Costa Rica's first written submission, para. 1133).

[2608] Costa Rica's first written submission, para. 1133.

[2609] Costa Rica's first written submission, paras. 1134 and 1145.

[2610] Costa Rica's first written submission, paras. 1135 and 1145. Costa Rica adds that, even assuming that Measure 4 was adopted to prevent the introduction of Foc TR4, closing the market to plantains and bananas from Costa Rica is more restrictive than required to achieve Panama's ALOP against this pest, and

7.1315. First, Costa Rica argues that the alternative measure is reasonably available, taking into account technical and economic feasibility, because Panama had been applying the resolution on importing plantains for almost a decade, and the resolution on importing bananas for more than seven years.[2611]

7.1316. Second, Costa Rica claims that applying the resolutions in question would achieve Panama's ALOP while the Panamanian authority is revising them, even assuming that Panama had set a very high ALOP. Costa Rica argues that, in October 2019, there was no new or unexpected phytosanitary situation related to the production of plantains or bananas. For Costa Rica, Measure 4 is disproportionate in the absence of a new risk associated with the revision of requirements.[2612] With respect to plantains, Costa Rica adds that, if the absence of approval of packing plants did not prevent imports of this product from Costa Rica in the past, the PIR provided for in the relevant resolution would achieve Panama's ALOP while consultations were held with a view to that approval being obtained.[2613]

7.1317. With respect to Foc TR4, Costa Rica maintains that the alternative measure would achieve Panama's ALOP with respect to this pest and to imports of Costa Rican plantains and bananas, which consists of "totally avoiding 'the introduction, establishment and spread of pests of plants and plant products within the territory of the Republic of Panama'".[2614] According to Costa Rica, the PRA of OIRSA concludes that the fresh fruit of the plantain and banana have a "very low" probability of risk, and in no instance does that PRA consider prohibiting the importation of these fruit, especially if they come from countries where Foc TR4 is absent.[2615] Costa Rica notes that, for imports of plantain and banana fruit from countries where Foc TR4 is absent, the OIRSA PRA recommends a phytosanitary certificate issued by the NPPO of the exporting country, indicating that the shipment has been inspected and found to be free from pests of quarantine interest.[2616] Costa Rica asserts that it has been complying with this measure for years, in accordance with the relevant resolutions.[2617] Costa Rica reiterates that other Members do not prohibit imports of plantain and banana fruit because of Foc TR4[2618], and asserts that Measure 4 is disproportionate and lacks a technical basis.[2619]

7.1318. Third, Costa Rica claims that the alternative measure would be significantly less trade-restrictive because the PIR and resulting certification allow "considerably greater market access" than Measure 4, which, according to Costa Rica, constitutes an "absolute prohibition".[2620]

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that the alternative measure meets the three conditions set out in footnote 3 to Article 5.6. (Costa Rica's first written submission, para. 1147; second written submission, para. 388).

[2611] Costa Rica's first written submission, paras. 1136 (referring to Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96); Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98)) (with respect to the PIR), and 1147 (with respect to Foc TR4). See also Costa Rica's second written submission, para. 384.

[2612] Costa Rica's first written submission, paras. 1137, 1140, and 1142. Costa Rica also refers to ISPM 2 and ISPM 20, which, in its view, confirm that the fact that a Member is engaged in examining its phytosanitary policies or measures does not mean that it has to stop trade during the revision process. (Ibid. para. 1141).

[2613] Costa Rica's first written submission, para. 1144.

[2614] Costa Rica's first written submission, para. 1147; second written submission, para. 385 (quoting Panama's response to Panel question No. 95, para. 267).

[2615] Costa Rica's first written submission, para. 1148 (quoting OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), pp. 8 and 205); second written submission, para. 386.

[2616] Costa Rica's first written submission, para. 1149 (quoting OIRSA, *Foc TR4 risk analysis* (2019) (Exhibit CRI-123), p. 205); second written submission, para. 386.

[2617] Costa Rica's first written submission, paras. 1150-1151 (quoting SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019) (Exhibit CRI-190); SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191)); second written submission, para. 386.

[2618] Costa Rica's first written submission, para. 1148; second written submission, para. 387.

[2619] Costa Rica's first written submission, para. 1152; second written submission, para. 388.

[2620] Costa Rica's first written submission, paras. 1144 (with respect to the technical review of the PIR) and 1147 (with respect to Foc TR4). Costa Rica notes that various panels have considered that "any measure imposing conditions upon importation, even if stringent, 'would still be significantly less restrictive to trade than an outright prohibition'". (Ibid. (quoting Panel Reports, *Russia – Pigs (EU)*, para. 7.829, in turn quoting Panel Report, *India – Agricultural Products*, para. 7.590; *Australia – Salmon*, para. 8.182)). See also Costa Rica's second written submission, para. 384.

7.6.1.4.1.2 Panama

7.1319. Panama maintains that Measure 4 is exempt from the obligations established under Articles 2.2 and 5.6 of the SPS Agreement, given that it is a provisional measure covered by Article 5.7 of the SPS Agreement.[2621]

7.1320. Panama adds that, even if Article 5.6 did apply to Measure 4, Costa Rica has not demonstrated the feasibility of the alternative measure proposed.[2622]

7.1321. Panama submits that, as of October 2019, it was unable to determine whether the PIR in Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012 were sufficient to achieve its ALOP because *in situ* inspections were required to assess the relevant risk. In this respect, Panama claims that it adopted a highly restrictive ALOP for Foc TR4 when the pest's presence in Latin America was confirmed. According to Panama, its ALOP, unlike the ALOP reflected in the OIRSA PRA, did not allow it to assess the risk of transmission of Foc TR4 through the importation of Costa Rican plantains and bananas in the absence of physical inspections and verification of the conditions and practices at production sites and packing plants in Costa Rica.[2623]

7.6.1.4.2 Assessment by the Panel

7.6.1.4.2.1 Relevant legal standard

7.1322. In order to determine whether Measure 4 is inconsistent with Article 5.6, in accordance with the legal standard set out above[2624], the Panel will analyse whether the alternative measure proposed by Costa Rica meets the three requirements in footnote 3 to Article 5.6, i.e. that (a) it is reasonably available taking into account technical and economic feasibility; (b) it achieves Panama's ALOP; and (c) it is significantly less restrictive to trade than Measure 4.

7.1323. With regard to Costa Rica's consequential claim under Article 2.2, the Panel recalls that, based on the similarities between Articles 2.2 and 5.6, in previous disputes a finding of inconsistency with Article 5.6 has been interpreted to result in a rebuttable presumption of inconsistency with Article 2.2.[2625]

7.1324. The Panel shares the assessments of the legal standard applicable under Articles 5.6 and 2.2 set out in section 7.3.1.3.2.1 on Measure 1 and will proceed with its analysis on that basis.

7.1325. The Panel will now address Costa Rica's claims under Articles 5.6 and 2.2 with respect to Measure 4. The Panel will consider, first, whether Costa Rica has demonstrated that an alternative to Measure 4 exists that meets the three cumulative requirements set out in footnote 3 to Article 5.6 of the SPS Agreement. Subsequently, the Panel will consider Costa Rica's consequential claim under Article 2.2 of the Agreement.

7.6.1.4.2.2 Whether Measure 4 is inconsistent with Article 5.6 of the SPS Agreement

Alternative measure proposed by Costa Rica

7.1326. Costa Rica submits that the alternative measure to Measure 4 consists of applying the PIR provided for in Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012.[2626] These Resolutions required the issue of a phytosanitary certificate, in addition to compliance with other

[2621] Panama's first written submission, paras. 166 and 435-436; second written submission, para. 238.
[2622] Panama's comments on Costa Rica's response to Panel question No. 105, para. 21.
[2623] Panama's responses to Panel question No. 197, paras. 246-249, No. 226, paras. 333-334, and No. 227, paras. 335-336.
[2624] See section 7.3.1.3.2.1 above.
[2625] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; and Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; and *Russia – Pigs (EU)*, paras. 7.841 and 7.846.
[2626] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96); Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98).

requirements related to the production, harvesting, packing, and transportation of the product.[2627] Costa Rica asserts that it has complied with this certification requirement for years.[2628] For Costa Rica, irrespective of the objective that the Panel may consider that Measure 4 seeks to achieve, this same alternative measure demonstrates that Measure 4 is more restrictive than required.

7.1327. Panama considers that Measure 4 is exempt from the obligations established under Articles 5.6 and 2.2, and asserts that, even if those articles applied to Measure 4, Costa Rica has not demonstrated the feasibility of the alternative measure proposed.[2629]

7.1328. The Panel observes that Panama's arguments that the alternative measure would not achieve Panama's ALOP[2630] centre around the risk of introduction of Foc TR4. Given that the ALOP is also referred to as the "acceptable level of *risk*"[2631], the risk that a Member is seeking to address affects any assessment of an alternative measure and, in particular, whether that measure achieves the Member's ALOP.

7.1329. In this respect, the Panel recalls that the risk that the Member imposing the measure is seeking to address also forms part of determining the objective of the measure. The Panel also recalls its finding in paragraph 7.1213 above that, as was communicated to Costa Rica in the notes of October 2019, the reason why Panama adopted Measure 4 was the initiation of a review of the resolutions containing the PIR for Costa Rican plantains and bananas, and the approval of plantain packing plants. Accordingly, the Panel considered that the objective of Measure 4 is to protect against the risks that Panama sought to address through this review and approval process. In the Panel's view, 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 into Panamanian territory. In view of these findings concerning the objective of Measure 4, the Panel will focus its analysis under Article 5.6 on the objective of phytosanitary protection against the risks that Panama sought to address by reviewing the relevant resolutions and approving plantain packing plants. Accordingly, the Panel will not address the arguments that the parties have made in relation to the risk of introduction of Foc TR4 into Panamanian territory.

7.1330. Although Panama's arguments, in particular those relating to the relevant ALOP, do not address the scenario in which the Panel does not accept that the reason for Measure 4 was Foc TR4, the Panel must be satisfied that Costa Rica has made a *prima facie* case that Measure 4 is inconsistent with Article 5.6 of the SPS Agreement.[2632]

Whether the alternative measure is reasonably available

7.1331. Costa Rica submits that the alternative measure is reasonably available, taking into account technical and economic feasibility. For Costa Rica, this measure is not "merely theoretical in nature", nor does it impose "an undue burden" on Panama, such as "prohibitive costs or substantial technical difficulties", as Panama had been applying Resolution AUPSA-DINAN-106-2009 for almost a decade and Resolution AUPSA-DINAN-019-2012 for more than seven years.[2633]

7.1332. The Panel recalls that, in previous disputes, it has been deemed that existing use of the measure, even if in a different context, weighs in favour of a finding of feasibility.[2634] The Panel also recalls that Panama considers that the Panel should treat this approach by the panel in

[2627] Resolution AUPSA-DINAN-106-2009 concerning the importation of plantains (Exhibit CRI-96), Article 3; Resolution AUPSA-DINAN-019-2012 concerning the importation of bananas (Exhibit CRI-98), Article 3.

[2628] Costa Rica's first written submission, paras. 1150-1151 (quoting SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019) (Exhibit CRI-190); SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191)); second written submission, para. 386.

[2629] Panama's comments on Costa Rica's response to Panel question No. 105, para. 21.

[2630] Panama's responses to Panel question No. 197, paras. 246-249, No. 226, paras. 333-334, and No. 227, paras. 335-336.

[2631] Note to the definition of ALOP in Annex A(5) to the SPS Agreement. (italics added)

[2632] The Panel notes that a claim must not be ruled on before the party bearing the burden of proof has made a *prima facie* case. (See e.g. Panel Report, *US – Shrimp (Ecuador)*, paras. 7.9-7.10).

[2633] Costa Rica's first written submission, para. 1136 (quoting Appellate Body Report, *Colombia – Textiles*, para. 5.74).

[2634] Panel Report, *Korea – Radionuclides*, para. 7.144 (referring to Panel Reports, *India – Agricultural Products*, paras. 7.541-7.542; *Japan – Apples (Article 21.5 – US)*, para. 8.187).

Korea – Radionuclides with caution, as it was not based on a substantive assessment of the measure at issue and the alternative measure.[2635] According to Panama, an alternative that is technically and economically feasible in one context may not be so in other contexts. Panama adds that neither of the two reports referred to by the panel in *Korea – Radionuclides*, i.e. *Japan – Apples (Article 21.5 – US)* and *India – Agricultural Products*, support its claim.[2636]

7.1333. As explained in paragraphs 7.832-7.833 above, the Panel sees no reason not to take into consideration the findings of the panel in *Korea – Radionuclides* concerning the use of a measure by the importing country and its implications when analysing the availability of an alternative measure to that Member. Furthermore, the Panel understands that Panama's central argument is that a measure that is technically and economically feasible in one context may not be so in other contexts. However, the alternative measure in the present case has been used in the same context as that in which Costa Rica is proposing that it be used again, i.e. to regulate imports of plantains and bananas from Costa Rica.

7.1334. The Panel considers that the fact that Panama has in the past applied the alternative measure consisting of applying Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012 is proof that the measure in question would be available to Panama, from a technical and economic point of view. Moreover, Panama has not demonstrated that the circumstances in which plantains and bananas are imported from Costa Rica had changed in October 2019 such that the measure in question was no longer technically or economically feasible. In the light of the previous use of the alternative measure, and in the absence of any rebuttal by Panama, the Panel considers that, in the specific context of plantain and banana imports from Costa Rica, the alternative measure is technically and economically feasible.

7.1335. Based on the foregoing, the Panel concludes that Costa Rica has demonstrated that the alternative measure is reasonably available taking into account technical and economic feasibility, within the meaning of footnote 3 to Article 5.6.

7.1336. The Panel will now analyse whether the alternative measure identified by Costa Rica achieves Panama's ALOP.

Whether the alternative measure achieves Panama's ALOP

7.1337. In accordance with the legal standard described above[2637], the Panel will first identify Panama's ALOP in order to then compare it to the level of protection that the alternative measure would achieve.

Panama's ALOP

7.1338. Panama asserts that its ALOP for plant health, including in relation to imports of Costa Rican plantains and bananas, consists of "preventing and monitoring, in a comprehensive manner" and, as a result, totally avoiding "the introduction, establishment and spread of pests of plants and plant products within the territory of the Republic of Panama". According to Panama, this ALOP is expressly set out in Law No. 47 of 9 July 1996, and is implemented specifically through the applicable PIR.[2638]

7.1339. Costa Rica submits that Panama did not identify its ALOP with sufficient precision[2639], and requests the Panel bear in mind, when assessing or determining Panama's ALOP, that Panama's

[2635] Panama's response to Panel question No. 105, para. 20 (referring to Panel Report, *Korea – Radionuclides*, paras. 7.145-7.149); comments on Costa Rica's response to Panel question No. 105, para. 22.

[2636] Panama's response to Panel question No. 105, paras. 20-22.

[2637] See paras. 7.333 and 7.336 above.

[2638] Panama's response to Panel question No. 95, para. 267 (quoting Legislative Assembly of Panama, Law No. 47 of 9 July 1996 (Exhibit PAN-98), Articles 1, 2.2, and 8).

[2639] Costa Rica's first written submission, para. 1138.

actions are inconsistent with the objective of minimizing the negative impact on trade, as provided for in Article 5.4 of the SPS Agreement.[2640]

7.1340. The Panel observes that the provisions of Law No. 47 of 9 July 1996 referring to the "overriding objective of preventing and monitoring, in a comprehensive manner, [p]hytosanitary issues" and "preventing the introduction, establishment, and spread of pests of plants and plant products"[2641] may inform Panama's relevant ALOP.[2642] As mentioned in the context of Measure 3, it may be considered that, as often happens, Panama has identified a generic ALOP for preventing the entry, establishment and spread of pests of plants and plant products.[2643]

7.1341. In the Panel's view, in the case of Measure 4 it is difficult to say precisely what Panama's ALOP is, given that the notes through which Panama informed Costa Rica of that measure do not mention any specific pest, such as Foc TR4.[2644] The Panel recalls that the objective of Measure 4 is to protect against the risks that Panama sought to address by revising the resolutions containing the PIR for Costa Rican plantains and bananas and the approval of plantain packing plants. As a result, in the light of the risk that Panama is seeking to address, Panama's ALOP may be defined as preventing the entry, establishment and spread of pests of interest to Panama that may affect plantains and bananas.

Level of protection achieved by the alternative measure

7.1342. The Panel will now consider whether the alternative measure achieves Panama's ALOP as identified in paragraph 7.1340 above. To this end, the Panel will compare Panama's ALOP with the level of protection that would be achieved by the alternative measure proposed by Costa Rica.

7.1343. Costa Rica maintains that the alternative measure would be sufficient to achieve Panama's ALOP, even assuming it to be very high[2645], for the following reasons: (a) in October 2019, no new risk arose associated with the revision of the phytosanitary requirements[2646]; (b) the lack of approval of packing plants had not previously prevented imports of plantain from Costa Rica[2647]; and (c) Costa Rica has always complied with the requirements of Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012, including the phytosanitary certification requirement and the requirement that "[t]he consignment [be] free from live insects of any kind, as well as of other contaminants [] including soil" and of "leaves or any other plant debris", which could potentially be host to pests such as Foc TR4.[2648]

7.1344. In essence, Costa Rica argues that there are no new risks or breaches of the PIR. As a result, according to Costa Rica, the level of risk relating to imports of plantains and bananas from

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[2640] Costa Rica's first written submission, para. 1139. However, given the "exhortatory nature" of the provision, Costa Rica is not requesting the Panel make findings of inconsistency with Article 5.4. (Costa Rica's response to Panel question No. 67, paras. 3.31-3.32).

[2641] Legislative Assembly of Panama, Act No. 47 of 9 July 1996 (Exhibit PAN-98), Articles 1 and 2. As mentioned, Panama claims that its ALOP consists of "*totally* avoiding 'the introduction, establishment and spread of pests of plants and plant products within the territory of the Republic of Panama.'" (Panama's response to Panel question No. 95, para. 267). (emphasis added) The Panel observes that the word "totally" does not appear in the provisions of Law No. 47 of 1996, which sets out Panama's phytosanitary protection objectives.

[2642] The Panel recalls that the relevant guidelines of the SPS Committee state that an indication of a Member's ALOP "may be contained in a published statement or other text generally available to interested parties". Examples might include government policy statements with regard to ALOPs in response to certain risks, or documents on animal health protection objectives, or with respect to plant protection. (Guidelines to further the practical implementation of Article 5.5, G/SPS/15, 18 July 2000, para. A.1). See fn 808 above.

[2643] See para. 7.1126 above.

[2644] Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97). See also paras. 7.1208-7.1214 above.

[2645] Costa Rica's first written submission, paras. 1137, 1140, and 1142.

[2646] Costa Rica's first written submission, para. 1142.

[2647] Costa Rica's first written submission, para. 1143.

[2648] Costa Rica's first written submission, paras. 1150-1151. See also ibid. para. 1144. Costa Rica's argument relating to the requirement that "[t]he consignment [be] free from live insects of any kind, as well as of other contaminants [] including soil" and of "leaves or any other plant debris" forms part of its line of argument in the event that the Panel might consider that the objective of Measure 4 is to prevent the introduction of Foc TR4 into Panama. However, this argument also addresses the possible risk of other pests that could affect plantain and banana, the Panel therefore considers it pertinent to mention it.

Costa Rica has not changed, and the resolutions previously applicable would still allow Panama's ALOP to be achieved. Costa Rica's arguments seem to indicate that the issue of whether the alternative measure meets Panama's ALOP would depend on whether there had been any change in the risk associated with plantain and banana imports from Costa Rica that would explain why the PIR that were being applied no longer achieve Panama's ALOP.

7.1345. As mentioned above, the Panel considers that the level of risk posed by imports may be relevant to whether a measure would achieve a Member's ALOP.[2649]

7.1346. The Panel recalls that nothing in the record indicates that new or unexpected phytosanitary circumstances have arisen with respect to imports of Costa Rican plantains and bananas.[2650] Furthermore, the Panel observes that Panama's ALOP for plantain and banana imports has not changed since the adoption of Measure 4.[2651] Given that there is no evidence in the record that the relevant phytosanitary situation has changed, the Panel considers that applying Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012 still makes it possible to prevent, to the same extent as before October 2019, the entry, establishment, and spread of pests of interest to Panama that affect plantain and banana. In this respect, the Panel also observes that, according to ISPM 11, the issuance of phytosanitary certificates provides official assurance that a consignment is considered to be free from the quarantine pests specified by the importing country and to conform with its PIR.[2652]

7.1347. Accordingly, the Panel concludes that Costa Rica has demonstrated that the alternative measure it proposes would achieve Panama's ALOP.

7.1348. The Panel will now analyse the third requirement in footnote 3 to Article 5.6, which consists of determining whether the alternative measure identified by Costa Rica is significantly less restrictive to trade than Measure 4.

Whether the alternative measure is significantly less restrictive to trade

7.1349. Costa Rica submits that the alternative measure would enable "considerably wider access to the market" than Measure 4.[2653] Costa Rica adds that phytosanitary certificates are the standard measure recognized by the IPPC and regulated by ISPM 12.[2654] Panama has not responded to these arguments made by Costa Rica.

7.1350. The Panel recalls that, in order for alternative measures to meet the requirements of footnote 3 to Article 5.6, the difference in terms of restrictiveness must be significant.[2655]

7.1351. Measure 4 consists of temporarily inactivating the resolutions containing the PIR for Costa Rican plantains and bananas.[2656] As a result, Measure 4 makes it impossible to import Costa Rican plantains and bananas into Panama, and implies the highest degree of restriction possible.[2657]

7.1352. On the other hand, the alternative measure proposed by Costa Rica, which consists of requiring a certificate issued by Costa Rica's NPPO, in addition to compliance with the other PIR, allows imports. In the Panel's view, for exporters there would be a notable difference between the inability to export, on the one hand, and the ability to export, albeit subject to the PIR established in Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012, on the other. As a result, the Panel considers that the alternative measure is significantly less restrictive to trade than an import

[2649] See para. 7.388 above.
[2650] See para. 7.1286 above.
[2651] Panama's response to Panel question No. 95, para. 267.
[2652] IPPC, ISPM 11 (Exhibit CRI-142). See also SFE, Phytosanitary export certificate for bananas from Costa Rica (4 July 2019) (Exhibit CRI-190); SFE, Phytosanitary export certificate for plantains from Costa Rica (21 September 2019) (Exhibit CRI-191).
[2653] Costa Rica's first written submission, para. 1144.
[2654] Costa Rica's first written submission, para. 1144 (quoting IPPC, ISPM 12 (Exhibit CRI-170)).
[2655] See para. 7.336 above.
[2656] See paras. 2.19-2.20 above.
[2657] See fn 911 above.

prohibition.[2658] ISPM 12 confirms this, since, as Costa Rica asserts, it states that phytosanitary certification "*facilitates* international trade in plants, plant products and other regulated articles by providing an internationally agreed document and related procedures".[2659]

7.1353. Accordingly, the Panel concludes that Costa Rica has demonstrated that the alternative measure identified by Costa Rica would be significantly less restrictive to trade than Measure 4.

7.6.1.4.2.3 Conclusion on Article 5.6 of the SPS Agreement

7.1354. In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the alternative measure to Measure 4 that it proposes meets the three requirements in footnote 3 to Article 5.6, given that it is reasonably available taking into account technical and economic feasibility, achieves Panama's ALOP, and is significantly less restrictive to trade.

7.1355. Accordingly, the Panel finds that Costa Rica has demonstrated that Measure 4 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP.

7.6.1.4.2.4 Whether Measure 4 is inconsistent with Article 2.2 of the SPS Agreement

7.1356. The Panel agrees with what has been said in previous disputes to the effect that a finding that a measure is more trade-restrictive than required to achieve a Member's ALOP, in breach of Article 5.6, leads to a rebuttable presumption of inconsistency with the obligation in Article 2.2 to ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health.[2660] The Panel considers that this rebuttable presumption arises in the present case, owing to its finding that Measure 4 is inconsistent with Article 5.6 of the SPS Agreement.[2661] Panama has not presented any arguments to rebut this presumption of inconsistency with Article 2.2.

7.1357. Accordingly, in the light of its finding that Measure 4 is inconsistent with Article 5.6 of the SPS Agreement, and in the absence of any rebuttal by Panama of the presumption of inconsistency with Article 2.2 of the SPS Agreement, the Panel finds that Measure 4 is inconsistent with Article 2.2, because it is not applied only to the extent necessary to protect plant life or health.

7.6.1.4.2.5 Conclusion on Article 2.2 of the SPS Agreement

7.1358. In the light of the foregoing, the Panel finds that Measure 4 is inconsistent with Article 2.2 because it is not applied only to the extent necessary to protect plant life or health.

7.6.1.5 Claims under Article 3.1 of the SPS Agreement

7.6.1.5.1 Main arguments of the parties

7.6.1.5.1.1 Costa Rica

7.1359. Costa Rica claims that Measure 4, adopted because of a process for the technical review of the PIR for plantain and banana, is inconsistent with Article 3.1 of the SPS Agreement, as it is not based on ISPM 2 and ISPM 20.[2662] Costa Rica submits that these standards are relevant to Measure 4, given that Measure 4 is a phytosanitary measure and that, pursuant to Annex A(3)(c) to

[2658] The Panel recalls that an alternative measure that imposes conditions on importation but allows trade may be considered significantly less restrictive than another that does not permit it. (See Panel Reports, *Australia – Salmon*, para. 8.182; *India – Agricultural Products*, paras. 7.590 and 7.595-7.596).

[2659] IPPC, ISPM 12 (2022) (Exhibit CRI-402), p. 7. (italics added)

[2660] Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38; and Panel Reports, *India – Agricultural Products*, paras. 7.603 and 7.614-7.615; and *Russia – Pigs (EU)*, paras. 7.841 and 7.846.

[2661] See para. 7.1354 above.

[2662] Costa Rica's panel request, p. 7; first written submission, paras. 1109 and 1120; and second written submission, para. 372. See Costa Rica's first written submission, para. 1115 (referring to IPPC, ISPM 2 (Exhibit CRI-101); IPPC, ISPM 20 (Exhibit CRI-161)); second written submission, para. 373.

the SPS Agreement, international standards, guidelines, and recommendations for plant health are those developed under the auspices of the IPPC Secretariat.[2663]

7.1360. Costa Rica asserts that ISPM 2 provides that, when carrying out a national review of phytosanitary regulations, requirements or operations, "[f]or existing trade, no new measures should be applied until the revision or new PRA has been completed, unless this is warranted by new or unexpected phytosanitary situations that may necessitate emergency measures".[2664] According to Costa Rica, pursuant to ISPM 20, "[e]mergency action may be required in a new or unexpected phytosanitary situation, such as the detection of quarantine pests or potential quarantine pests"; and the prohibition of import "should be used when no alternatives for pest risk management exist" and should be reserved for "case[s] of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".[2665]

7.1361. Costa Rica submits that Panama did not base Measure 4 on these standards, given that it adopted a "prohibition on the import of plantains and bananas from Costa Rica".[2666] Costa Rica asserts that Measure 4 is not the measure foreseen by ISPM 2 and ISPM 20 in situations when a country undertakes a review or revision of its phytosanitary requirements. According to Costa Rica, imposing an import *prohibition* in cases where an international standard provides for the *continuation* of trade amounts to a contradiction of the international standard, so logically the measure is not based on that international standard.[2667]

7.1362. Furthermore, Costa Rica submits that, even if the Panel were to find that the reason for Measure 4 is to prevent the introduction of Foc TR4, Measure 4 would still be a phytosanitary measure that is not based on ISPM 2 and ISPM 20, contrary to Article 3.1 of the SPS Agreement.[2668] According to Costa Rica, as of October 2019 and with respect to Foc TR4, no "new or unexpected" situation had arisen with regard to Costa Rica's phytosanitary status, i.e. as a territory from which the pest is absent, that would warrant an emergency measure in accordance with ISPM 2 and ISPM 20. In this sense, Costa Rica notes that Panama had not reported any "detection" of the pest, "repeated non-compliance" or "significant non-compliance" in plantain and banana imports from Costa Rica.[2669] Costa Rica submits that, therefore, Measure 4 would not have "a very strong and very close relationship" with the IPPC Standards, such that those standards could not form "the basis for" Panama's measure.[2670]

7.6.1.5.1.2 Panama

7.1363. Panama submits that Costa Rica cannot establish a violation under Article 3.1 of the SPS Agreement, as Article 5.7 requires that Members base their SPS measures on available pertinent information, including that from the relevant international organizations, but does not require Members to base provisional measures on international standards.[2671] In Panama's view, this is especially the case when the scientific information that a Member requires to perform a risk assessment was not examined as part of the process that led to the adoption of the international standard or guideline.[2672]

[2663] Costa Rica's first written submission, paras. 1112-1113.

[2664] Costa Rica's first written submission, para. 1116 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8); second written submission, para. 373.

[2665] Costa Rica's first written submission, para. 1117 (quoting IPPC, ISPM 20 (Exhibit CRI-161), pp. 14 and 22-23): second written submission, para. 373.

[2666] Costa Rica's first written submission, para. 1118.

[2667] Costa Rica's first written submission, paras. 1118-1119. See also ibid. para. 1114 (referring to Panel Reports, *India – Agricultural Products*, paras. 7.270-7.274; and *Korea – Radionuclides*, para. 7.100, in turn referring to Appellate Body Report, *EC – Sardines*, para. 248; and Appellate Body Report, *India – Agricultural Products*, para. 5.111); Costa Rica's second written submission, paras. 375-376.

[2668] Costa Rica's first written submission, paras. 1121-1123.

[2669] Costa Rica's first written submission, para. 1123 (quoting IPPC, ISPM 2 (Exhibit CRI-101), p. 8; ISPM 20 (Exhibit CRI-161), pp. 22-23); second written submission, para. 375.

[2670] Costa Rica's first written submission, para. 1124 (quoting Appellate Body Report, *EC – Sardines*, para. 245).

[2671] Panama's first written submission, para. 438.

[2672] Panama's responses to Panel question No. 71, para. 204, and No. 75, para. 214.

7.6.1.5.2 Assessment by the Panel

7.1364. The Panel recalls that Article 3.1 provides that "Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3".

7.1365. The Panel has found that Measure 4 is not covered by Article 5.7 of the SPS Agreement.[2673] In its analysis under that provision, the Panel concluded that nothing in the record indicated that any new or unexpected phytosanitary situations referred to in the section of ISPM 2 that Costa Rica also cites under Article 3.1 have arisen.[2674] The Panel has also found that Measure 4 is inconsistent with Articles 5.1, 5.2, 5.3, 2.2, and 5.6 of the SPS Agreement.[2675] These findings relate to both the scientific basis as well as the trade-restrictiveness and necessity of Measure 4.

7.1366. Therefore, the Panel considers that, under the circumstances of this dispute, the abovementioned findings are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[2676] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under Article 3.1 with respect to Measure 4, and decides to exercise judicial economy in respect of those claims.

7.6.1.6 Claims under Article 7 of and Annex B of the SPS Agreement

7.6.1.6.1 Main arguments of the parties

7.6.1.6.1.1 Costa Rica

7.1367. In its panel request, Costa Rica claims that all of the measures at issue are inconsistent with Article 7 and Annex B(1) of the SPS Agreement, "because Panama failed to meet its transparency and publication obligations in relation to each of the measures at issue".[2677]

7.1368. In its first written submission, Costa Rica submits that Panama acted inconsistently with the obligation under Annex(B)(5)(b), or, alternatively, under Annex(B)(6)(a). Costa Rica requests the Panel to find that Panama acted inconsistently with Article 7 as a consequence of the inconsistency with Annex B.[2678]

7.1369. Costa Rica argues that its panel request also includes a claim under Article 7 of the SPS Agreement, which "can be applied independently of Annex B".[2679] Costa Rica adds that, in the event that the Panel were to consider that Article 7 can be invoked independently of Annex B, the Panel would have all of the elements necessary to "find that Panama failed to notify the prohibitions to the WTO".[2680]

7.6.1.6.1.2 Panama

7.1370. Panama notes that Costa Rica's first written submission does not contain any claim under Annex B(1) with respect to Measure 1.[2681]

[2673] See para. 7.1293 above.
[2674] See para. 7.1286 above.
[2675] See paras. 7.1309 (with respect to Articles 5.1, 5.2, 5.3, and 2.2), 7.1355 (with respect to Article 5.6), and 7.1358 (with respect to Article 2.2) above.
[2676] See Articles 3.4, 3.7, 11, and 21.1 of the DSU. The Panel notes that previous panels have refrained from making findings with respect to claims under Article 3 following a finding that the measure at issue is inconsistent with other provisions of the SPS Agreement, namely, Articles 2.2, 2.3, 5.1, 5.5, and 5.6. (Panel Reports, *Australia – Salmon*, para. 8.184; *Costa Rica – Avocados (Mexico)*, para. 7.2285).
[2677] Costa Rica's panel request, p. 7. Costa Rica also states that the inconsistency of the measures at issue with Article 7 and Annex B(1) "also gives rise to a violation of Article X:1 of the GATT 1994, since Panama failed to publish laws, regulations and administrative rulings of general application pertaining to requirements, restrictions or prohibitions on imports". (Ibid.).
[2678] Costa Rica's first written submission, para. 507.
[2679] Costa Rica's response to Panel question No. 66, paras. 3.25 and 3.28.
[2680] Costa Rica's response to Panel question No. 106, paras. 2.15-2.17.
[2681] Panama's first written submission, para. 33.

7.1371. Panama also submits that Costa Rica's claims under Article 7 and Annex B(5)(b) and Annex B(6)(a) of the SPS Agreement are not within the Panel's terms of reference.[2682]

7.6.1.6.2 Assessment by the Panel

7.1372. The Panel recalls that, in its analysis of Costa Rica's claims under Article 7 and Annex B with respect to Measure 1, it has noted that:

a. In its preliminary ruling of 5 April 2023, the Panel found that claims under Annex B(5)(b) and Annex B(6)(a) of the SPS Agreement fall outside the Panel's terms of reference.[2683]

b. Annex B elaborates on the obligations that must be met under Article 7 and, consequently, Annex B and Article 7 are intertwined and must be read together.[2684]

c. In these proceedings, Costa Rica has not advanced any argument to support its claim concerning the publication of the measures at issue under Article 7 and Annex B(1).[2685]

7.1373. Therefore, in the absence of any argumentation by Costa Rica, the Panel considers that Costa Rica has failed to demonstrate that Measure 4 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations established thereunder.

7.6.1.6.3 Conclusion on Article 7 of and Annex B.1 of the SPS Agreement

7.1374. In view of the foregoing, the Panel finds that Costa Rica has failed to demonstrate that Measure 4 is inconsistent with Article 7 of and Annex B(1) of the SPS Agreement.

7.6.1.7 Claims under Articles 1.1 and 2.1 of the SPS Agreement

7.6.1.7.1 Main arguments of the parties

7.1375. Costa Rica claims that Measure 4 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement. In the light of all the inconsistencies that, according to Costa Rica, it has demonstrated, Costa Rica requests the Panel to find that Panama has, consequently, acted inconsistently with its obligations under Articles 1.1 and 2.1 of the SPS Agreement.[2686]

7.1376. Panama submits that Costa Rica cannot establish claims under Articles 1.1 and 2.1, as it has not demonstrated that Measure 4 is inconsistent with the provisions of the SPS Agreement.[2687]

7.6.1.7.2 Assessment by the Panel

7.1377. The Panel recalls the general obligation under Articles 1.1 and 2.1 of the SPS Agreement that any SPS measure must be consistent with the provisions of the SPS Agreement. The Panel also recalls that previous panels found a measure at issue to be inconsistent with Articles 1.1 and 2.1 after having found it to be inconsistent with any of the obligations under the SPS Agreement.[2688]

7.1378. The Panel has found that Measure 4 is inconsistent with Articles 5.1, 5.2, 5.3, 2.2, and 5.6 of the SPS Agreement.[2689] Consequently, the Panel finds that Measure 4 is inconsistent with

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[2682] Panama's first written submission, para. 17.
[2683] See para. 7.421 above (referring to the Panel's preliminary ruling of 5 April 2023, para. 5.1(b)).
[2684] See paragraph 7.423 above (referring to Panel Reports, *India – Agricultural Products*, para. 7.741; *Russia – Pigs (EU)*, para. 7.1416).
[2685] See para. 7.424 above.
[2686] Costa Rica's panel request, p. 6; first written submission, paras. 1221-1224; and second written submission, paras. 405-406.
[2687] Panama's first written submission, para. 443; second written submission, para. 245.
[2688] See para. 7.430 above.
[2689] See paras. 7.1309 (with respect to Articles 5.1, 5.2, 5.3, and 2.2), 7.1355 (with respect to Article 5.6), and 7.1358 (with respect to Article 2.2) above.

Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement.

7.6.2 Claims under the GATT 1994 and the Agreement on Agriculture

7.6.2.1 Main arguments of the parties

7.6.2.1.1 Costa Rica

7.1379. Costa Rica claims that Measure 4 is inconsistent with Article XI:1 of the GATT 1994, as this measure: (a) falls within the broad residual category of "other measures" that may be challenged under Article XI:1 of the GATT 1994; and (b) amounts to an import prohibition, since Panama's decision to inactivate imports of plantains and bananas constitutes "a legal ban on the trade or importation of a specified commodity".[2690]

7.1380. Costa Rica also claims that Measure 4 is inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture. According to Costa Rica, the Agreement on Agriculture applies to Measure 4, as plantains and bananas are agricultural products classified under Chapter 8 of the Harmonized System. Costa Rica argues that the violation of Article XI:1 of the GATT 1994 implies a violation of the obligation not to resort to quantitative import restrictions or similar border measures on agricultural products, set forth in Article 4.2 and footnote 1 of the Agreement on Agriculture.[2691]

7.6.2.1.2 Panama

7.1381. Panama submits that Costa Rica "has not established its claims" under Article XI:1 of the GATT 1994 and Article 4.2 and footnote 1 of the Agreement on Agriculture.[2692]

7.6.2.2 Assessment by the Panel

7.1382. With respect to the claims under the GATT 1994, the Panel observes that previous panels have recognized that the relationship between the SPS Agreement and the GATT 1994 could lead to circular reasoning that does not contribute to securing a positive solution to the dispute. Those panels have considered that any findings of inconsistency with GATT 1994 provisions would also require an examination of whether the measure was justified under Article XX(b) of the GATT 1994, which refers to measures necessary to protect human, animal or plant life or health.[2693] The Panel agrees with this reasoning and recalls that the SPS Agreement is an extension of Article XX(b) of the GATT 1994.[2694]

7.1383. Furthermore, the Panel recalls that it has found that Measure 4 is inconsistent with Articles 5.1, 5.2, 5.3, 2.2, and 5.6 of the SPS Agreement.[2695] These findings relate both to the scientific basis and to the necessity and trade-restrictiveness of Measure 4.

7.1384. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[2696] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the GATT 1994, and decides to exercise judicial economy in respect of those claims.[2697]

[2690] Costa Rica's first written submission, paras. 1237-1241; second written submission, paras. 574-577.
[2691] Costa Rica's first written submission, paras. 1242-1246; second written submission, paras. 578-582.
[2692] Panama's second written submission, para. 246. See also Panama's first written submission, para. 443.
[2693] Panel Reports, *Australia – Salmon*, para. 7.19; *US – Poultry (China)*, para. 7.481; *US – Animals*, para. 7.730; and *Costa Rica – Avocados (Mexico)*, para. 7.2318.
[2694] See fn 953 above.
[2695] See paras. 7.1309 (with respect to Articles 5.1, 5.2, 5.3, and 2.2), 7.1355 (with respect to Article 5.6), and 7.1358 (with respect to Article 2.2) above.
[2696] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.
[2697] In previous disputes in which measures were challenged under the SPS Agreement and the GATT 1994, the panels applied the principle of judicial economy with respect to the claims under the GATT 1994 after having found inconsistencies with the provisions of the SPS Agreement. See e.g. Panel Reports, *EC – Hormones (Canada)*, para. 8.275; *EC – Hormones (US)*, para. 8.272; *Australia – Salmon*,

7.1385. With respect to the claims under the Agreement on Agriculture, the Panel notes that, according to Costa Rica, the inconsistency of Measure 4 with Article 4.2 and footnote 1 of the Agreement on Agriculture stems from its inconsistency with Article XI:1 of the GATT 1994. The Panel recalls that it has decided to exercise judicial economy with respect to Costa Rica's claims under the GATT 1994. Furthermore, the Panel has addressed the issue of the trade-restrictiveness of Measure 4 in relation to Article 5.6 of the SPS Agreement. The Panel considers that, under the circumstances of this dispute, the findings above are sufficient to enable the DSB to make recommendations or rulings that achieve a satisfactory settlement of the matter and that are sufficiently precise to ensure prompt compliance therewith.[2698] Accordingly, the Panel does not deem it necessary to address Costa Rica's claims under the Agreement on Agriculture, and decides to exercise judicial economy in respect of these claims.[2699]

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. Regarding its terms of reference:

i. Costa Rica's panel request is not inconsistent with the requirement under Article 6.2 of the DSU to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly";

ii. Costa Rica's claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement are outside the Panel's terms of reference; and

iii. the procedures related to Measures 1, 3, and 4 challenged by Costa Rica are outside the Panel's terms of reference.

b. Regarding the measure concerning the importation of strawberries (Measure 1):

i. the SPS Agreement is applicable to Measure 1 because the measure constitutes an SPS measure within the meaning of Annex A(1)(b) to the SPS Agreement and directly affects international trade within the meaning of Article 1.1 of the SPS Agreement;

ii. Measure 1 does not constitute a provisional measure covered by Article 5.7 of the SPS Agreement because Panama has not demonstrated that it adopted the measure in a situation of insufficient relevant scientific evidence or on the basis of available pertinent information, in breach of two of the requirements under Article 5.7;

iii. Measure 1 is inconsistent with Article 5.1 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to human health, taking into account risk assessment techniques developed by the relevant international organizations;

iv. Measure 1 is inconsistent with Article 5.2 of the SPS Agreement because, in the absence of a risk assessment, Panama did not take into account the elements listed in this provision in the assessment of risks;

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para. 8.185; *Japan – Apples*, para. 8.328; *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 6.3429; *India – Agricultural Products*, para. 7.803; *US – Animals*, paras. 7.731 and 7.732; and *Costa Rica – Avocados (Mexico)*, para. 7.2319.

[2698] See Articles 3.4, 3.7, 11, and 21.1 of the DSU.

[2699] The panel in *Japan – Apples*, in which measures were challenged under the SPS Agreement and the Agreement on Agriculture, applied the principle of judicial economy in respect of the claims under the Agreement on Agriculture, after having found inconsistencies with the provisions of the SPS Agreement. (See Panel Report, *Japan – Apples*, para. 8.332). The panel in *US – Poultry (China)*, in which measures were challenged under the SPS Agreement, the GATT 1994, and the Agreement on Agriculture, applied the principle of judicial economy in respect of the claims under the Agreement on Agriculture, after having found inconsistencies with the provisions of the SPS Agreement and the GATT 1994. In particular, the panel noted that it had resolved the aspects in the dispute related to the "restrictions". (See Panel Report, *US – Poultry (China)*, paras. 7.69 and 7.485-7.487).

v. Measure 1 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP;

vi. Measure 1 is inconsistent with Article 2.2 of the SPS Agreement because it is not applied only to the extent necessary to protect human health, is not based on scientific principles, and is maintained without sufficient scientific evidence;

vii. Costa Rica has failed to demonstrate that Measure 1 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations established by these provisions;

viii. Measure 1 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement;

ix. the Panel exercises judicial economy with respect to Costa Rica's claims under Article 3.1 of the SPS Agreement; and

x. the Panel exercises judicial economy with respect to Costa Rica's claims under the GATT 1994 and the Agreement on Agriculture.

c. Regarding the measure concerning the importation of dairy and meat products (Measure 2):

i. Costa Rica has demonstrated that Measure 2 consists of an import prohibition on dairy and meat products from Costa Rica maintained by virtue of the non-renewal of the sanitary approvals of 16 of the 18 establishments identified by Costa Rica in its panel request;

ii. Costa Rica has failed to demonstrate that Measure 2 consists of an import prohibition on dairy and meat products from Costa Rica maintained by virtue of Panama's decision to revoke sanitary/animal health eligibility, because it failed to demonstrate that Panama revoked or ceased to recognize Costa Rica's sanitary/animal health eligibility for the products in question;

iii. the SPS Agreement is applicable to Measure 2 because the measure constitutes an SPS measure within the meaning of Annex A(1)(b) and (c) to the SPS Agreement and directly affects international trade within the meaning of Article 1.1 of the SPS Agreement;

iv. Measure 2 is inconsistent with Annex C(1)(a) to the SPS Agreement because Panama incurred undue delays in the course of the procedures for renewing the sanitary approvals of 16 Costa Rican establishments;

v. Measure 2 is inconsistent with Annex C(1)(c) to the SPS Agreement because Panama required more information from Costa Rica than was necessary for the purpose of completing the procedure for renewing the sanitary approvals of 16 Costa Rican establishments;

vi. as a consequence of the inconsistency with Annex C(1)(a) and Annex C(1)(c), Measure 2 is inconsistent with Article 8 of the SPS Agreement;

vii. Measure 2 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement because it arbitrarily or unjustifiably discriminates against 16 establishments in Costa Rica compared to the establishments in Peru and New Zealand;

viii. Costa Rica has failed to demonstrate that Measure 2 is inconsistent with the second sentence of Article 2.3 of the SPS Agreement;

ix. the Panel exercises judicial economy with respect to Costa Rica's claims under Article 5.5 of the SPS Agreement;

x. Measure 2 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP;

xi. Measure 2 is inconsistent with Article 2.2 of the SPS Agreement because it is not applied only to the extent necessary to protect human life or health;

xii. Costa Rica has failed to demonstrate that Measure 2 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations established by these provisions;

xiii. Measure 2 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement; and

xiv. The Panel exercises judicial economy with respect to Costa Rica's claims under the GATT 1994 and the Agreement on Agriculture.

d. Regarding the measure concerning the importation of pineapples (Measure 3):

i. the SPS Agreement is applicable to Measure 3 because the measure constitutes an SPS measure within the meaning of Annex A(1)(a) to the SPS Agreement and directly affects international trade within the meaning of Article 1.1 of the SPS Agreement;

ii. Measure 3 does not constitute a provisional measure covered by Article 5.7 of the SPS Agreement because Panama has not demonstrated that it adopted the measure in a situation of insufficient relevant scientific evidence or on the basis of available pertinent information, in breach of two of the requirements under Article 5.7;

iii. Measure 3 is inconsistent with Article 5.1 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;

iv. Measure 3 is inconsistent with Article 5.2 of the SPS Agreement because, in the absence of a risk assessment, Panama did not take into account the elements listed in this provision in the assessment of risks;

v. Measure 3 is inconsistent with Article 5.3 of the SPS Agreement because, in the absence of a risk assessment, Panama did not take into account the economic factors listed in this provision in assessing the risks;

vi. Measure 3 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement because it arbitrarily or unjustifiably discriminates against pineapple from Costa Rica compared to avocado from Colombia;

vii. Costa Rica has failed to demonstrate that Measure 3 arbitrarily or unjustifiably discriminates against pineapple from Costa Rica compared to pineapple from the United States and Colombia, in breach of the first sentence of Article 2.3 of the SPS Agreement;

viii. Measure 3 is inconsistent with the second sentence of Article 2.3 of the SPS Agreement because it is applied in a manner which constitutes a disguised restriction on international trade;

ix. the Panel exercises judicial economy with respect to Costa Rica's claims under Article 5.5 of the SPS Agreement;

x. Measure 3 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP;

xi. Measure 3 is inconsistent with Article 2.2 of the SPS Agreement because it is not applied only to the extent necessary to protect plant life or health, is not based on scientific principles, and is maintained without sufficient scientific evidence;

xii. Costa Rica has failed to demonstrate that Measure 3 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations established by these provisions;

xiii. Measure 3 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement;

xiv. the Panel exercises judicial economy with respect to Costa Rica's claims under Article 3.1 of the SPS Agreement; and

xv. the Panel exercises judicial economy with respect to Costa Rica's claims under the GATT 1994 and the Agreement on Agriculture.

e. Regarding the measure concerning the importation of plantains and bananas (Measure 4):

i. the SPS Agreement is applicable to Measure 4 because the measure constitutes an SPS measure within the meaning of Annex A(1)(a) to the SPS Agreement and directly affects international trade within the meaning of Article 1.1 of the SPS Agreement;

ii. Measure 4 does not constitute a provisional measure covered by Article 5.7 of the SPS Agreement because Costa Rica has demonstrated, and Panama has failed to rebut, that Panama did not adopt Measure 4 in a situation of insufficient relevant scientific evidence;

iii. Measure 4 is inconsistent with Article 5.1 of the SPS Agreement because it is not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;

iv. Measure 4 is inconsistent with Article 5.2 of the SPS Agreement because, in the absence of a risk assessment, Panama did not take into account the elements listed in this provision in the assessment of risks;

v. Measure 4 is inconsistent with Article 5.3 of the SPS Agreement because, in the absence of a risk assessment, Panama did not take into account the economic factors listed in this provision in assessing the risks;

vi. Measure 4 is inconsistent with Article 5.6 of the SPS Agreement because it is more trade-restrictive than required to achieve Panama's ALOP;

vii. Measure 4 is inconsistent with Article 2.2 of the SPS Agreement because it is not applied only to the extent necessary to protect plant life or health, is not based on scientific principles, and is maintained without sufficient scientific evidence;

viii. Costa Rica has failed to demonstrate that Measure 4 is inconsistent with Article 7 and Annex B(1) of the SPS Agreement with respect to the publication obligations established by these provisions;

ix. Measure 4 is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement because the measure is inconsistent with other provisions of the SPS Agreement;

x. the Panel exercises judicial economy with respect to Costa Rica's claims under Article 3.1 of the SPS Agreement; and

xi. the Panel exercises judicial economy with respect to Costa Rica's claims under the GATT 1994 and the Agreement on Agriculture.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with the SPS Agreement, they have nullified or impaired benefits accruing to Costa Rica under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that Panama bring its measures into conformity with its obligations under the SPS Agreement.

APPENDIX 1 - CHRONOLOGY OF EVENTS RELATED TO THE RENEWAL OF THE SANITARY APPROVALS OF THE 18 COSTA RICAN ESTABLISHMENTS IN QUESTION (MEASURE 2)

The following table presents a chronology of events related to Measure 2, including the exchange of communications between the parties and other evidence related to Measure 2 submitted by the parties (such as screenshots of the AUPSA website).[2700] This chronology covers events from January 2014, when Panama granted the first sanitary approvals to the Costa Rican establishments in question, to May 2023, when Panama granted the most recent extension[2701] of the sanitary approval of one of the Costa Rican establishments in question.

Date	Event
23 January 2014	AUPSA grants sanitary approval, valid for three years, to establishment No. 46B of the *Cooperativa de Productores de Leche Dos Pinos (Dos Pinos)*.[2702]
3 March 2014	AUPSA grants sanitary approval, valid for three years, to establishment No. 8 of the company *Coopemontecillo*[2703], establishment No. 12 of the company *CIISA-El Arreo*[2704], and establishment No. 9 of the company *Gico*.[2705]
3 April 2014	AUPSA grants sanitary approval, valid for three years, to establishment No. 12C of the company *Camsa*[2706], establishment No. 21 of the company *Distribuidora de Carnes Zamora*[2707], and establishment No. 8C of the company *Coopemontecillo*.[2708]
7 May 2014	AUPSA grants sanitary approval, valid for three years, to establishments No. 46A[2709] and No. 46C[2710] of the company *Dos Pinos*.
18 June 2014	AUPSA grants sanitary approval, valid for three years, to establishment No. 48 of the company *Nutrilac*.[2711]
21 July 2014	AUPSA grants sanitary approval, valid for three years, to establishment No. 762 of the company *Biomar Aqua Corporation Products (Biomar)*.[2712]

[2700] In the interest of clarity, the Panel refers to the "renewal of the sanitary approvals", which is understood to be what SENASA and AUPSA are referring to when in their communications following the approvals of the Costa Rican establishments in question they use phrases such as "authorization for exportation", "renewal of the export permit", "approval" of the establishments, among other similar phrases. In addition, the Panel refers to "audits", although in the communications terms such as "visits" and "inspections" are used.

[2701] The Panel recalls that, in the Spanish version of this report, the terms "*prórroga*" or "*prórrogas*" ("extension"/"extensions") are used to refer to any reference in the communications of the parties' authorities to the "*extensión*" or "*ampliación*" (also "extension" in English) of the validity of the sanitary approvals granted by Panama to establishments in other countries that do not meet the requirements for a renewal, pursuant to Panamanian regulations. See fns 1070 and 1110 above.

[2702] AUPSA, Resolution No. 029-2014 (Exhibit CRI-236).
[2703] AUPSA, Resolution No. 16 (2014) (Exhibit CRI-225).
[2704] AUPSA, Resolution No. 14 (2014) (Exhibit CRI-241).
[2705] AUPSA, Resolution No. 15 (2014) (Exhibit CRI-244).
[2706] AUPSA, Resolution No. 10 (2014) (Exhibit CRI-215).
[2707] AUPSA, Resolution No. 12 (2014) (Exhibit CRI-231).
[2708] AUPSA, Resolution No. 11 (2014) (Exhibit CRI-228).
[2709] AUPSA, Resolution No. 028-2014 (Exhibit CRI-234).
[2710] AUPSA, Resolution No. 030-2014 (Exhibit CRI-237).
[2711] AUPSA, Resolution No. 039-2014 (Exhibit CRI-247).
[2712] AUPSA, Resolution No. 43 (2014) (Exhibit CRI-206).

Date	Event
7 November 2014	AUPSA grants sanitary approval, valid for three years, to establishment No. 5 of the company *Planta Cinta Azul (Pipasa)*[2713], establishment No. 30E of the company *Proceso Posterior (Pipasa)*[2714], and establishment No. 7 of the company S*igma Alimentos*.[2715] AUPSA grants sanitary approval, valid for five years, to establishment No. 158 of the company *Central Veterinaria*.[2716]
15 February 2016	AUPSA grants a three-year renewal of the sanitary approval of establishment No. 40 of the company *El Ángel*[2717] and establishments No. 45[2718] and No. 47[2719] of the company *Sigma Alimentos*.
13 January 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 8C of the company *Coopemontecillo*[2720] and establishment No. 21 of the company *Distribuidora de Carnes Zamora* and to indicate the expected date on which the audits will be conducted.[2721]
17 January 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 8 of the company *Coopemontecillo* and to indicate the expected date on which the audit will be conducted.[2722]
23 January 2017	Expected date of expiry of the sanitary approval granted on 23 January 2014 to establishment No. 46B of the company *Dos Pinos*.[2723]
24 January 2017	AUPSA indicates that: • It had registered and would convey the approval renewal request in order to include establishments No. 8 and No. 8C of the company *Coopemontecillo* in audit missions in 2017, on a date to be communicated. • While audits are being arranged for the renewal of the approvals that are about to expire, these establishments can continue to export their products to Panama.[2724]
2 February 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 48 of the company *Nutrilac* and to indicate the expected date on which the audit will be conducted.[2725]
9 February 2017	SENASA requests AUPSA to renew the sanitary approval of establishments No. 12C of the company *Camsa*[2726] and No. 12 of the company *CIISA-El Arreo* and to indicate the expected date on which the audits will be conducted.[2727]

[2713] AUPSA, Resolution No. 46 (2014) (Exhibit CRI-250).
[2714] AUPSA, Resolution No. 45 (2014) (Exhibit CRI-253).
[2715] AUPSA, Resolution No. 44 (2014) (Exhibit CRI-256).
[2716] AUPSA, Resolution No. 48 (2014) (Exhibit CRI-219).
[2717] AUPSA, Resolution No. 10-CTI-16 (Exhibit CRI-238). The record does not contain the sanitary approval renewed by this resolution.
[2718] AUPSA, Resolution No. 008-CTI-16 (Exhibit CRI-259). The record does not contain the sanitary approval renewed by this resolution.
[2719] AUPSA, Resolution No. 007-CTI-16 (Exhibit CRI-262). The record does not contain the sanitary approval renewed by this resolution.
[2720] Memorandum SENASA-DG-047-2017 (Exhibit CRI-229).
[2721] Memorandum SENASA-DG-512-2017 (Exhibit CRI-232). The Panel understands this renewal to concern the sanitary approval granted on 3 April 2014.
[2722] Memorandum SENASA-DG-046-2017 (Exhibit CRI-226). The Panel understands this renewal to concern the sanitary approval granted on 3 March 2014.
[2723] The Panel recalls that, pursuant to Panamanian law, all the sanitary approvals were granted by AUPSA.
[2724] Memorandum AUPSA-DINAN-009-2017 (Exhibit CRI-31).
[2725] Memorandum SENASA-DG-246-2017 (Exhibit CRI-248). The Panel understands this renewal to concern the sanitary approval granted on 18 June 2014.
[2726] Memorandum SENASA-DG-0139-2017 (Exhibit CRI-216).
[2727] Memorandum SENASA-DG-140-2017 (Exhibit CRI-242). The Panel understands this renewal to concern the sanitary approvals granted on 3 April and 3 March 2014, respectively.

Date	Event
14 February 2017	SENASA requests AUPSA to renew the sanitary approval of establishments No. 46A[2728], No. 46B[2729], and No. 46C[2730] of the company *Dos Pinos* and to indicate the expected date on which the audit will be conducted.
16 February 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 9 of the company *Gico* and to indicate the expected date on which the audit will be conducted.[2731]
3 March 2017	Expected date of expiry of the sanitary approvals granted on 3 March 2014 to establishment No. 8 of the company *Coopemontecillo*, establishment No. 12 of the company *CIISA-El Arreo* and establishment No. 9 of the company *Gico*.
3 April 2017	Expected date of expiry of the sanitary approvals granted on 3 April 2014 to establishment No. 12C of the company *Camsa*, establishment No. 21 of the company *Distribuidora de Carnes Zamora*, and establishment No. 8C of the company *Coopemontecillo*.
7 May 2017	Expected date of expiry of the sanitary approvals granted on 7 May 2014 to establishments No. 46A and No. 46C of the company *Dos Pinos*.
18 June 2017	Expected date of expiry of the sanitary approval granted on 18 June 2014 to establishment No. 48 of the company *Nutrilac*.
21 June 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 30E of the company *Proceso Posterior (Pipasa)* and to indicate the expected date on which the audit will be conducted.[2732]
21 July 2017	Expected date of expiry of the sanitary approval granted on 21 July 2014 to establishment No. 762 of the company *Biomar*.
4 August 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 7 of the company *Sigma Alimentos* and to indicate the expected date on which the audit will be conducted.[2733]
9 August 2017	SENASA requests AUPSA to renew the sanitary approval of establishment No. 5 of the company *Planta Cinta Azul (Pipasa)* and to indicate the expected date on which the audit will be conducted.[2734] AUPSA informs SENASA that the scheduling of the audit at origin for the renewal of the sanitary approval of establishment No. 7 of the company *Sigma Alimentos*, as well as of the other establishments that have expressed interest in renewal through SENASA, is under way and that, "given the limited number of auditors and the large volume of requests, the planned date of the visit will be slightly postponed".[2735]
7 November 2017	Expected date of expiry of the sanitary approval granted on 7 November 2014 to establishment No. 5 of the company *Planta Cinta Azul (Pipasa)*, establishment No. 30E of the company *Proceso Posterior (Pipasa)*, and establishment No. 7 of the company *Sigma Alimentos*.
5 December 2017	The company *Biomar* requests AUPSA to extend the validity of the sanitary approval of establishment No. 762, while the audit of the plant scheduled for January 2018 was conducted.[2736]

[2728] Memorandum SENASA DG-0159-2017 (Exhibit CRI-37). The Panel understands this renewal to concern the sanitary approval granted on 7 May 2014.
[2729] Memorandum SENASA-DG-0160-2017 (Exhibit CRI-141). The Panel understands this renewal to concern the sanitary approval granted on 23 January 2014.
[2730] Memorandum SENASA-DG-0161-2017 (Exhibit CRI-204). The Panel understands this renewal to concern the sanitary approval granted on 7 May 2014.
[2731] Memorandum SENASA-DG-170-2017 (Exhibit CRI-245). The Panel understands this renewal to concern the sanitary approval granted on 3 March 2014.
[2732] Memorandum SENASA-DG-704-2017 (Exhibit CRI-254). The Panel understands this renewal to concern the sanitary approval granted on 7 November 2014.
[2733] Memorandum SENASA-DG-963-2017 (Exhibit CRI-257). The Panel understands this renewal to concern the sanitary approval granted on 7 November 2014.
[2734] Memorandum SENASA-DG-983-2017 (Exhibit CRI-251). The Panel understands this renewal to concern the sanitary approval granted on 7 November 2014.
[2735] Note AUPSA-DINAN-154 (Exhibit CRI-32).
[2736] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 12.

Date	Event
6 December 2017	In response to the communication of 5 December 2017, AUPSA reported that a four-month extension had been granted to establishment No. 762 of the company *Biomar* and indicates that the audit of the plant is being scheduled for the first quarter of 2018.[2737]
19 March 2018	The company *Biomar* consults with AUPSA about whether there were any developments in respect of scheduling the audit of establishment No. 762.[2738]
12 April 2018	The company *Biomar* informs AUPSA that the audit of establishment No. 762 is still pending in view of the expiry of the four-month extension that was granted in December 2017.[2739]
13 April 2018	In response to the communication of 12 April sent by the company *Biomar*, AUPSA indicates that it would prolong the extension of the sanitary approval of establishment No. 762 and that, "as soon as the [audit] is scheduled, the authorities at origin will let [Biomar] know".[2740]
30 July 2018	The company *Biomar* asks AUPSA whether there is a planned date for conducting the audit of establishment No. 762.[2741]
31 July 2018	In response to the communication of 30 July sent by the company *Biomar*, AUPSA indicates that it has a "rather busy" schedule, and that, as soon as they have a likely date for conducting the audit of establishment No. 762, they will communicate it to the company *Biomar*. AUPSA also indicates that the extension would be amended if necessary.[2742]
6 September 2018	The company *Biomar* requests AUPSA for a further extension of the sanitary approval of establishment No. 762.[2743]
7 September 2018	In response to the communication of 6 September sent by the company *Biomar*, AUPSA indicated that the "matter [is] settled for now".[2744]
12 November 2018	SENASA requests AUPSA to renew the sanitary approval of establishments No. 45[2745] and No. 47[2746] of the company *Sigma Alimentos* and to indicate the expected date on which the audit will be conducted.
4 December 2018	SENASA requests AUPSA to renew the sanitary approval of establishment No. 40 of the company *El Ángel* and to indicate the expected date on which the audit will be conducted.[2747]

[2737] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 12.
[2738] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 11.
[2739] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 11.
[2740] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 10. See also ibid. p. 9, where AUPSA indicates that the extension was made effective and sends a link that presumably confirms that extension.
[2741] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), pp. 8-9.
[2742] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 8.
[2743] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), pp. 7-8.
[2744] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 7.
[2745] Memorandum SENASA-DG-1512-2018 (Exhibit CRI-260). The Panel understands this renewal to concern the sanitary approvals granted to these establishments on 15 February 2016.
[2746] Memorandum SENASA-DG-1511-2018 (Exhibit CRI-263). The Panel understands this renewal to concern the sanitary approvals granted to these establishments on 15 February 2016.
[2747] Memorandum SENASA-DG-1587-2018 (Exhibit CRI-239). The Panel understands this renewal to concern the sanitary approval granted on 15 February 2016.

Date	Event
10 and 22 January 2019	The company *Biomar*: • Requests AUPSA, on each of these days, "for [its] help again with the issue of the approval" of establishment No. 762. • Indicates that the most recent extension granted expires on 31 January 2019 and the audit of establishment No. 762 is still pending.[2748]
23 January 2019	In response to the communications of January 2019 sent by the company *Biomar*, AUPSA indicates that it would respond to the request.[2749]
4 February 2019	SENASA requests guidance from AUPSA to advance the renewal of the sanitary approval of establishments No. 8 and No. 8C of the company *Coopemontecillo.* SENASA also requests AUPSA to indicate the expected date on which the audit will be conducted.[2750]
15 February 2019	Expected date of expiry of the sanitary approval granted on 15 February 2016 to establishment No. 40 of the company *El Ángel*, and to establishments No. 45 and No. 47 of the company *Sigma Alimentos*.
17 April 2019	The company *Biomar* requests AUPSA to further extend its sanitary approval, which expires on 25 April 2019, and to conduct the audit of establishment No. 762.[2751]
23 April 2019	Further to the communication from AUPSA of 17 April 2019, the company *Biomar* again requests help from the person responsible for the issue at AUPSA to obtain a further extension of its sanitary approval, as the extension in effect at that time would expire on 25 April 2019.[2752]
30 April 2019	SENASA requests AUPSA for a visit from its officials to conduct the audit of establishment No. 762 of the company *Biomar* in order to renew the sanitary approval of that establishment.[2753]
21 May 2019	SENASA requests AUPSA to renew the sanitary approvals of establishments No. 8 and No. 8C of the company *Coopemontecillo*, while AUPSA indicates the date on which the audits of these establishments will be conducted.[2754]
22 July 2019	The company *Biomar* consults AUPSA on the actions taken in relation to the memorandum sent by SENASA on 30 April 2019 concerning the scheduling of the audit of the plant in question and requests the granting of a further extension of the sanitary approval of establishment No. 762, as the extension in effect at that time would expire on 31 July 2019.[2755]
23 July 2019	In response to the communication of 22 July 2019 from the company *Biomar*, AUPSA reports that it is undergoing administrative changes and that the new person in charge has not yet assumed office, for which reason the process is still pending.[2756]
10 October 2019	The company *Biomar*: • Requests AUPSA for a further extension of its sanitary approval, taking into account that the extension in effect at that time would expire on 31 October 2019. • Requests information on the status of the audit of establishment No. 762 and the possibility of coordinating it.[2757]

[2748] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 6.
[2749] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 5.
[2750] Memorandum SENASA-DG-0090-2019 (Exhibit CRI-54). The Panel understands this renewal to concern the sanitary approvals granted to these establishments on 3 March and 3 April 2014, respectively.
[2751] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), pp. 4-5.
[2752] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 4.
[2753] Memorandum SENASA-DG-550-2019 (Exhibit CRI-10). The Panel understands this renewal to concern the sanitary approval granted on 21 July 2014.
[2754] Memorandum SENASA-DG-627-2019 (Exhibit CRI-175) (referring to Memorandum SENASA-DG-046-2017 (Exhibit CRI-226); Memorandum SENASA-DG-047-2017 (Exhibit CRI-229); and Memorandum AUPSA-DINAN-009-2017 (Exhibit CRI-31)). SENASA refers to its communications to AUPSA of 13 and 17 January 2017, and the AUPSA memorandum of 24 January 2017.
[2755] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), pp. 3-4.
[2756] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 3.
[2757] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 2.

Date	Event
15 October 2019	AUPSA: • Informs SENASA that it granted a two-month extension (from 31 October to 31 December 2019) for the expired health approvals of the Costa Rican establishments the renewal of which had been requested in writing. • Notes that, beyond that period, trade would not be interrupted, as they would immediately coordinate the start of the audit process.[2758] The Panel notes that AUPSA does not refer to specific establishments.
31 October 2019	The company *Biomar* requests AUPSA for its collaboration to grant a further extension, given that it has not received a response to its communication of 10 October and the system still reflects the expiry of the approval on 31 October 2019.[2759]
7 November 2019	Expected date of expiry of the sanitary approval granted on 7 November 2014 to establishment No. 158 of the company *Central Veterinaria*.
8 November 2019	AUPSA grants an extension of the sanitary approval of establishment No. 158 of the company *Central Veterinaria* until 31 October 2020.[2760]
2 December 2019	AUPSA sends SENASA a communication informing it that it is in the "process of analysing and renewing" the sanitary approval of establishment No.762 of the company *Biomar*. AUPSA also requests SENASA (a) to confirm whether establishment No. 762 is authorized to export the products in question, and (b) to issue sanitary certification indicating that in that establishment "there are no nor have there been sanitary risk situations" involving the products in question over the past five years.[2761]
26 December 2019	AUPSA extends for six months, that is, until 30 June 2020, the sanitary approvals of establishments handling bovine, swine, poultry, and aquaculture products, for all the establishments the sanitary approval of which would expire on 31 December 2019.[2762] The Panel notes that the listed establishments include 17 of the 18 Costa Rican establishments in question.[2763]
2 January 2020	AUPSA informs SENASA that it is scheduling the on-site audit of establishments No. 46A and No. 46C of the company *Dos Pinos* for the end of January 2020, and requests SENASA to update the information contained in the attached questionnaire.[2764]
7 January 2020	In response to its communication of 2 December 2019, SENASA sends AUPSA a proposal for a sanitary certificate for products used in animal feed in furtherance of the renewal process for the sanitary approval of establishment No. 762 of the company *Biomar*.[2765]
3 February 2020	AUPSA informs SENASA that it has organized the on-site audit of establishments No. 46A and No. 46C of the company *Dos Pinos* for the first week of March 2020.[2766] In response to the AUPSA memorandum of the same day, SENASA requests the inclusion of establishment No. 46B of the company *Dos Pinos* in the on-site audit scheduled for the first week of March for establishments No. 46A and No. 46C of the same company.[2767]

[2758] Note AUPSA-AG-399-2019 (Exhibit CRI-35).
[2759] Communications between Biomar and AUPSA (2017-2019) (Exhibit CRI-393), p. 2.
[2760] AUPSA, Approval of processing plants: Costa Rica (July 2020) (Exhibit CRI-398). See also the table in Costa Rica's response to Panel question No. 139.
[2761] Note AUPSA-AG-451-2019 (Exhibit CRI-207).
[2762] AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2). See also AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217).
[2763] The only establishment not mentioned in Resolution No. 145-AG-2019 is Central Veterinaria, given that its sanitary approval was valid until 31 October 2020. AUPSA, Approval of processing plants: Costa Rica (July 2020) (Exhibit CRI-398). See also AUPSA, Resolution No. 143-AG-2019 (Exhibit PAN-129), extending the validity of Biomar's sanitary approval for the period in question.
[2764] Note AUPSA-AG-001-2020 (Exhibit CRI-38). Although it refers to establishments "41A" and "41C" of the company *Dos Pinos*, the Panel understands this to be a typographical error and that, in fact, it was referring to establishments 46A and 46C of the company *Dos Pinos*.
[2765] Memorandum SENASA-DG-0025-2020 (Exhibit CRI-208).
[2766] Memorandum AUPSA-AG-025-2020 (Exhibit CRI-176).
[2767] Memorandum SENASA-DG-132-2020 (Exhibit CRI-181).

Date	Event
19 February 2020	SENASA sends the responses to the questionnaire sent on 2 January 2020 concerning the renewal of the sanitary approvals of establishments No. 46A and No. 46C of the company *Dos Pinos*.[2768]
20 February 2020	AUPSA acknowledges receipt of the documentation sent by SENASA on 19 February 2020.[2769] On the same day, AUPSA informs SENASA that the on-site audit of establishments No. 46A and No. 46C of the company *Dos Pinos* will be conducted between 2 and 6 March 2020 and provides details thereof.[2770]
27 February 2020	AUPSA: • Informs SENASA that, as requested by SENASA on 3 February 2020, establishment No. 46B of the company *Dos Pinos* is included in the audit. • Requests to change the date of the audit to the week of 9-13 March 2020 owing to "delays in the administrative process of issuing the passport of one of [its] auditors".[2771]
9 March 2020	AUPSA informs SENASA of its decision to postpone the on-site audit of establishments No. 46A, No. 46B, and No. 46C of the company *Dos Pinos* owing to the yellow alert issued by Costa Rica in view of the COVID-19 cases in the country.[2772] The Panel notes that a proposed date for conducting the audit is not indicated.
12 June 2020	SENASA requests AUPSA to "extend the period of" the sanitary approval of all the Costa Rican establishments exporting products of animal origin for human consumption that had valid approval until 30 June 2020, such that they have "legal certainty to continue exporting to Panama". SENASA proposes that, pursuant to Article 13 of the Central American Regulations on Sanitary and Phytosanitary Measures and Procedures, AUPSA carry out a documentary assessment of the establishments in view of the sanitary situation due to the COVID-19 pandemic, and that the on-site audit be conducted at another time.[2773]
26 June 2020	SENASA again requests AUPSA to renew the sanitary approval of establishment No. 7 of the company *Sigma Alimentos*, and clarifies that, should an on-site audit of the establishment be required, it would cover the costs.[2774]
29 June 2020	SENASA informs AUPSA that it has not received a response to its proposal for a sanitary certificate sent on 7 January 2020 regarding establishment No. 762 of the company *Biomar*. SENASA indicates that this establishment needs to continue with the authorization process.[2775]
30 June 2020	Expected date of expiry of the extension of the sanitary approval granted on 26 December 2019 to certain Costa Rican establishments the renewal of which had been requested in writing.

[2768] Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39). See also Costa Rica's responses to Panama's questionnaire verifying the sanitary status of a country (19 February 2020) (Exhibit CRI-6).
[2769] Email from the Director of Animal Quarantine of SENASA to the Administrator General of AUPSA (19 February 2020) (Exhibit CRI-39).
[2770] Note AUPSA-AG-049-2020 (Exhibit CRI-180).
[2771] Note AUPSA-AG-059-2020 (Exhibit CRI-40).
[2772] Note AUPSA-AG-078-2020 (Exhibit CRI-41).
[2773] Memorandum SENASA-DG-721-2020 (Exhibit CRI-43).
[2722] Memorandum SENASA-DG-778-2020 (Exhibit CRI-182).
[2775] Memorandum SENASA-DG-781-2020 (Exhibit CRI-209).

Date	Event
3 July 2020	SENASA requests AUPSA to extend the sanitary approval of establishments No. 46A, No. 46B, and No. 46C of the company *Dos Pinos*, indicating that the audit could be conducted when sanitary conditions so permitted. SENASA refers to the communications about these establishments sent between February 2017 and June 2020 and notes that it has still not received a response to its request of 16 June 2020 to extend the period of approval for establishments exporting products of animal origin for human consumption.[2776]
10 July 2020	In response to SENASA's communication of 12 June 2020, AUPSA confirms that the extension for the establishments in question expired on 30 June 2020. AUPSA also indicates that a purely documentary assessment does not satisfy or ensure compliance with the requirements laid down in Panama's sanitary legislation, and that, given the circumstances of the COVID-19 pandemic, Costa Rica's establishments could be subject to a new procedure for their approval.[2777]
16 July 2020	SENASA requests that AUPSA: • renew the sanitary approval of establishment No. 158 of the company *Central Veterinaria*; and • indicate "the requirements to comply with [Panama's] provisions" to renew sanitary approvals and maintain trade relations.[2778]
11 August 2020	SENASA reiterates to AUPSA its request of 3 July 2020 to renew the sanitary approvals of establishments No. 46A, No. 46B, and No. 46C of the company *Dos Pinos* on the basis of a documentary review instead of conducting an on-site audit, taking into account the global sanitary situation caused by the COVID-19 pandemic. SENASA once again refers to Article 13 of the Central American Regulations on Sanitary and Phytosanitary Measures and Procedures, and indicates that it already completed the documentary assessment through the requisite questionnaire in February 2020.[2779]
11 August 2020	SENASA requests AUPSA to renew the sanitary approval of establishment No. 48 of the company *Nutrilac* on the basis of a documentary review instead of carrying out an on-site visit, taking into account the global sanitary situation caused by the COVID-19 pandemic and the provisions of Article 13 of the Central American Regulations on Sanitary and Phytosanitary Measures and Procedures.[2780]
12 August 2020	SENASA requests AUPSA to renew the sanitary approval of the following establishments, on the basis of a documentary review instead of carrying out an on-site visit, taking into account the global sanitary situation caused by the COVID-19 pandemic and Article 13 of the Central American Regulations on Sanitary and Phytosanitary Measures and Procedures: No. 12C[2781] of the company *Camsa*, No. 8[2782] and No. 8C[2783] of the company *Coopemontecillo*, No. 40[2784] of the company *El Ángel*, No. 12 of the company *CIISA-El Arreo*[2785], and No. 45[2786] and No. 47[2787] of the company *Sigma Alimentos*.
13 August 2020	SENASA requests AUPSA to renew the sanitary approval of the following establishments, on the basis of a documentary review instead of carrying out an on-site visit, taking into account the global sanitary situation caused by the COVID-19 pandemic and Article 13 of the Central American Regulations on Sanitary and Phytosanitary Measures and Procedures: No. 21 of the company *Distribuidora de Carnes Zamora*[2788], No. 9 of the

[2776] Memorandum SENASA-DG-805-2020 (Exhibit CRI-235).
[2777] Note AUPSA-AG-0229-2020 (Exhibit CRI-45).
[2778] Memorandum SENASA-DG-840-2020 (Exhibit CRI-220). The Panel understands this renewal request to concern the sanitary approval granted on 7 November 2014.
[2779] Memorandum SENASA-DG-946-2020 (Exhibit CRI-50).
[2780] Memorandum SENASA-DG-950-2020 (Exhibit CRI-249).
[2781] Memorandum SENASA-DG-941-2020 (Exhibit CRI-218).
[2782] Memorandum SENASA-DG-958-2020 (Exhibit CRI-227).
[2783] Memorandum SENASA-DG-959-2020 (Exhibit CRI-230).
[2784] Memorandum SENASA-DG-957-2020 (Exhibit CRI-240).
[2785] Memorandum SENASA-DG-960-2020 (Exhibit CRI-243).
[2786] Memorandum SENASA-DG-951-2020 (Exhibit CRI-261).
[2787] Memorandum SENASA-DG-952-2020 (Exhibit CRI-264).
[2788] Memorandum SENASA-DG-962-2020 (Exhibit CRI-233).

Date	Event
	company *Gico*[2789], No. 5[2790] of the company *Planta Cinta Azul (Pipasa)*, No. 30E[2791] of the company *Proceso Posterior (Pipasa)*, and No. 7[2792] of the company *Sigma Alimentos*. On the same date, AUPSA refers to the communication from SENASA of 10 August 2020 (SENASA-DG-0940-2020)[2793] and notes that it is not aware of having received Memorandum SENASA-DG-0025-2020, sent on 7 January 2020, regarding the proposal for a sanitary certificate for the products of the company *Biomar*.[2794]
21 August 2020	AUPSA informs SENASA that it is necessary to initiate an animal health evaluation process to determine the eligibility of the following establishments to export animals and products and by-products of animal origin to Panama: No. 46A, No. 46B, and No. 46C of the company *Dos Pinos*, No. 48 of the company *Nutrilac*, No. 45 and No. 47 of the company *Sigma Alimentos*, No. 12C of the company *Camsa*, No. 8 and No. 8C of the company *Coopemontecillo*, No. 12 of the company *CIISA-El Arreo*, No. 21 of the company *Distribuidora de Carnes Zamora*, No. 5 of the company *Planta Cinta Azul (Pipasa)*, and No. 30E of the company *Proceso Posterior (Pipasa)*.[2795]
8 October 2020	SENASA: • again requests AUPSA to renew the sanitary approvals of establishment No. 158 of the company *Central Veterinaria*; and • reiterates its request of 16 July 2020 for that company to be informed of the respective requirements for renewing sanitary approvals and maintaining trade relations with Panama.[2796]
13 October 2020	SENASA remarks in a note addressed to AUPSA that none of the scenarios in the OIE Terrestrial Animal Health Code apply to initiating an "animal health evaluation process for Costa Rica to determine its eligibility to export animals and products and by-products of animal origin to Panama".[2797] Consequently, SENASA requests AUPSA to open the Panamanian market to the products that Costa Rica exported to Panama before 30 June 2020, and to apply Article 2.1.2 of the OIE Terrestrial Animal Health Code because none of the scenarios for carrying out a risk assessment apply.[2798]
31 October 2020	Expected date of expiry of the sanitary approval granted on 8 November 2019 to establishment No. 158 of the company *Central Veterinaria*.
23 November 2020	AUPSA, in response to SENASA's communication of 13 October 2020, reiterates that it is necessary to initiate an animal health evaluation process for Costa Rica to determine its eligibility to export animals and products and by-products of animal origin to Panama. To this end, AUPSA requests a reply from SENASA to be able to initiate the animal health evaluation process.[2799]

[2789] Memorandum SENASA-DG-963-2020 (Exhibit CRI-246).
[2790] Memorandum SENASA-DG-961-2020 (Exhibit CRI-252).
[2791] Memorandum SENASA-DG-966-2020 (Exhibit CRI-255).
[2792] Memorandum SENASA-DG-967-2020 (Exhibit CRI-258).
[2793] This communication is not in the record.
[2794] Note AUPSA-AG-383-2020 (Exhibit CRI-394).
[2795] Note AUPSA-AG-395-2020 (Exhibit CRI-51).
[2796] Memorandum SENASA-DG-1215-2020 (Exhibit CRI-221).
[2797] Costa Rica is referring to the following scenarios: (a) when the intention is to import a product that has not been imported previously, (b) when the intention is to import from a country or region from which imports have not been received previously, (c) when there is a change in the sanitary status of a country or region, or (d) when new information emerges about a disease. (Memorandum SENASA-DG-1420-2020 (Exhibit CRI-42), pp. 2-3).
[2798] Memorandum SENASA-DG-1233-2020 (Exhibit CRI-53). The Panel notes that Article 2.1.2 of the Terrestrial Code to which SENASA is referring states that "[a]n importing country may decide to permit the importation using the appropriate sanitary standards recommended in the Terrestrial Code, thus eliminating the need for a risk assessment". (Ibid. p. 4).
[2799] Note AUPSA-AG-571-2020 (Exhibit CRI-55).

Date	Event
24 November 2020	SENASA: • Refers to the communication from AUPSA the day before and notes that, in line with OIE documents, risk assessments or animal health evaluations are generally initiated under four scenarios that are absent from Costa Rica.[2800] • Requests that, accordingly, AUPSA provide "the scientific basis underpinning this measure". • Informs AUPSA that "the borders are currently open, for which reason AUPSA can conduct the audits that it deems necessary". • Reiterates to AUPSA its request of 12 June 2020 to renew sanitary approvals on the basis of a documentary review instead of conducting a verification audit in respect of several Costa Rican establishments, in accordance with Article 13 of the Central American Regulations on Sanitary and Phytosanitary Measures and Procedures.[2801]
7 December 2020	SENASA requests AUPSA to renew the sanitary approval of establishment No. 762 of the company *Biomar*.[2802]
12 February 2021	A high-level binational meeting is held in Paso Canoas, where the following is agreed: • The establishment of a Bilateral Technical Working Commission on sanitary and phytosanitary measures between the authorities of Costa Rica and Panama. • Panama would approve the plants of *Biomar* and *Central Veterinaria* before 19 February 2021 and conduct "an evaluation of the Costa Rican sanitary system for products of trade interest, which w[ould] take place within 30 working days of the request". If the evaluation were positive, Panama would automatically renew for six months the plants exporting products of animal origin for human consumption.[2803]
15 February 2021	As part of the Paso Canoas commitments, AUPSA informs SENASA that it granted establishment No. 158 of the company *Central Veterinaria* and establishment No. 762 of the company *Biomar* a six-month extension of their sanitary approval. In addition, AUPSA asks SENASA for a note in which it "give[s] [its] consent to initiate the animal health eligibility process [for Costa Rica]".[2804]
16 February 2021	In response to the communication from AUPSA the previous day, SENASA requests "the date on which Panama is to initiate the process, in order to prepare the information required".[2805]
18 February 2021	The first session of the Bilateral Technical Working Commission is held, where it is agreed, *inter alia*: • that Panama would conduct the evaluation of Costa Rica's sanitary system within 30 working days of the Ministers' agreement; • that Panama would inform Costa Rica about what information is required by its authorities; and that • Panama would send Costa Rica the information required in relation to the sanitary approval of Panamanian plants by no later than 22 February 2021.[2806]
22 February 2021	Further to the Paso Canoas commitments, AUPSA: • notifies SENASA of the formal initiation of Costa Rica's animal health evaluation procedure; • sends a new questionnaire; and • indicates that, at "a later stage, Panama will carry out the relevant on-site verifications, as provided for in our regulations".[2807]

[2800] See fn 2797 above.
[2801] Memorandum SENASA-DG-1420-2020 (Exhibit CRI-42).
[2802] Memorandum SENASA-DG-1461-2020 (Exhibit CRI-210). The Panel understands the renewal to concern the sanitary approval of 21 July 2014, which had last been extended from 26 December 2019 until 30 June 2020. (AUPSA, Resolution No. 143-AG-2019 (Exhibit PAN-129)).
[2803] Paso Canoas Bilateral Agreement (12 February 2021) (Exhibit CRI-14).
[2804] Note AUPSA-AG-078-2021 (Exhibit CRI-274). See Bilateral Technical Working Commission, Aide-Mémoire, Session No. 1 (18 February 2021) (Exhibit CRI-15), item I:4, which indicates that the extension was for six months. See also the table in Costa Rica's response to Panel question No. 139.
[2805] Memorandum SENASA-DG-168-2021 (Exhibit CRI-275). See also Memorandum SENASA-DG-152-2021 (Exhibit CRI-56).
[2806] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 1 (18 February 2021) (Exhibit CRI-15).
[2807] Note AUPSA-AG-100-2021 (Exhibit CRI-57); Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268).

Date	Event
24 February 2021	In response to AUPSA's communication of 22 February 2021, SENASA gives, *inter alia*, the reasons why it considers the information requested by AUPSA to be excessive and indicates that the agreement at Paso Canoas was to subject Costa Rica to an evaluation of its sanitary system, with a view to restoring trade within 30 days, not to a country eligibility procedure.[2808]
11 March 2021	The fourth session of the Bilateral Technical Commission is held, during which: • Panama requested Costa Rica to provide the information required for the evaluation of Costa Rica's sanitary system, in line with the questionnaire sent on 22 February 2021. • Costa Rica confirmed its full availability to provide the information required for the evaluation of its sanitary system and proposed to send Panama the information, updated to 2021, included in its response to the questionnaire received from Panama in February 2020.[2809]
24 March 2021	Further to what was discussed at the meeting of 11 March 2021, SENASA sends AUPSA information updated to 2020 in response to the questionnaire sent by AUPSA on 2 January 2020 for verifying the sanitary status of a country. Included is new information on the population of different animal species, the breakdown of the bovine population, links to maps and additional references to legislation.[2810]
1 April 2021	AUPSA: • informs SENASA that the information provided on 24 March "fails to provide the information requested" on 22 February 2021; and • requests SENASA "to send [them] the above-mentioned questionnaire with the corresponding responses again, so that the Panamanian sanitary authorities may carry out the required evaluation of the Costa Rican sanitary system, as agreed".[2811]
21 May 2021	SENASA requests AUPSA to renew: • the sanitary approval of establishment No. 762 of the company *Biomar*[2812]; and • the sanitary approval of establishment No. 158 of the company *Central Veterinaria.*[2813]
3 June 2021	SENASA refers to what was discussed during the virtual bilateral meeting on 16 April 2021[2814] and to the Paso Canoas agreement, and sends AUPSA responses to the questionnaire sent on 22 February 2021 "so that Panama can conduct the evaluation of Costa Rica's sanitary system, with the aim of reopening for exports of products of animal origin to" Panama. SENASA reiterates that this information is not provided as part of a country eligibility procedure, given that "the intention is not to export for the first time" the goods covered by the responses in the questionnaire.[2815]

[2808] Memorandum SENASA-DG-191-2021 (Exhibit CRI-58).
[2809] Bilateral Technical Working Commission, Aide-Mémoire, Session No. 4 (11 March 2021) (Exhibit CRI-20).
[2810] Memorandum SENASA-DG-340-2021 (Exhibit CRI-60); Costa Rica's updated responses to Panama's questionnaire verifying the sanitary status of a country (24 March 2021) (Exhibit CRI-61).
[2811] Note AUPSA-AG-176-2021 (Exhibit CRI-62).
[2812] Memorandum SENASA-DG-665-2020 (Exhibit CRI-211).
[2813] Memorandum DG-666-2021 (Exhibit CRI-222).
[2814] The record does not contain any minutes or aide-mémoires of this meeting.
[2815] Memorandum SENASA-DG-725-2021 (Exhibit CRI-63); Costa Rica's responses to Panama's questionnaire for the sanitary evaluation of Costa Rica (3 June 2021) (Exhibit CRI-29).

Date	Event
21 July 2021	SENASA once again requests AUPSA to: • renew the sanitary approval of establishment No. 762 of the company *Biomar*, noting that it did not receive a response to its request of 21 May 2021[2816]; and • renew the sanitary approval of establishment No. 158 of the company *Central Veterinaria*, noting that it did not receive a response to its request of 21 May 2021.[2817]
12 July 2021	DINASA: • mentions that AUPSA forwarded for its consideration the information sent by SENASA on 3 June 2021, and notes that the process of evaluating Costa Rica's sanitary system is advancing, and "the evaluation team has made progress in reviewing the information provided"; and • mentions that, during the evaluation process, UNESYF had identified issues of concern regarding the capacity and reliability of sanitary control; for example, in areas related to the system of bovine traceability, internal animal movement controls, and infection control and eradication programmes for *Brucella* and bovine tuberculosis.[2818]
16 August 2021	AUPSA: • confirms that it granted establishments No. 762 of the company *Biomar* and No. 158 of the company *Central Veterinaria* an extension of their respective sanitary approvals until 28 February 2022[2819]; and • indicates that, as part of the procedure for renewing all Costa Rica's establishments, these "must comply with the animal health eligibility process as laid down in Panamanian regulations in Law No. 23 of 15 July 1997".[2820]
17 March 2022	Establishment No. 158 of the company *Central Veterinaria* receives a six-month extension of its sanitary approval. In this regard, the Panamanian Food Agency (APA), successor to AUPSA, explains that DINASA conducted an epidemiological evaluation of the company's extension request, and determined that the product exported by establishment No. 158 of the company *Central Veterinaria* "is of negligible risk to" Panama.[2821]
1 April 2022	SENASA requests MIDA's DINASA to indicate the requisites for granting a sanitary certificate for exports and official certification in accordance with the requirements of Panama's regulations, in order to process the renewal request for the sanitary approval of establishment No. 762 of the company *Biomar*.[2822]
25 July 2022	Expected date of expiry of the sanitary approval of establishment No. 762 of the company *Biomar*, as shown in one of the screenshots of the AUPSA website.[2823]
18 September 2022	Expected date of expiry of the extension granted to establishment No. 158 of the company *Central Veterinaria* on 17 March 2022.[2824]
18 May 2023	APA and DINASA grant establishment No. 762 of the company *Biomar* a two-year renewal of its sanitary approval. The DINASA report states that renewal is approved, "as this product does not pose an animal health risk" to Panama.[2825] The Panel understands that these two years start from 18 May 2023.
30 June 2023	Expected date of expiry of the sanitary approval of establishment No. 762 of the company *Biomar*, as shown in one of the screenshots of the AUPSA website.[2826]

[2816] Memorandum SENASA-DG-937-2021 (Exhibit CRI-212).
[2817] Memorandum SENASA-DG-936-2021 (Exhibit CRI-223).
[2818] Note DSA-335-2021 (Exhibit CRI-64).
[2819] AUPSA refers to a communication of the same day in which it had indicated, by mistake, that the extension was until 28 February 2021. This communication is not in the record.
[2820] Note AUPSA-AG-428-2021 (Exhibit CRI-213).
[2821] DINASA, Note DSA-212-2022 (Exhibit PAN-107).
[2822] Memorandum SENASA-DG-352-2022 (Exhibit CRI-396).
[2823] AUPSA, Approval of processing plants: Costa Rica (April 2022) (Exhibit CRI-395).
[2824] AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217).
[2825] Note APA-DD-410-2023 (Exhibit CRI-397).
[2826] AUPSA, Approval of processing plants: Costa Rica (July 2022) (Exhibit CRI-217).