



PANAMA — MEASURES CONCERNING THE IMPORTATION OF CERTAIN PRODUCTS FROM COSTA RICA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS599/R.

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WORKING PROCEDURES OF THE PANEL

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 19 April 2022

General

1. (1) In these proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following working procedures shall apply.

(2) The Panel reserves the right to modify these procedures or adopt additional procedures as necessary, after consultation with the parties.

(3) The working language of the Panel shall be Spanish.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these working procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) A party to a dispute may, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel with the parties, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceedings, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If Panama considers that the Panel should issue a ruling, prior to the issuance of its report, that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure shall apply. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. Panama shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Costa Rica shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request prior to or during the first substantive meeting, if possible, or the Panel may defer a ruling on the issues raised by the request until it issues its report to the parties.
- c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be transmitted to third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceedings, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for responding to questions or commenting on responses provided by the other party or by experts. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission that contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Costa Rica should be numbered CRI-1, CRI-2, etc. Exhibits submitted by Panama should be numbered PAN-1, PAN-2, etc. If the last exhibit in connection with the first submission was numbered CRI-5, the first exhibit in connection with the next submission would thus be numbered CRI-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in one of its submissions and wishes for the cited content to form part of the official record, this party shall provide the cited content of the website as an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

- a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.
- b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these working procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.

13. Each party shall provide the Panel with a list of the members of its delegation no later than 5 p.m. (Geneva time) five (5) working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage or no later than three (3) weeks before the meeting, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall invite Costa Rica to make an opening statement to present its case first. Subsequently, the Panel shall invite Panama to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement, as well as any other additional material accompanying the statement, including exhibits or PowerPoint presentations. In the event that interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
- b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least five (5) working days prior to the meeting, and it should also provide, at the same time, an estimate of the duration of its statement. The Panel shall accord equal time to both parties for their statements.

- c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
- d. The Panel may subsequently pose questions to the parties.
- e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Costa Rica presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
- f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement and, if applicable, of the additional materials accompanying it, no later than 5 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the time-frame established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the time-frame established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting, except that Panama shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

Third-party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. English-Spanish-English simultaneous interpretation shall be provided at this session. If any third party wishes to deliver its oral statement in French, it should make a request to the Panel for French-Spanish-French simultaneous interpretation as early as possible, preferably upon receiving the working procedures and timetable for the proceedings or no later than three (3) weeks prior to the meeting, to allow sufficient time to ensure availability of interpreters.

19. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, no later than five (5) working days preceding the third-party session of the meeting with the Panel.

20. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, these working procedures and any other additional procedures adopted by the Panel, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.

21. The third-party session shall be conducted as follows:

- a. All parties and third parties may be present during the entirety of this session.

- b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.
- c. Each third party should limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least five (5) working days prior to the meeting, and it should provide, at the same time, an estimate of the duration of its statement. The Panel shall accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements.
- e. The Panel may subsequently pose questions to the third parties.
- f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement no later than 5 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the time-frame established by the Panel before the end of the meeting, any questions to a third party or third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the time-frame established by the Panel before the end of the meeting, any questions to a third party or third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within the time-frame established by the Panel before the end of the meeting.

Panel consultation with experts

22. In the course of the proceedings, the Panel shall determine, after consultation with the parties, whether there is a need to seek expert advice. In addressing matters concerning scientific and/or technical advice from experts¹, the Panel shall have regard to the provisions of the DSU and may have regard, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost. In that case, the procedures described below shall apply.

23. Pursuant to Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Panel may seek advice from experts and from international organizations, as appropriate.

24. Should the Panel determine that there is a need to seek expert advice, the Panel may request such advice from any relevant institution and shall ask the parties to suggest potential experts. Parties shall not engage in direct contact with the individuals suggested, for the purpose of this dispute.

25. The Panel shall provide the parties with a list of potential experts, their curricula vitae and declarations of potential conflicts of interest. In that declaration, each potential expert shall be asked to disclose information that may concern the following aspects:

¹ For the purpose of these working procedures, the term "expert" may be used to refer to individuals, institutions, research bodies or international organizations.

- a. financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- b. professional interests (e.g. a past or present relationship with private clients or the relevant industry, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- c. other active interests (e.g. active participation in public interest groups or other organizations which may have a declared agenda relevant to the dispute in question);
- d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
- e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and
- f. any other relevant information.

26. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.

27. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, taking into the account the comments of the parties, and shall not select experts whom the Panel considers to have a conflict of interest either after self-disclosure or otherwise. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

28. The Panel shall inform the parties of the experts and international organizations it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in their personal capacities and not as representatives of any entity. However, should the Panel seek advice from an international organization, the advice received shall be deemed to be received from the international organization and not the individual staff members or representatives of the international organization. Moreover, any staff members of such international organizations that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective international organization.

29. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

30. The Panel shall prepare written questions for the experts. The Panel may invite the parties to suggest a limited number of questions that the Panel could include in its questions to the experts. The experts shall be requested to provide responses in writing to the Panel's questions within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The responses of experts shall be part of the Panel's record, but shall not be attached to the Panel report as annexes. The Panel shall provide the parties with copies of the responses, in accordance with the adopted timetable. The parties shall have the opportunity to comment in writing on the responses from the experts. The parties shall also have the opportunity to pose written questions to the experts in advance of the meeting, which shall be answered orally during the meeting.

31. The Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions.

32. The Panel may schedule a meeting with the experts after the first substantive meeting and prior to the second substantive meeting. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

- a. the parties' comments on the experts' written responses are provided to all experts;
- b. each expert is provided with the other experts' responses to the Panel's questions; and
- c. each expert is provided with any advance questions from the parties to the experts.

33. The Panel's meeting with the experts would be conducted as follows:

- a. The Panel shall invite each expert to make an opening statement. This statement may include, but is not limited to, any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel and the parties with written versions of their statements, before they take the floor. The Panel shall make available, to the other experts and to the parties, a final version of each expert's written statement, no later than 5 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To facilitate this, each party may send in writing in advance of the meeting, within a time-frame to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the Panel's meeting with the experts. Each expert shall be invited to respond orally to the parties' questions and to react to the parties' comments.
- c. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions. The Panel may also give the other experts the opportunity to ask questions or make comments.
- d. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement.
- e. The Panel may pose additional written questions or schedule additional meetings with the experts if necessary.

34. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceedings. This transcript shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

Descriptive part and executive summaries

35. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the integrated executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These integrated executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

36. Each party shall submit one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's written submissions, its oral statements and, if possible, its responses to questions following the substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

37. The integrated executive summary shall be limited to no more than 30 pages.

38. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

39. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

40. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

41. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and final report

42. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

43. The following procedures regarding service of documents shall apply to all documents submitted by the parties and third parties during the proceedings:

Each party and third party shall submit all documents to the Panel via the Disputes Online Registry Application (DORA), the WTO's online registry (<https://dora.wto.org>), by 5 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party and the third parties.

By 5 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all the documents it submits to the Panel, including the exhibits, to the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the filing. If any document is in a format that is impractical to submit as a paper copy, the party may submit it in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

The Panel shall provide the parties with the descriptive part, the interim report and the final report, as well as other documents or communications from the Panel, via DORA, as appropriate.

If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

If any party or third party is unable to meet the 5 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry without delay and provide an electronic version of all documents to be submitted to the Panel by email, including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5.30 p.m. on the due

date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or would require more than five email messages, owing to the number of exhibits to be filed or their size, large exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9.30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

If any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem and shall, if possible, identify the relevant document(s). The DS Registrar shall promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

Correction of clerical errors in submissions

44. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the filing of the submission in question.

ANNEX A-2

**ADDITIONAL WORKING PROCEDURES CONCERNING
BUSINESS CONFIDENTIAL INFORMATION**

Adopted on 22 April 2022

1. These procedures, adopted in accordance with paragraph 2(4) of the Panel's working procedures, are additional to the general protection of confidential information set forth in paragraph 2(1) of the Panel's working procedures and shall apply to any business confidential information (BCI) that a party submits in the course of the present Panel proceedings.
2. For the purposes of these Panel proceedings, BCI is defined as any information that has been designated as such by a party submitting the information to the Panel, that is not available in the public domain, and the release of which could reasonably be considered to cause or threaten to cause serious harm to the interests of the originator(s) of the information.
3. Each party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene, in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI has not been exercised.
4. No person may have access to BCI except a member of the Secretariat¹ or the Panel, an employee of a party or third party, an outside advisor or an expert providing assistance to the Panel, a party or a third party and their clerical staff for the purposes of this dispute.
5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees, outside advisors and experts comply with these procedures.
6. At the request of either party, the Panel shall review whether particular confidential information it has submitted is so sensitive that it should not be provided to the third parties, taking into consideration the need for the third party to have access to the particular information. If the Panel finds such information to be particularly sensitive, it shall direct the party submitting the information to provide a summary of the contents of the redacted information, which shall be made available to the third parties.
7. An employee of a party or a third party, an outside advisor or an expert assisting the Panel, a party or a third party shall not be permitted access to BCI if that employee, outside advisor or expert is an officer or employee of an enterprise engaged in the production, distribution, sale, export or import of the products affected by the measures at issue in this dispute, or of an association of such enterprises.
8. The party or third party submitting BCI, including referring to or quoting BCI already submitted by another party, shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information in any document submitted to the Panel. Documents containing BCI should be marked as follows:

The cover or first page of the document shall state in bold **"Contains Business Confidential Information on pages xxxxxx"**.

Each page of the document that contains BCI shall indicate in bold **"Contains Business Confidential Information"** at the top of the page.

¹ Including translators and interpreters.

Where the document contains both BCI and non-confidential information, the specific BCI in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]].

The party or third party shall indicate that the document contains BCI when uploading the document into the Disputes Online Registry Application (DORA).

9. The party submitting BCI, or the third party referring to BCI, in the form of, or as part of, an exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit CRI-1 (BCI), Exhibit PAN-1 (BCI)) in the list of exhibits. The party or third party shall also indicate that the exhibit contains BCI when uploading it into DORA. If the entire content of an exhibit constitutes BCI, the cover page and the top of each page of the exhibit shall state the following in bold: **"All of the information included in this exhibit is Business Confidential Information"**. In this way, there shall be no need to place all of the specific BCI in that exhibit between double square brackets.

10. Where BCI is submitted in binary-encoded form, the file name shall include the words "Business Confidential Information" or "BCI". Upon uploading to DORA a document in binary-encoded form containing BCI, the confidentiality level for the document shall be selected as "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the words "Business Confidential Information" or "BCI".

11. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel that the statement is to contain BCI three working days before the meeting with the Panel so that appropriate arrangements can be made to protect the confidentiality of that information. The Panel shall ensure that, when the statement is made, only persons authorized to have access to BCI pursuant to these procedures can hear that information. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraphs 9-11 of these procedures.

12. If a party considers that information submitted or cited by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party designated as BCI information that should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Unless impracticable, if a party challenges the non-designation or designation of information as BCI, the party making the objection shall do so within five working days of the information having been submitted. The Panel shall decide whether information subject to an objection is to be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2 of these procedures.

13. Any person authorized to have access to documents containing BCI under the terms of these procedures shall store such documents, including those in electronic form, so as to prevent unauthorized access to such information.

14. The Panel shall not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to Members, the Panel shall give each party an opportunity to review the report to ensure that it does not disclose any information that the party has properly designated as BCI.

15. At the conclusion of the dispute², and within a period to be established by the Panel, each party or third party shall either return all documents (including electronic material) containing BCI, submitted during the Panel proceedings, to the party that submitted such documents or certify in writing to the Panel and the other parties that all such documents have been destroyed, or otherwise protect the BCI against public disclosure, in accordance with its obligations under its domestic laws.

² Where this is defined as when (a) the Panel or Appellate Body report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel or Appellate Body report; (b) the authority for the establishment of the Panel lapses under Article 12.12 of the DSU; or (c) a mutually satisfactory solution is notified to the DSB under Article 3.6 of the DSU.

The WTO Secretariat has the right to retain one copy of each of the documents containing BCI for the archives of the WTO.

16. Documents containing information designated as BCI form part of the official record of the dispute for the purposes of any further proceedings under the DSU. Parties seeking to have that information protected in a similar way in further proceedings should address such a request to the appropriate body and should do so as early as possible so as to ensure procedures are in place before the DS Registry transmits the record of the proceedings. When transmitting the record, the DS Registry shall indicate which documents contain BCI.

17. The Panel reserves the right, after consulting with the parties, to amend and/or supplement these additional working procedures concerning BCI.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COSTA RICA

1 INTRODUCTION

1.1. This dispute concerns measures taken by Panama in 2019 and 2020 that prohibit the importation of the following agricultural products from Costa Rica: (i) dairy and meat products; (ii) pineapples; (iii) plantains and bananas; and (iv) strawberries.

1.2. In the space of two years, Panama took measures to prevent Costa Rican imports of these products. On 29 January 2019, Panama closed the market to Costa Rican pineapples, allegedly owing to the presence of the pink mealybug pest in Costa Rican territory. Nine months later, on 10 and 25 October 2019, Panama prohibited the importation of Costa Rican plantains and bananas, respectively, on grounds that are so confusing and implausible that Panama itself is struggling to maintain a coherent narrative. Then, on 20 January 2020, Panama prohibited imports of Costa Rican strawberries after detecting pesticide residues in two shipments from Costa Rica, a common occurrence in international trade that can be effectively addressed through other measures. Lastly, on 30 June 2020, Panama closed its market to various dairy and meat products because, owing to the unjustified revocation of Costa Rica's sanitary eligibility and to the delays caused by Panama, the sanitary authorizations of 18 Costa Rican establishments expired.

1.3. The challenged measures are part of a series of attempts made by Panama in recent years to restrict imports of agricultural products. On 24 July 2018, the National Assembly of Panama discussed a draft law to suspend all imports of agricultural products, including dairy and meat products, for one year. Subsequently, in 2019, during his presidential campaign, the current President of Panama promised to "end imports during the harvest season"¹ and abolish the Panamanian Food Safety Authority (AUPSA). AUPSA was abolished on 30 March 2021 through the adoption of Law No. 206. The Authority was replaced with the Panamanian Food Agency (APA), which was described as an "entity that defends the interests of producers and consumers".²

1.4. Panama took the four measures at issue in this dispute at the beginning of the current President's administration, in 2019 and 2020, in the political climate described above. While these measures have different characteristics, they all led to the same result: preventing Costa Rica from exporting agricultural products to Panama without providing further technical justification.

1.5. Panama's measures violate multiple obligations under the SPS Agreement: the obligation to conduct a risk assessment; the obligation to ensure alignment with international standards; non-discrimination obligations; the obligation not to restrict trade more than is required; and the obligation not to incur undue delay in procedures. These measures also contravene several provisions of the GATT 1994 and of the Agreement on Agriculture.

2 MEASURE CONCERNING THE IMPORTATION OF DAIRY AND MEAT PRODUCTS

Introduction

2.1. Panama has prohibited imports of dairy and meat products of Costa Rican origin since 30 June 2020. This prohibition is the result of Panama's refusal to renew the sanitary authorizations of 18 Costa Rican establishments. Despite Costa Rica's request for these authorizations to be renewed prior to their expiry on 30 June 2020, Panama has impeded the renewal process, citing a need to redetermine Costa Rica's sanitary eligibility. This is tantamount to stating that Costa Rica has lost its sanitary eligibility to export dairy and meat products, which is a precondition for granting the renewal.

¹ "Cortizo reitera su compromiso en acabar las importaciones en épocas de cosecha", *La Estrella de Panamá* (16 March 2019) (Exhibit CRI-184).

² Statement by President Cortizo (Exhibit CRI-4).

2.2. The procedures for renewing the sanitary authorizations have been affected not only by Panama's requirement for a new sanitary eligibility procedure but also by delays caused by Panama since 2017, when Costa Rica began to request the renewal of the authorizations granted three years previously. Although Panama considers on-site audits to be a requirement for the renewal of sanitary authorizations, it has not conducted them for internal reasons. In most cases, Panama did not even take the necessary steps to schedule a date for these audits.

2.3. Knowing that the most recent renewal of the sanitary authorizations would expire on 30 June 2020, Costa Rica reiterated its earlier requests for renewal on 12 June 2020 in Memorandum SENASA-DG-0721-2020.³ Owing to the logistical constraints linked to the COVID-19 pandemic that were widespread at the time, Costa Rica raised the possibility for Panama to assess and approve the Costa Rican establishments through a documentary evaluation, on the understanding that the on-site audit would take place at a later date.⁴ Costa Rica proposed this because Panama had taken this approach on two separate occasions in 2019.⁵

2.4. To Costa Rica's surprise, the Panamanian authorities rejected this proposal, citing as justification precisely "the current COVID-19 situation".⁶ However, the Panamanian authorities did grant this type of extension to establishments in Peru, Mexico and New Zealand⁷, even citing, as justification for their decision, the "international health situation resulting from the pandemic caused by the COVID-19 virus".⁸

Panama acted inconsistently with Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement by revoking Costa Rica's sanitary eligibility without conducting a risk analysis

2.5. The sanitary authorizations of the Costa Rican establishments were not renewed because, *inter alia*, Panama is requiring Costa Rica to undergo a new country-level sanitary eligibility procedure. Since country-level sanitary eligibility is a precondition for renewing the establishments' sanitary authorizations, Panama has refused to continue conducting these renewal procedures. This means that the country's sanitary eligibility, originally recognized by Panama in 2009, has been revoked by the Panamanian authorities.

2.6. Panama is in violation of Articles 5.1, 5.2, 5.3 and, by extension, 2.2 of the SPS Agreement, since the revocation of sanitary eligibility, which necessarily involves closing the market, is not based on a risk assessment.

2.7. An analysis under Article 5.1 consists of four steps: (i) whether there is a risk assessment within the meaning of Annex A(4) of the SPS Agreement; (ii) whether that risk assessment is appropriate to the circumstances; (iii) whether the science supports the conclusions in the risk assessment; and (iv) whether the measure is based on that risk assessment.⁹ A finding, in the context of the first step, that the importing Member did not conduct any risk assessment would be sufficient to conclude that there is an inconsistency with Article 5.1.¹⁰

2.8. Panama claims that Costa Rica's challenge does not cover substantive requirements such as the revocation of sanitary eligibility.¹¹ For this reason, Panama has presented no defence arguments concerning Costa Rica's claim under Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement relating to the lack of a risk assessment. Panama does not even attempt to justify this violation under Article 5.7 of the SPS Agreement.

2.9. Panama is wrong to state that it has never revoked Costa Rica's sanitary eligibility and that the substantive aspect challenged by Costa Rica is therefore non-existent. Consequently, it is also

³ Memorandum SENASA-DG-0721-2020 (Exhibit CRI-43).

⁴ Memorandum SENASA-DG-0721-2020 (Exhibit CRI-43).

⁵ Note AUPSA-AG-0399-2019 (Exhibit CRI-35), para. 2; AUPSA, Resolution No. 145-AG-2019 (Exhibit PAN-2), fourth recital.

⁶ Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para. 2.

⁷ 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).

⁸ Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth recital.

⁹ Panel Report, *Russia – Pigs (EU)*, para. 7.635 (referring to Panel Report, *US – Animals*, para. 7.321).

¹⁰ Panel Reports, *US – Poultry (China)*, paras. 7.191-7.192; *Russia – Pigs (EU)*, para. 7.713.

¹¹ Panama's first written submission, paras. 65, 74 and 85; opening statement at the first meeting of the Panel, para. 24.

mistaken in its assertion that Costa Rica is seeking to "convert the inspection and approval procedures into substantive sanitary and phytosanitary measures".¹²

2.10. The chronology of events and Panama's submissions show that the sanitary eligibility originally granted by Panama to Costa Rica in 2009 was subsequently withdrawn without justification. The facts demonstrate that, on 12 June 2020, when Costa Rica requested the renewal of the authorizations of the Costa Rican establishments, the sanitary eligibility was no longer valid. This was announced by Panama on 21 August 2020 when it rejected Costa Rica's request for renewal, arguing that, as a condition for processing the applications for renewal in respect of the Costa Rican establishments, "there is a need to initiate the animal health evaluation process to determine its eligibility".¹³ The only logical inference from this assertion by AUPSA is that the previously granted sanitary eligibility, which Panama also refers to as animal health eligibility, had lapsed.

2.11. Panama confirmed this state of affairs in the communications that it subsequently sent to Costa Rica. In its communication of 9 October 2020, Panama again mentioned the need to "initiate the animal health evaluation procedure for Costa Rica to determine its eligibility".¹⁴ Subsequently, on 22 February 2021, Panama declared the "formal initiation" of the procedure to determine Costa Rica's sanitary eligibility.¹⁵ As part of the formal initiation of this procedure, Panama sent Costa Rica a questionnaire entitled "[p]reliminary questionnaire to determine a country's animal health eligibility".¹⁶ By requiring Costa Rica to initiate a procedure for determining sanitary eligibility, Panama is declaring that Costa Rica's sanitary eligibility from 2009 has lapsed.

2.12. The Panel should also reject Panama's argument that the information requested from Costa Rica on 22 February 2021 as part of the "formal initiation of Costa Rica's animal health evaluation procedure"¹⁷ was not to determine sanitary eligibility anew but is information required as a matter of course in procedures to renew the sanitary authorizations of foreign establishments.¹⁸ According to Panama, this was based on paragraph 7 of the AUPSA Manual for the approval of establishments, which provides that, in order to renew the approval of an establishment, AUPSA may request information on the "sanitary and/or phytosanitary status of the exporting country".¹⁹ A correct reading of paragraph 7 of the Manual indicates that, in the renewal process for establishments, AUPSA may request information on the sanitary status of the exporting country. This refers to a request for the information needed for AUPSA to update the exporting country's record and renew its sanitary eligibility automatically, *unless* the information indicates that there was a change in epizootiological status or a failure to comply with sanitary standards.²⁰

2.13. According to Panama's regulations, sanitary eligibility may be revoked or suspended in only two scenarios: (i) when substantial changes in sanitary status are found to have occurred; and (ii) when there are scientific and technical elements providing conclusive evidence of non-compliance with the sanitary standards in force.²¹ Neither of these circumstances was found to have arisen in the case of Costa Rica.

2.14. As with any sanitary or phytosanitary measure, the revocation of sanitary eligibility should have been based on a risk assessment pursuant to Article 5.1 of the SPS Agreement. In fact, Resolution AUPSA-DINAN-0092-2017, which forms part of Panama's regulations on sanitary eligibility, stipulates that the revocation or suspension of sanitary eligibility in the two above-mentioned scenarios requires a risk assessment.²²

¹² Panama's opening statement at the first meeting of the Panel, para. 26.

¹³ Note AUPSA-AG-395-2020 (Exhibit CRI-51), final paragraph. (emphasis added)

¹⁴ Note AUPSA-AG-481-2020 (Exhibit CRI-52), final paragraph.

¹⁵ Note AUPSA-AG-100-2021 (Exhibit CRI-57), para. 1.

¹⁶ Animal health evaluation questionnaire (22 February 2021) (Exhibit CRI-268). (emphasis added)

¹⁷ Note AUPSA-AG-100-2021 (Exhibit CRI-57), para. 1.

¹⁸ Panama's response to Panel question No. 27(c), paras. 96-97.

¹⁹ Panama's response to Panel question No. 27(c), para. 96. See also Panama's response to Panel question No. 31(a), para. 103.

²⁰ See AUPSA, Manual on sanitary eligibility (Exhibit CRI-22), para. 37; Law No. 23 of 1997 (Exhibit PAN-105), Article 67.

²¹ Resolution AUPSA-DINAN-092-2007 (Exhibit CRI-26), Article 4. See also Panama's response to Panel question No. 42(d), para. 134; response to Panel question No. 45(b), para. 140.

²² See Resolution AUPSA-DINAN-0092-2017 (Exhibit CRI-26), Article 5; AUPSA, Manual on sanitary eligibility (Exhibit CRI-22), definition of "risk analysis", p. 4.

2.15. Panama did not conduct any risk assessment in relation to the revocation of Costa Rica's sanitary eligibility. None of the assertions or points contained in the communications sent by AUPSA to Costa Rica constitutes a risk assessment for the purposes of the SPS Agreement. Panama's assertions that "the Costa Rican sanitary system ha[s] not been subjected to a thorough evaluation by our authorities since 2014"²³ and that the new sanitary eligibility procedure is necessary owing to "the current COVID-19 situation"²⁴ cannot be considered as a risk assessment, that is, a "scientific process aimed at establishing the scientific basis for a Member's sanitary measures, both based on laboratory methods as well as on the situation of the particular area where the risk is being assessed".²⁵

2.16. As explained previously, in the absence of a risk assessment, a panel may find an inconsistency with Article 5.1 of the SPS Agreement without examining the other elements of this provision, the analysis of which would be feasible only if there was a risk assessment.²⁶ The inconsistency with Article 5.1 therefore entails an inconsistency with Articles 5.2, 5.3²⁷ and 2.2 of the SPS Agreement.²⁸

2.17. In the case of the measure concerning dairy and meat products, Panama did not invoke Article 5.7 as a possible justification for the violation of Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement. In any event, even if Panama invoked Article 5.7 of the SPS Agreement to justify the lack of a risk assessment in relation to the revocation of sanitary eligibility, the four cumulative requirements of that qualified exemption would not be met: (i) scientific evidence is insufficient; (ii) the measure must be adopted on the basis of available pertinent information; (iii) the importing Member must seek to obtain the additional information necessary for an assessment of risk; and (iv) the importing Member must review the measure within a reasonable period of time.²⁹

2.18. Accordingly, Costa Rica requests the Panel to find that Panama acted inconsistently with Articles 5.1, 5.2, 5.3 and, by extension, 2.2 of the SPS Agreement, since the revocation of Costa Rica's sanitary eligibility to export dairy and meat products to Panama was not based on a risk assessment.

Panama acted inconsistently with the obligation under Articles 5.6 and 2.2 of the SPS Agreement not to restrict trade more than required

2.19. Panama violated Article 5.6 of the SPS Agreement because, in respect of dairy and meat products, it applied a measure that is more trade-restrictive than required to achieve its ALOP.

2.20. Article 5.6 of the SPS Agreement states that, when applying sanitary or phytosanitary measures, "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". Footnote 3 of the SPS Agreement establishes that a measure is more trade-restrictive than required when there is an alternative measure that possesses three characteristics: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the importing Member's appropriate level of protection (ALOP); and (iii) is significantly less restrictive to trade.³⁰

2.21. In its first written submission, Costa Rica identified an alternative measure that was available to Panama: to renew the authorizations of the Costa Rican establishments on the basis of documentary evidence, leaving the on-site audit for a later date, in line with its previous practice and as it did for establishments in Peru, Mexico and New Zealand.³¹

2.22. This alternative measure meets all three elements under footnote 3 of the SPS Agreement. With regard to the first and second elements of footnote 3, the fact that Panama agreed to renew the sanitary authorizations of the establishments in Peru, Mexico and New Zealand, which have

²³ Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para. 3.

²⁴ Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para. 2.

²⁵ Panel Report, *Russia – Pigs (EU)*, para. 7.636.

²⁶ Panel Reports, *US – Poultry (China)*, paras. 7.191-7.192; *Russia – Pigs (EU)*, para. 7.713.

²⁷ Panel Report, *Russia – Pigs (EU)*, para. 7.774.

²⁸ Panel Report, *Russia – Pigs (EU)*, paras. 7.713-7.714 and 7.719.

²⁹ Costa Rica's first written submission, paras. 545-584.

³⁰ Appellate Body Report, *Korea – Radionuclides*, para. 5.22.

³¹ Costa Rica's first written submission, paras. 587-589.

conditions similar to those of the Costa Rican establishments, shows that this alternative measure is reasonably available to Panama in view of its technical and economic feasibility, and would enable Panama to achieve its ALOP.³² Although Panama stated that, in Costa Rica's case, "[a] purely documentary evaluation does not satisfy or ensure compliance with the requirements laid down in Panama's sanitary legislation for such establishments"³³, in the case of Peru, Mexico and New Zealand, the Panamanian authorities allowed the renewal procedure to be initiated by means of a documentary review, leaving for a later date the on-site audit, which could be carried out even after the expiry of the extension.³⁴

2.23. As for the third element, the alternative measure is significantly less restrictive to trade than the challenged measure.³⁵ If Panama had allowed the renewal procedure to be conducted on the basis of documentary evidence, without immediate on-site audits, the Costa Rican establishments would have had their sanitary authorizations renewed, which would have enabled them to continue exporting to Panama uninterrupted. Costa Rica recalls that an import prohibition is "as trade-restrictive as can be".³⁶ Given that the alternative measure would allow trade to resume, it would restrict trade significantly less than the current import prohibition.

2.24. Panama has decided not to submit specific rebuttal arguments in respect of this claim by Costa Rica. Panama wrongly states that the challenged measure relating to dairy and meat products concerns only control, inspection and approval procedures and that "[a]ccordingly, these procedures do not fall within the scope of Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.6 and 5.7 of the SPS Agreement".³⁷ As Costa Rica has explained, Panama's characterization of the challenged measure is incorrect, and the failure to provide rebuttal arguments therefore implies an absence of effective refutation of the *prima facie* case presented by Costa Rica.³⁸

2.25. In view of the above, Costa Rica submits that Panama acted inconsistently with Article 5.6 of the SPS Agreement, as the prohibition on dairy and meat products is more trade-restrictive than required. As a result, the measure also fails to comply with the obligation under Article 2.2 of the SPS Agreement to apply an SPS measure only "to the extent necessary".³⁹

Panama acted inconsistently with the non-discrimination obligations under Articles 2.3 and 5.5 of the SPS Agreement

2.26. Panama violated the non-discrimination obligations under Articles 2.3 and 5.5 of the SPS Agreement because, while it refused to extend the sanitary authorizations of the Costa Rican establishments by means of a documentary review without a prior on-site audit, it did grant this type of extension to similar establishments in Peru, Mexico and New Zealand.

2.27. This results in a breach of the obligation under Article 2.3 of the SPS Agreement not to arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.⁴⁰ Costa Rica demonstrated the three elements required for there to be a violation of this provision.

2.28. First, the conditions in Costa Rica are identical or similar to those in Peru, Mexico and New Zealand owing to similarities in several aspects: the validity of the various countries' sanitary eligibility; the types of establishment and products concerned; the steps taken by these countries to request the renewal of the approvals of their establishments; the type of extension to be granted by Panama both to Costa Rica and to the other countries; and the temporal aspect of the AUPSA decisions to reject or accept the extension requests.⁴¹

³² Costa Rica's first written submission, paras. 591-597.

³³ Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para. 3.

³⁴ Resolution No. 014-AG-AUPSA-2020 (Exhibit CRI-47), fourth recital and Article 4; Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), seventh recital and Article 4; and Resolution No. 018-AG-AUPSA-2020 (Exhibit CRI-48), seventh recital and Article 4.

³⁵ Costa Rica's first written submission, paras. 598-599.

³⁶ Panel Report, *Brazil – Retreaded Tyres*, para. 7.114.

³⁷ Panama's first written submission, para. 65.

³⁸ Appellate Body Report, *EC – Hormones*, para. 104.

³⁹ Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38.

⁴⁰ Costa Rica's first written submission, paras. 603-645.

⁴¹ Costa Rica's first written submission, paras. 612-621; Panama's response to Panel question No. 22.

2.29. Second, there is discrimination against Costa Rica because, in contrast to the treatment accorded to Peru, Mexico and New Zealand, Panama did not extend the sanitary approvals of the Costa Rican establishments to enable them to continue to export to Panama.⁴² Third, the discrimination is arbitrary or unjustifiable.⁴³ In Costa Rica's view, there is no cause or rationale to explain the discrimination against the Costa Rican establishments. Panama cited the COVID-19 health situation as a reason for rejecting Costa Rica's request to extend the sanitary approvals, but invoked the same circumstances in granting such an extension to Peru.⁴⁴

2.30. Panama also acted inconsistently with Article 5.5 of the SPS Agreement, since it applied, in an arbitrary or unjustifiable manner, different ALOPs in comparable situations.⁴⁵ Costa Rica has demonstrated the following:

2.31. First, Panama applies different ALOPs in different but comparable situations. This is a reference to the similarity between Costa Rica's situation and the situations in Peru, Mexico and New Zealand, as explained above in the analysis of Article 2.3 of the SPS Agreement.

2.32. Second, the facts show that the differences in the ALOPs applied by Panama are arbitrary or unjustifiable.⁴⁶ Panama has failed to identify a single substantive aspect, whether in relation to food safety or Costa Rica's sanitary status, to justify its decision not to extend the sanitary approvals of Costa Rican establishments but to grant such an extension to establishments in Peru, Mexico and New Zealand. Contradictorily, COVID-19 was a circumstance invoked by Panama to reject Costa Rica's request for an extension but to accept Peru's request.

2.33. Third, the distinction in the ALOPs results in a "discrimination or a disguised restriction on international trade" within the meaning of Article 5.5 of the SPS Agreement.⁴⁷ Case law has identified certain "warning signals" and factors pointing to the existence of discrimination or a disguised restriction on international trade: (i) the arbitrary or unjustifiable nature of distinctions in the ALOPs; (ii) a substantial difference between the ALOPs; and (iii) the inconsistency of the measure with the obligation to conduct a risk assessment under Articles 5.1 and 2.2 of the SPS Agreement. Costa Rica explained that all these warning signals are present in this case.⁴⁸

2.34. Costa Rica proposes that the Panel first address the claim under Article 2.3 of the SPS Agreement, followed by the claim under Article 5.5 of the SPS Agreement⁴⁹, owing to the broader nature of the non-discrimination obligations contained in Article 2.3, as opposed to the focus of Article 5.5 on discrimination that may arise in respect of distinctions in levels of protection.⁵⁰ This is the order of analysis followed by the panels in *India – Agricultural Products* and *Russia – Pigs (EU)*.⁵¹ However, should the Panel decide to examine the claim under Article 5.5 of the SPS Agreement first, Costa Rica recalls that, when a Member acts inconsistently with the obligation contained in Article 5.5 of the SPS Agreement, it also, by implication, acts in a manner inconsistent with Article 2.3 of the SPS Agreement.⁵²

2.35. In its first written submission, Panama argued that Costa Rica's challenge in respect of dairy and meat products does not cover substantive measures "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".⁵³ For this reason, Panama presented no specific defence arguments concerning some of Costa Rica's claims, including those brought under Articles 2.3 and 5.5 of the SPS Agreement. Costa Rica requests the Panel to conclude that Panama

⁴² Costa Rica's first written submission, paras. 622-636.

⁴³ Costa Rica's first written submission, paras. 637-644.

⁴⁴ Memorandum SENASA-DG-0721-2020 (Exhibit CRI-43), paras. 3 and 4; Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth recital.

⁴⁵ Costa Rica's first written submission, paras. 646-669.

⁴⁶ Costa Rica's first written submission, paras. 658-662.

⁴⁷ Costa Rica's first written submission, paras. 663-667.

⁴⁸ Costa Rica's first written submission, paras. 663-667.

⁴⁹ Costa Rica's first written submission, paras. 883 and 932.

⁵⁰ Panel Report, *Russia – Pigs (EU)*, para. 7.1261.

⁵¹ Panel Reports, *India – Agricultural Products*, para. 7.481; *Russia – Pigs (EU)*, para. 7.1264.

⁵² Appellate Body Report, *Australia – Salmon*, para. 178.

⁵³ Panama's first written submission, para. 85.

acted inconsistently with Articles 2.3 and 5.5 of the SPS Agreement owing to the absence of effective refutation of the *prima facie* case presented by Costa Rica.⁵⁴

Panama acted inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement by incurring undue delay in the procedures for the renewal of sanitary approvals

2.36. Costa Rica submits that, since 2017, Panama has been violating Annex C(1)(a) to the SPS Agreement by incurring undue delay in initiating and completing the procedures for the renewal of the sanitary authorizations of 18 Costa Rican establishments.⁵⁵

2.37. In the context of Annex C(1)(a), the term "delay" refers to "(a period of) time lost by inaction or inability to proceed"⁵⁶, while the term "undue" refers to something "[g]oing beyond what is warranted" and that is "unjustifiable".⁵⁷ In previous cases, it was understood that "inaction or an inability to proceed on the substance of the application would constitute something outside the normal course of the procedure and should be considered a delay within the meaning of Article 8 and Annex C(1)(a)".⁵⁸

2.38. Panama incurred "delay" within the meaning of Annex C(1)(a) in the form of delays in conducting the on-site audits related to the process of renewing the sanitary authorizations of the Costa Rican establishments. As indicated in the Annex to Costa Rica's first written submission, the Costa Rican authorities requested Panama to renew the sanitary authorizations originally granted between 2014 and 2016.⁵⁹

2.39. Despite requiring on-site audits to be conducted as a necessary part of the procedure for renewing establishments' sanitary authorizations, Panama has not carried out any audits in the renewal procedures linked to Costa Rican establishments. Panama has acknowledged that, in the vast majority of cases, it did not even schedule a date for these on-site audits.⁶⁰

2.40. The only procedure in which Panama did schedule a date for an audit is the one concerning the Dos Pinos establishment. However, there were also delays in that case because Panama never conducted the on-site audit, since it unilaterally decided to suspend it indefinitely.⁶¹

2.41. Panama asserts that any delay in the renewal procedures could have occurred only after 30 June 2020 because AUPSA allegedly completed the renewal procedures prior to that date.⁶² The Panel should reject this argument. It is incorrect to state that, during the period from 2017 to 2020, Panama completed the procedures for renewing sanitary approvals. While AUPSA's automatic and informal extensions allowed trade to continue beyond the expiry of the original authorizations, this does not mean that AUPSA properly processed and completed the renewal procedures. On some occasions, these extensions were not confirmed in writing, and on others, they consisted of a brief indication that all Costa Rican establishments could continue to export.⁶³ Panama cannot state, on the one hand, that "on-site audits were absolutely necessary to renew the approval of each establishment"⁶⁴, and, on the other, that it formally completed the renewal procedures by granting extensions without conducting such on-site audits. Moreover, in previous cases, it was understood that, once an undue delay has occurred, the Member cannot cure or undo it even by conducting such procedures without undue delay thereafter.⁶⁵

⁵⁴ Appellate Body Report, *EC – Hormones*, para. 104.

⁵⁵ In its panel request, Costa Rica identifies the 18 Costa Rican establishments concerned (see Costa Rica's panel request, p. 3, fn 6 and Annex).

⁵⁶ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

⁵⁷ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

⁵⁸ Panel Report, *US – Animals*, para. 7.113.

⁵⁹ See Costa Rica's first written submission, Section VIII, Annex – Table on authorizations and renewals of Costa Rican establishments.

⁶⁰ Panama's response to Panel question No. 29, para. 100.

⁶¹ Panama's first written submission, paras. 683-684.

⁶² Panama's first written submission, para. 128; opening statement at the first meeting of the Panel, para. 29.

⁶³ Note AUPSA-AG-0399-2019 (Exhibit CRI-35).

⁶⁴ Panama's first written submission, para. 145.

⁶⁵ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.51. (fn omitted; emphasis added)

2.42. The Panel should also dismiss Panama's argument that the delays that occurred after 30 June 2020 are justified by COVID-19 restrictions⁶⁶ and by Costa Rica's refusal to provide the information required by Panama.⁶⁷ Bearing in mind precisely the difficulty of conducting on-site audits in Costa Rican territory on account of COVID-19, Costa Rica proposed that Panama assess and approve the Costa Rican establishments through a documentary evaluation, on the understanding that the audit would take place at a later date.⁶⁸ Panama rejected Costa Rica's proposal⁶⁹ but did agree to a renewal of this type for establishments in Peru, Mexico and New Zealand, in the light, contradictorily, of the "international health situation resulting from the pandemic caused by the COVID-19 virus".⁷⁰ It is also worth reiterating that Panama has refused to conduct on-site audits even after the withdrawal of COVID-19 travel restrictions.

2.43. Regarding Costa Rica's alleged refusal to provide the information required by Panama, it should be recalled that Costa Rica provided information on its health system on three occasions. On 19 February 2020, Costa Rica submitted responses to the questionnaire sent by Panama on 2 January in relation to the renewal procedure for the Dos Pinos establishment.⁷¹ Subsequently, on 24 March 2021, Costa Rica sent Panama an updated version of its original responses of 19 February 2020.⁷² Finally, on 3 June 2021, Costa Rica provided information in response to the questionnaire sent by Panama on 22 February 2021.⁷³

2.44. Costa Rica therefore requests the Panel to find that Panama incurred undue delay contrary to Annex C(1)(a) to the SPS Agreement. Since a violation of Annex C(1)(a) entails a violation of Article 8⁷⁴, Costa Rica requests that the Panel also find a violation of Article 8 of the SPS Agreement.

Panama acted inconsistently with Article 8 and Annex C(1)(c) of the SPS Agreement by requiring more information than was necessary to undertake the procedures for the renewal of sanitary authorizations

2.45. Annex C(1)(c) to the SPS Agreement provides that Members shall ensure that "information requirements are limited to what is necessary for appropriate control, inspection and approval procedures".

2.46. As a condition for renewing the sanitary authorizations of Costa Rican establishments, Panama is requiring Costa Rica to undergo a new sanitary eligibility procedure. In terms of the excessive nature of the information requested by Panama, Costa Rica has explained that there is no reason to declare as invalid the sanitary eligibility granted to Costa Rica in 2009. Panama's regulations indicate that sanitary eligibility may be revoked in only two situations: when substantial changes in the exporting country's sanitary status are found to have occurred or when there is "conclusive" evidence of non-compliance with sanitary and phytosanitary standards.⁷⁵ Neither of these two situations occurred in the case of Costa Rica.

2.47. Panama is therefore violating Annex C(1)(c) to the SPS Agreement by requiring more information than is necessary for a control, inspection or approval procedure.⁷⁶

⁶⁶ Panama's first written submission, paras. 133-149; opening statement at the first meeting of the Panel, paras. 30-35; and response to Panel question No. 28, paras. 99-100.

⁶⁷ Panama's first written submission, paras. 150-154; opening statement at the first meeting of the Panel, paras. 4-6; and response to Panel question No. 4(a), paras. 17 and 20, and to Panel question No. 5(c).

⁶⁸ Memorandum SENASA-DG-0721-2020 (Exhibit CRI-43).

⁶⁹ Note AUPSA-AG-0229-2020 (Exhibit CRI-45), para. 2.

⁷⁰ Resolution No. 015-AG-AUPSA-2020 (Exhibit CRI-46), fourth recital.

⁷¹ On 19 February 2020, Costa Rica provided, by email (Exhibit CRI-39), its responses (Exhibit CRI-6) to the questionnaire sent by Panama on 2 January 2020 (Exhibit CRI-38).

⁷² On 24 March 2021, through Memorandum SENASA-DG-340-2021 (Exhibit CRI-60), Costa Rica sent Panama an updated version of its responses (Exhibit CRI-61) previously submitted on 19 February 2020.

⁷³ Memorandum SENASA-DG-725-2021 (Exhibit CRI-63).

⁷⁴ Appellate Body Report, *Australia – Apples*, para. 434. See also Panel Reports, *US – Animals*, para. 7.62; and *Korea – Radionuclides*, para. 7.363.

⁷⁵ Resolution AUPSA-DINAN-092-2007 (Exhibit CRI-26), Article 4.

⁷⁶ Costa Rica's first written submission, paras. 705-715.

The measure is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement

2.48. Pursuant to Article 1.1 of the SPS Agreement, all sanitary and phytosanitary measures affecting international trade "shall be developed and applied in accordance with the provisions of this Agreement".⁷⁷ Furthermore, Article 2.1 of the SPS Agreement recognizes the right of WTO Members to take sanitary and phytosanitary measures "provided that such measures are not inconsistent with the provisions of this Agreement".

2.49. In the light of all the inconsistencies demonstrated by Costa Rica in relation to the import prohibition on dairy and meat products, the Panel should find that Panama failed to comply with the obligations under Articles 1.1 and 2.1 of the SPS Agreement.

MEASURE CONCERNING THE IMPORTATION OF PINEAPPLES

Introduction

2.50. Panama maintains a prohibition on the importation of fresh pineapples from Costa Rica for allegedly phytosanitary reasons, i.e. the presence of the pink mealybug pest (*Maconellicoccus hirsutus* or *M. hirsutus*) in Costa Rican territory. This measure was notified to Costa Rica on 29 January 2019, through Note AUPSA-AG-032-2019⁷⁸, and has prevented Costa Rican pineapples from accessing the Panamanian market for almost five years now.

2.51. The pink mealybug is a widely known insect that feeds on hundreds of plant species and is present in every continent of the world.⁷⁹ In Costa Rica, this pest has been a quarantine pest since it was reported in 2014.⁸⁰ It has been detected in only one area of the country, in just one host, the ornamental hibiscus plant, and never in pineapple-producing areas. In January 2019, after importing fresh pineapples from Costa Rica for years, Panama suddenly closed its market to this product without any justification, on the pretext of the pink mealybug. Costa Rica has demonstrated that this measure is inconsistent with multiple obligations under the SPS Agreement.

The measure is inconsistent with Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement and is not covered by Article 5.7 of the SPS Agreement

2.52. Article 5.1 of the SPS Agreement requires Members to ensure that their phytosanitary measures are based on an appropriate risk assessment, within the meaning of Annex A(4). Case law has established that non-compliance with Article 5.1 necessarily entails non-compliance with Articles 5.2 and 5.3 of the SPS Agreement⁸¹, which list certain factors that Members must take into account when assessing risks. Furthermore, where a measure is not based on a risk assessment under Article 5.1 of the SPS Agreement, it is presumed to be inconsistent with Article 2.2 of that Agreement.⁸²

2.53. Panama has expressly acknowledged that "[t]he provisional measure suspending the importation of pineapples from Costa Rica was not based on a risk assessment".⁸³ This should be sufficient to conclude that Panama has acted inconsistently with its obligations under Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement. According to Panama, however, the import prohibition on pineapples from Costa Rica is a provisional measure, in accordance with Article 5.7 of the SPS Agreement, and is, therefore, not inconsistent with Articles 5.1, 5.2, 5.3 and 2.2 of the

⁷⁷ Panel Report, *US – Animals*, para. 7.719 (the panel observed that a measure that violates any provision of the SPS Agreement also results in a consequential violation of Article 1.1 of the SPS Agreement).

⁷⁸ Note AUPSA-AG-032-2019 (Exhibit CRI-65).

⁷⁹ EPPO Datasheet, 2021 (Exhibit CRI-144), pp. 2 and 5.

⁸⁰ The IPPC 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" (ISPM 5 (Exhibit CRI-75), p. 56).

⁸¹ Panel Report, *US – Animals*, para. 7.320. See also Panel Reports, *Japan – Apples*, para. 8.230; *Australia – Apples*, para. 7.211; and *Russia – Pigs (EU)*, para. 7.770.

⁸² Appellate Body Reports, *EC – Hormones*, para. 180; *Australia – Apples*, para. 209; and *India – Agricultural Products*, para. 5.29.

⁸³ Panama's response to Panel question No. 50, para. 143. See also Panama's response to Panel question No. 9(b), para. 32.

SPS Agreement.⁸⁴ Nevertheless, Panama has failed to meet its burden of proving compliance with the four cumulative requirements of Article 5.7 of the SPS Agreement.

2.54. First, Panama has failed to demonstrate that its measure was adopted in a situation where relevant scientific evidence was *insufficient* to conduct a risk assessment. When Panama closed its market in January 2019, its phytosanitary authorities had very extensive scientific evidence concerning the pink mealybug pest and had known, since May 2014, that this pest was a quarantine pest in Costa Rica, because Costa Rica had notified it as such directly to Panama and the IPPC.⁸⁵ Indeed, Panama has acknowledged that, since May 2014, it was aware of this status, which has remained, in Panama's own words, "unchanged".⁸⁶ Panama has therefore failed to demonstrate that, as of January 2019, it lacked information or was in a situation where "new scientific evidence casts doubts as to whether the previously existing body of scientific evidence still permits of a sufficiently objective assessment of risk".⁸⁷ Panama could perfectly well have carried out an appropriate risk assessment, which would not have concluded that a complete prohibition on Costa Rican pineapples was justified on account of the pink mealybug. However, instead of performing the task that fell to it, Panama closed its market directly without any justification. Since Panama had sufficient relevant scientific evidence to carry out a risk assessment, the first condition under Article 5.7 of the SPS Agreement has not been satisfied.

2.55. Second, even assuming that the scientific evidence had been insufficient to carry out a risk assessment in this case, Panama has failed to demonstrate that its measure was based on available "pertinent information", which is the second condition under Article 5.7 of the SPS Agreement. Article 5.7 states that "pertinent information" includes that "from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members". Costa Rica expressly referred to both.

2.56. Costa Rica first referred to pertinent information from international standards of the IPPC, which is the relevant international organization for plant health, in accordance with Annex A(3)(c) of the SPS Agreement. Costa Rica referred specifically to ISPM 2 and ISPM 20. ISPM 2 states that "[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".⁸⁸ Meanwhile, ISPM 20 states that "[e]mergency action may be required in a new or unexpected phytosanitary situation" and allows for prohibition only "[i]n the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".⁸⁹ In the present case, as of January 2019, there had been *no* unexpected events concerning imports of Costa Rican pineapples and the pink mealybug pest. Thus, there is no "rational and objective relationship" between Panama's prohibition and the pertinent information provided by ISPM 2 and ISPM 20 on situations that warrant the adoption of an emergency provisional measure.

2.57. Costa Rica also identified "pertinent information" from phytosanitary measures adopted by other WTO Members, and by Panama itself, with respect to the pink mealybug.⁹⁰ Costa Rica noted, for example, that Peru requires, for imports of avocados and pineapples from Colombia (a country where the pink mealybug is present⁹¹), that shipments be accompanied by an official phytosanitary certificate including the additional declaration "[p]roduct free from: *Maconellicoccus hirsutus*".⁹² Costa Rica also noted that Panama itself allows imports of avocados from Colombia, requiring nothing more than certification that "the consignment is free from *Maconellicoccus hirsutus*"⁹³, and that it does not impose any requirements relating to the pink mealybug on imports from the United States and Colombia, even though both countries have reported the presence of this pest.⁹⁴ In light of this,

⁸⁴ Panama's response to Panel question No. 9(b), para. 32.

⁸⁵ Memorandum DSFE-261-2014 (Exhibit CRI-68); Report to the IPPC (Exhibit CRI-69).

⁸⁶ Panama's response to Panel question No. 52(a), para. 147.

⁸⁷ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 703.

⁸⁸ ISPM 2 (Exhibit CRI-101).

⁸⁹ ISPM 20 (Exhibit CRI-161).

⁹⁰ Costa Rica's first written submission, paras. 786-788.

⁹¹ EPPO, Distribution of the pink mealybug in Colombia (Exhibit CRI-167).

⁹² Directorate Resolution No. 0042-2016-MINAGRI-SENASA-DSV of Peru (Exhibit CRI-163); Peru's requirements for fresh pineapples from Colombia (Exhibit CRI-372).

⁹³ Resolution AUPSA-DINAN-122-2009 (Exhibit CRI-164).

⁹⁴ EPPO, Distribution of the pink mealybug in the United States (Exhibit CRI-165); EPPO, Distribution of the pink mealybug in Colombia (Exhibit CRI-167).

Panama's prohibition does not have any "rational and objective relationship" with the pertinent information provided by the measures adopted by other Members, and by Panama itself, with regard to the pink mealybug.

2.58. Third, even assuming that Panama had complied with the first two conditions under Article 5.7 of the SPS Agreement, Panama has failed to demonstrate that it meets the third requirement of this provision, namely, to "seek to obtain the additional information necessary for a more objective assessment of risk". In order to meet this requirement, the Member "should be able to identify the insufficiencies in the relevant scientific evidence" and "must make best efforts to remedy the insufficiencies" in such evidence.⁹⁵ The facts, however, show that as of the sudden closure of the market in January 2019, it was Costa Rica that repeatedly provided Panama with confirmation of its phytosanitary status in respect of the pink mealybug, while Panama remained completely silent and failed to identify any insufficiency in terms of information that allegedly prevented it from conducting a risk assessment. After prohibiting imports of Costa Rican pineapples for more than two years, Panama asked Costa Rica to provide a clearly excessive and unnecessary list of information. Although Costa Rica submitted *all* the requested information to Panama, and Panama has not identified any insufficiencies in respect of that information, the prohibition remains in place almost five years after being introduced. Panama has therefore failed to comply with the third condition under Article 5.7 of the SPS Agreement.

2.59. Fourth, even assuming that Panama had complied with the first three conditions under Article 5.7 of the SPS Agreement, Panama has failed to demonstrate that it meets the fourth requirement of this provision, namely, to review the provisional phytosanitary measure "within a reasonable period of time". As of the date of establishment of the Panel, Panama's inaction had lasted almost two years and eight months, during which there is no record of Panama having examined any information provided by Costa Rica or of it having had "difficulty [in] obtaining [such information]".⁹⁶ Costa Rica notes that this delay is more than four times longer than the delay incurred by Russia in *Russia – Pigs (EU)*, which lasted seven months and was considered to be in breach of Article 5.7.⁹⁷ Furthermore, Costa Rica stresses that, to date, Panama has prohibited imports of fresh pineapples from Costa Rica and caused serious economic injury to the Costa Rican production sector for almost five years. In light of all this, it is clear that Panama has not reviewed its measure "within a reasonable period of time". Thus, Panama has failed to comply with the fourth condition under Article 5.7 of the SPS Agreement.

2.60. Given that Panama's measure does not satisfy any of the four conditions under Article 5.7 of the SPS Agreement, it is not covered by this provision. As a result, Panama cannot use this "qualified exemption"⁹⁸ from the obligations set out in Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement, which the Panel should find to have been violated.

The measure is inconsistent with the harmonization obligation under Article 3.1 of the SPS Agreement

2.61. Panama's measure prohibiting imports of fresh pineapples from Costa Rica is inconsistent with Article 3.1 of the SPS Agreement, as it is not based on existing international standards, guidelines or recommendations, most notably ISPM 2 and ISPM 20.

2.62. As noted previously, ISPM 2 states that "[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".⁹⁹ Meanwhile, ISPM 20 states that "[e]mergency action may be required in a new or unexpected phytosanitary situation" and allows for prohibition only "[i]n the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".¹⁰⁰

⁹⁵ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.

⁹⁶ Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

⁹⁷ Panel Report, *Russia – Pigs (EU)*, paras. 7.705 and 7.1186.

⁹⁸ Panel Report, *Russia – Pigs (EU)*, para. 7.632 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 91).

⁹⁹ ISPM 2 (Exhibit CRI-101).

¹⁰⁰ ISPM 20 (Exhibit CRI-161).

2.63. In the present case, Panama adopted an import prohibition on fresh pineapples from Costa Rica when there was a long-standing trading relationship, when no "new" or "unexpected" situation had occurred in relation to trade in fresh pineapples with Costa Rica, and when Panama had not reported any "detection", "repeated non-compliance" or "significant non-compliance" in respect of shipments of this product from Costa Rica.¹⁰¹ The adoption of an import *prohibition* in cases where the international standard provides for the *continuation* of trade is tantamount to contradicting the international standard.¹⁰² In turn, case law has indicated that a measure that contradicts the international standard is, logically, not based on that international standard.¹⁰³ Thus, as Costa Rica established *prima facie* in its first written submission, Panama's measure prohibiting imports of Costa Rican pineapples is inconsistent with Article 3.1 of the SPS Agreement.¹⁰⁴

2.64. Panama has not offered rebuttal arguments to the *prima facie* case that Costa Rica made in its first written submission under Article 3.1 of the SPS Agreement. Panama's only argument with respect to Costa Rica's claim is that "the provisional measures adopted in accordance with the requirements of Article 5.7 of the SPS Agreement are exempt from the obligation provided for in Article 3.1 of the SPS Agreement".¹⁰⁵ However, Panama's theory that a provisional measure under Article 5.7 of the SPS Agreement is not subject to the other obligations of the Agreement is not supported by the text of that provision and has, in fact, been contradicted by case law. Indeed, the panel in *Russia – Pigs (EU)* found that "even when a measure is adopted pursuant to Article 5.7, without a risk assessment, the obligation under Article 5.3 still applies with respect to the choice of the [provisional] measure to be applied".¹⁰⁶ Accordingly, the adoption of a provisional measure under Article 5.7 of the SPS Agreement does not imply, as an *ipso jure* consequence, that the other obligations of the SPS Agreement are inapplicable to that provisional measure. In any event, the Panamanian measure at issue does not comply with the requirements of Article 5.7, so the Panel will not have to address Panama's theory regarding the inapplicability of other SPS Agreement obligations to the provisional measures.

2.65. Costa Rica has made a *prima facie* case that the measure prohibiting pineapples from Costa Rica is inconsistent with the harmonization obligation under Article 3.1 of the SPS Agreement. In the absence of effective refutation by Panama, the Panel should, "as a matter of law"¹⁰⁷, rule in favour of Costa Rica and find that the measure is inconsistent with Article 3.1 of the SPS Agreement.

The measure is inconsistent with the obligation not to restrict trade more than required under Articles 5.6 and 2.2 of the SPS Agreement

2.66. Panama's measure prohibiting imports of fresh pineapples from Costa Rica is inconsistent with Article 5.6 of the SPS Agreement and, consequently, with Article 2.2 of the SPS Agreement, since it is more trade-restrictive than required to achieve Panama's appropriate level of protection and is not applied only to the extent necessary to protect plant life or health.¹⁰⁸

2.67. Costa Rica put forward two alternative measures that meet the three cumulative requirements in footnote 3 to Article 5.6 of the SPS Agreement: (i) to be "reasonably available taking into account technical and economic feasibility"; (ii) to achieve Panama's ALOP; and (iii) to be "significantly less restrictive to trade".¹⁰⁹

2.68. First, Costa Rica proposed applying the same phytosanitary requirements that Panama had imposed on Costa Rican pineapples before the market was closed, which are set out in Resolution AUPSA-DINAN-116-2008.¹¹⁰ Costa Rica noted that, given that Panama had already applied these requirements for more than a decade, this measure was "*reasonably available taking into account*

¹⁰¹ Costa Rica's first written submission, para. 845.

¹⁰² Panel Report, *India – Agricultural Products*, paras. 7.270-7.274. See also Appellate Body Report, *India – Agricultural Products*, para. 5.111.

¹⁰³ Appellate Body Report, *EC – Sardines*, para. 245.

¹⁰⁴ Costa Rica's first written submission, para. 847.

¹⁰⁵ Panama's response to Panel question No. 75, para. 214. See also Panama's first written submission, para. 438.

¹⁰⁶ Panel Report, *Russia – Pigs (EU)*, para. 7.777.

¹⁰⁷ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁰⁸ Costa Rica's panel request, p. 6; first written submission, paras. 848-879.

¹⁰⁹ Appellate Body Report, *Korea – Radionuclides*, para. 5.22.

¹¹⁰ Resolution AUPSA-DINAN-116-2008 (Exhibit CRI-66).

technical and economic feasibility".¹¹¹ Costa Rica also observed that these requirements, which permitted imports, constituted a measure "*significantly less restrictive to trade*" than the complete prohibition on imports of fresh Costa Rican pineapples.¹¹² Lastly, Costa Rica noted that the application of these phytosanitary requirements *achieves Panama's ALOP*, "even assuming that Panama has set a very high ALOP".¹¹³ Between May 2014 (when Costa Rica informed Panama and the IPPC of the presence of the pink mealybug in its territory) and January 2019 (when Panama closed its market) exports of Costa Rican pineapples to Panama continued as normal for almost five years, in accordance with the phytosanitary requirements applied by Panama, without any incident being reported.¹¹⁴ This confirms that the alternative measure achieves a high level of protection and meets Panama's ALOP to prevent the introduction of the pest.

2.69. Second, Costa Rica proposed, as another conceptual alternative measure, that specific phytosanitary requirements for the pink mealybug be applied to imports of fresh pineapples from Costa Rica.¹¹⁵ Costa Rica indicated that Panama could, for instance, require that shipments of fresh pineapples from Costa Rica be certified as *shipments free of pink mealybug*¹¹⁶ or as coming from *areas, places or sites of production free of pink mealybug*.¹¹⁷ Costa Rica noted that both options are *reasonably available*, as demonstrated by the fact that Panama already applies these requirements to products from other origins, such as avocados from Colombia or almonds from China.¹¹⁸ Costa Rica also stated that both certification options constitute measures that are "*significantly less restrictive to trade*" than the import prohibition, as they would allow fresh Costa Rican pineapples to access the Panamanian market.¹¹⁹ Lastly, Costa Rica noted that the fact that Panama has applied these specific certification requirements in respect of the pink mealybug to products from countries where the pest is present, also confirms that these alternatives *achieve Panama's ALOP*. If shipments of avocados from Colombia and almonds from China achieve Panama's ALOP when they are certified as free of pink mealybug or as coming from places free of this pest, respectively, shipments of Costa Rican pineapples certified in the same way should also achieve Panama's ALOP.¹²⁰

2.70. Given that Costa Rica has identified alternative measures that meet the conditions in footnote 3 to Article 5.6 of the SPS Agreement, Panama's prohibition is inconsistent with Article 5.6 of the SPS Agreement and, consequently, also with Article 2.2 of that Agreement.¹²¹ As with the claim under Article 3.1 of the SPS Agreement, Panama has not offered any rebuttal argument to Costa Rica's *prima facie* case under Articles 5.6 and 2.2 of the SPS Agreement. Thus, the Panel should, "as a matter of law", rule in favour of Costa Rica.¹²²

The measure is inconsistent with the non-discrimination obligation under Articles 2.3 and 5.5 of the SPS Agreement

2.71. Panama's measure prohibiting imports of fresh pineapples from Costa Rica is inconsistent with Article 2.3 of the SPS Agreement, because it arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail and constitutes a disguised restriction on international trade.¹²³ The measure is also inconsistent with Article 5.5 of the SPS Agreement, because it reflects arbitrary or unjustifiable distinctions in the levels that Panama considers to be appropriate in different situations, resulting in discrimination or a disguised restriction on international trade.¹²⁴

2.72. With respect to Article 2.3 of the SPS Agreement, Costa Rica demonstrated the three elements necessary for a violation of this provision. First, the relevant phytosanitary "conditions" – those relating to the presence of the pink mealybug – are "identical or similar" in Costa Rica and in other

¹¹¹ Costa Rica's first written submission, para. 859. (emphasis added)

¹¹² Costa Rica's first written submission, para. 864. (emphasis added)

¹¹³ Costa Rica's first written submission, para. 860.

¹¹⁴ INEC, Official data on pineapple imports 2010-2020 (Exhibit CRI-77).

¹¹⁵ Costa Rica's first written submission, para. 866.

¹¹⁶ Costa Rica's first written submission, para. 867.

¹¹⁷ Costa Rica's first written submission, para. 868.

¹¹⁸ Costa Rica's first written submission, para. 870.

¹¹⁹ Costa Rica's first written submission, para. 872.

¹²⁰ Costa Rica's first written submission, para. 871.

¹²¹ Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38.

¹²² Appellate Body Report, *EC – Hormones*, para. 104.

¹²³ Costa Rica's panel request, p. 7; first written submission, paras. 884-907.

¹²⁴ Costa Rica's panel request, p. 7; first written submission, paras. 912-931.

WTO Members that export pineapples and other products to Panama, such as the United States or Colombia. Second, Panama's measure "discriminate[s]" against Costa Rica *vis-à-vis* other Members. Panama prohibits the importation of pineapples from Costa Rica allegedly because the pink mealybug is present in Costa Rican territory, and yet it does not prohibit imports of pineapples from the United States and Colombia, even though the pink mealybug is also present in those countries.¹²⁵ Similarly, while Panama prohibits imports of pineapples from Costa Rica, its market remains open for avocados from Colombia, even though avocados are also a host fruit for the pink mealybug.¹²⁶ Third, Panama's measure "arbitrarily or unjustifiably" discriminates between Costa Rica and the United States or Colombia. Fresh pineapples from Costa Rica present the same level of risk as fresh pineapples from the United States or Colombia, and yet Panama has only prohibited imports from Costa Rica.¹²⁷ Similarly, the difference in Panama's treatment of avocados from Colombia and pineapples from Costa Rica bears no "rational connection"¹²⁸ to Panama's purported objective of protecting itself against the risk of introduction of the pink mealybug. In conclusion, Panama's prohibition on the importation of fresh pineapples from Costa Rica arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail – which necessarily constitutes a disguised restriction on international trade – and is therefore inconsistent with Article 2.3 of the SPS Agreement.

2.73. With respect to Article 5.5 of the SPS Agreement, Costa Rica has also demonstrated the three elements necessary for a violation of this provision. First, "different situations" exist that are comparable. Exports of fresh pineapples from Costa Rica to Panama constitute a different, but "comparable" situation to exports of fresh pineapples from the United States or Colombia to Panama. Exports to Panama of fresh pineapples from Costa Rica also constitute a different, but "comparable" situation to exports to Panama of other fruits that host the pink mealybug, such as avocados from Colombia. Second, the distinctions in Panama's levels of protection are "arbitrary or unjustifiable". Panama's treatment of pineapples from Costa Rica constitutes a complete *prohibition* on imports.¹²⁹ In contrast, Panama's treatment of pineapples from the United States and Canada constitutes a *tolerance* for imports.¹³⁰ However, fresh pineapples from Costa Rica pose the same risk as fresh pineapples from the United States or Colombia, since the phytosanitary status of Costa Rica, the United States and Colombia is the same with regard to the pink mealybug.¹³¹ Furthermore, while Panama prohibits fresh pineapples from Costa Rica, it accords more tolerant treatment to avocados from Colombia, which need only to be accompanied by a phytosanitary certificate stating that "the consignment is free from *Maconellicoccus hirsutus*".¹³² Third, these arbitrary and substantial distinctions in Panama's levels of protection, as well as the fact that the measure is not supported by a risk assessment, are "warning signals" indicating the existence of discrimination or a disguised restriction on international trade. In conclusion, Panama's prohibition on fresh pineapples from Costa Rica is inconsistent with Article 5.5. of the SPS Agreement.

2.74. Once again, Panama has not offered any rebuttal argument to Costa Rica's *prima facie* case under Articles 2.3 and 5.5 of the SPS Agreement. Thus, the Panel should, "as a matter of law", rule in favour of Costa Rica.¹³³

Panama is incurring undue delay in a manner that is inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement

2.75. Panama has indicated that it is undertaking a process of reviewing its phytosanitary requirements that includes a risk analysis phase, for which it is necessary to determine Costa Rica's

¹²⁵ INEC, Official data on pineapple imports 2010-2020 (Exhibit CRI-77).

¹²⁶ CABI datasheet, 2021 (Exhibit CRI-71), p. 21.

¹²⁷ In the context of Article 5.5 of the SPS Agreement (which constitutes a specification of the basic obligation contained in Article 2.3 of the SPS Agreement), the Appellate Body in *Australia – Salmon* upheld the panel's finding that the measure at issue was arbitrarily and unjustifiably discriminatory because it treated differently two products that presented the same level of risk (Panel Report, *Russia – Pigs (EU)*, para. 7.1322 (referring to Appellate Body Report, *Australia – Salmon*, para. 158)).

¹²⁸ Panel Report, *Russia – Pigs (EU)*, para. 7.1323.

¹²⁹ Note AUPSA-AG-032-2019 (Exhibit CRI-65).

¹³⁰ INEC, Official data on pineapple imports 2010-2020 (Exhibit CRI-77); USDA, Exports of fresh pineapples to Panama (Exhibit CRI-368).

¹³¹ EPPO, Distribution of the pink mealybug in Costa Rica (Exhibit CRI-174); EPPO, Distribution of the pink mealybug in the United States (Exhibit CRI-165); and EPPO, Distribution of the pink mealybug in Colombia (Exhibit CRI-167).

¹³² Resolution AUPSA-DINAN-122-2009 (Exhibit CRI-164).

¹³³ Appellate Body Report, *EC – Hormones*, para. 104.

phytosanitary status. However, Panama has incurred, and is incurring, "undue delay" with respect to its alleged review process, in a manner that is inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.

2.76. By the date of establishment of the Panel, 27 September 2021, almost two years and eight months had passed since Costa Rica had first sent information on its phytosanitary status with regard to the pink mealybug, on 6 February 2019. This period, during which Panama did absolutely nothing, constitutes a "delay", within the meaning of Annex C(1)(a) to the SPS Agreement. Moreover, this delay is "undue", as there is no "legitimate reason, or justification"¹³⁴ to explain it. Furthermore, Panama has maintained its complete "inactivity"¹³⁵ since 27 September 2021, which is when the Panel was established. There is no reason why the establishment of this Panel should have prevented the Panamanian authorities from completing – in the light of all the information provided by Costa Rica – the review process that they began almost five years ago. Panama seems to want to prolong for as long as possible an import prohibition that has no technical basis and that is not covered by SPS Agreement disciplines.

2.77. In conclusion, the Panel should find that Panama incurs undue delay, in a manner that is inconsistent with Annex C(1)(a) to the SPS Agreement. Since "a violation of the obligations in Annex C will also entail a violation of Article 8"¹³⁶, the Panel should also find that Panama is acting inconsistently with Article 8 of the SPS Agreement.¹³⁷

The measure is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement

2.78. In light of all the inconsistencies with SPS Agreement obligations demonstrated by Costa Rica in relation to Panama's measure prohibiting the importation of fresh pineapples from Costa Rica, the Panel should find that Panama is, consequently, also acting inconsistently with the obligations under Articles 1.1 and 2.1 of the SPS Agreement.

MEASURE CONCERNING THE IMPORTATION OF PLANTAINS AND BANANAS

Introduction

2.79. Just nine months after having prohibited imports of fresh pineapples of Costa Rican origin, Panama also prohibited, all of a sudden, imports of fresh plantains and bananas from Costa Rica. By means of Note AUPSA-AG-392-2019, of 10 October 2019, Panama informed Costa Rica that it had proceeded to inactivate the phytosanitary requirements for imports of plantains from Costa Rica.¹³⁸ By means of Note AUPSA-AG-424-2019, of 25 October 2019, Panama informed Costa Rica that it had proceeded to inactivate the phytosanitary requirements for imports of bananas from Costa Rica.¹³⁹ To date, the Panamanian market has been closed for more than four years to imports of plantains and bananas from Costa Rica, causing serious economic injury to the Costa Rican production sector.

2.80. One of the fundamental underlying problems with respect to this measure is the constant change in the reasons put forward by Panama to explain its prohibition. When it closed its market, in October 2019, Panama stated that it was prohibiting imports of Costa Rican plantains and bananas as a result of a technical review process for the phytosanitary requirements and the need, in the case of plantains, to approve packing plants in Costa Rica.¹⁴⁰ Two months later, in December 2019, Panama stated that the market closure was due to a national alert for the pest *Fusarium oxysporum* f. sp. *cubense* Tropical Race 4 (Foc TR4), declared on 12 September 2019. Foc TR4 is a fungus that affects musaceae and that is, as Panama acknowledges¹⁴¹, absent from Costa Rica.¹⁴² More than a year later, in February 2021, Panama stated that the prohibition was also

¹³⁴ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.

¹³⁵ Panel Report, *US – Animals*, para. 7.164.

¹³⁶ Appellate Body Report, *Australia – Apples*, para. 434. See also Panel Reports, *US – Animals*, para. 7.62; *Korea – Radionuclides*, para. 7.363.

¹³⁷ Costa Rica's first written submission, paras. 965-969.

¹³⁸ Note AUPSA-AG-392-2019 (Exhibit CRI-95).

¹³⁹ Note AUPSA-AG-424-2019 (Exhibit CRI-97).

¹⁴⁰ Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97).

¹⁴¹ See Panama's response to Panel question No. 6, para. 28.

¹⁴² Note from the Minister of Panama, DM-N-1352-2019 (Exhibit CRI-103).

"due to" an alleged inconsistency with the maximum residue limit (MRL) for the pesticide chlorpyrifos in a shipment of plantains from Costa Rica¹⁴³ which had allegedly occurred on 26 September 2019.

2.81. In an effort to make sense of this confusing situation, in its first written submission, Panama submitted that the market was closed because of the Foc TR4 alert. This narrative that Panama submitted to the Panel is not, however, reflected in the notes that Panama sent to Costa Rica and that are on the record of this dispute. According to the timeline of events, Panama could have referred to the state of national alert for Foc TR4 and the alleged inconsistency with its chlorpyrifos MRL when it closed the market in October 2019. However, it did not do so. In Costa Rica's view, Members should not be allowed to rationalize their phytosanitary measures *ex post facto*.¹⁴⁴

2.82. With regard to Costa Rica's claims under the SPS Agreement, Panama has acknowledged that its prohibition on imports of plantains and bananas from Costa Rica is a phytosanitary measure, within the meaning of Annex A(1) to the SPS Agreement, which affects international trade, within the meaning of Article 1.1 of the SPS Agreement, and which is, therefore, subject to the obligations under the SPS Agreement.¹⁴⁵ Costa Rica has demonstrated violations of multiple obligations under the SPS Agreement.

The measure is inconsistent with Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement and is not covered by Article 5.7 of the SPS Agreement

2.83. Panama has expressly acknowledged that the measure prohibiting imports of plantains and bananas from Costa Rica is not based on a risk assessment. This is sufficient to conclude that Panama has acted inconsistently with its obligations under Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement. Panama argues, however, that its import prohibition on plantains and bananas from Costa Rica is a provisional measure, in accordance with Article 5.7 of the SPS Agreement, and is, therefore, not inconsistent with those obligations.¹⁴⁶ Nevertheless, assuming that, as Panama argues, its measure was adopted because of Foc TR4, Panama has failed to meet its burden of proving compliance with the four cumulative requirements of Article 5.7 of the SPS Agreement.

2.84. First, Panama has failed to demonstrate that its prohibition was adopted in circumstances where relevant scientific evidence on Foc TR4 was *insufficient* to conduct a risk assessment, which is the first requirement established under Article 5.7 of the SPS Agreement for adopting a provisional measure. Costa Rica notes from the outset that Panama does not dispute that Foc TR4 is a pest that is absent from Costa Rica's territory.¹⁴⁷ This fact alone is already a clear sign that the prohibition on Costa Rican plantains and bananas does not, in fact, pursue a phytosanitary objective related to this pest.

2.85. Panama argues, however, that at the time it adopted the measure it did not have sufficient relevant scientific evidence to conduct a risk assessment with respect to Foc TR4 and to imports of plantains and bananas from Costa Rica because there is the "possibility that Foc TR4 can infect the fruit of the banana tree".¹⁴⁸ In support of this statement, Panama relies primarily on the pest risk analysis (PRA) carried out by OIRSA – the regional organization operating within the framework of the IPPC, within the meaning of Annex A(3)(c) to the SPS Agreement, and which counts both Costa Rica and Panama among its member countries.¹⁴⁹ This PRA states that there is no scientific evidence of Foc TR4 being spread through the fruit of musaceae, but notes that "further studies are

¹⁴³ Note DNSV-0113-2021-OIAR (Exhibit CRI-109).

¹⁴⁴ Costa Rica's first written submission, paras. 1004-1011; opening statement at the first meeting of the Panel, paras. 58-59; and response to Panel question No. 57, paras. 2.139-2.148.

¹⁴⁵ Panama's response to Panel question No. 9(b), para. 32.

¹⁴⁶ Panama's response to Panel question No. 9(b), para. 32.

¹⁴⁷ See Panama's response to Panel question No. 6, para. 28.

¹⁴⁸ Panama's opening statement at the first meeting of the Panel, para. 49. See also Panama's first written submission, para. 390.

¹⁴⁹ In February 2018, OIRSA submitted, for comments from its member countries, the "*Análisis de riesgo de plagas Fusarium oxysporum f. sp. cubense raza 4 Tropical (Foc R4T), como plaga cuarentenaria para la región del OIRSA*" ("Pest risk analysis for *Fusarium oxysporum f. sp. cubense* Tropical Race 4 (Foc TR4), as a quarantine pest for the OIRSA region") (Exhibit CRI-188). In December 2018, OIRSA shared a second version of the PRA, which included comments received from member countries (Exhibit CRI-189). In October 2019, OIRSA made available a new version of its PRA for Foc TR4, "in the light of the suspected presence of the disease on the South American continent" (Exhibit CRI-123). The scientific conclusions reflected in the three versions are, essentially, the same. See Costa Rica's first written submission, paras. 1049 and 1085.

needed to determine the pest's degree of association with the fruit as a contaminant".¹⁵⁰ According to Panama, this is "a typical example of the scenario contemplated under Article 5.7".¹⁵¹ Panama is wrong. The possibility of further research does not prevent the risks from being assessed and reasonably justified scientific conclusions from being reached.¹⁵² The conclusions of the OIRSA PRA, prepared on the basis of wide-ranging body of scientific literature¹⁵³, are not invalidated because it is stated that the possibility of Foc TR4 associating with plantain and banana fruit should be studied further. The simple fact that OIRSA has already carried out a risk assessment – which concludes, specifically, that the risk of entry, establishment and spread of Foc TR4 through fresh plantain and banana fruit is "[v]ery low"¹⁵⁴ – has, objectively, "probative value as to the sufficiency of the scientific evidence needed for conducting [said] risk assessment" with respect to Foc TR4.¹⁵⁵ Panama has, therefore, failed to demonstrate compliance with the first condition under Article 5.7 of the SPS Agreement.

2.86. Second, even assuming that the scientific evidence had been insufficient to carry out a specific risk assessment in this case, Panama has failed to demonstrate that its import prohibition on plantains and bananas from Costa Rica was based on available "pertinent information", which is the second condition under Article 5.7 of the SPS Agreement. Firstly, Panama had a multitude of studies by OIRSA on Foc TR4 that indicated, unanimously, that plantain and banana fruit are not a significant pathway for the transmission of the pest.¹⁵⁶ Panama also knew that Foc TR4 is *absent* from Costa Rican territory, a fact that has never been disputed.¹⁵⁷ This information has absolutely no "rational and objective relationship"¹⁵⁸ with a complete prohibition on plantains and bananas from Costa Rica.

2.87. Costa Rica recalls that Article 5.7 states that "pertinent information" includes that "from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members". Costa Rica referred to both.

2.88. First, Costa Rica recalled that ISPM 2 expressly stipulates that "[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"¹⁵⁹, and that ISPM 20 allows for the prohibition of imports only "[i]n the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".¹⁶⁰ Panama completely ignored ISPM 2 and ISPM 20, since it closed its market, despite not having, as of October 2019, evidence of any new or unexpected situation, nor having reported any detection of the pest or any cases of repeated or significant non-compliance with respect to imports of plantains and bananas from Costa Rica.¹⁶¹ Second, Costa Rica noted that the phytosanitary measures applied by other Members confirm that Foc TR4 is not a pest that leads to a prohibition on imports of plantain and banana fruit. In particular, Costa Rica noted that neither the United States nor the countries of the OIRSA region apply import prohibitions on plantain and banana fruit because of Foc TR4. In fact, surprisingly, Panama's prohibition on plantains and bananas from Costa Rica is not even consistent with its own Resolution OAL-102-ADM-2019, declaring the state of national alert for Foc TR4 and which states that "entry into the country of plants, reproductive material ... and plant material ... from musaceae and heliconias from areas *where the pest has been reported*" only should be prohibited.¹⁶²

¹⁵⁰ Panama's first written submission, para. 392 (quoting OIRSA PRA for Foc TR4, February 2018 (Exhibit CRI-188), p. 118; OIRSA PRA for Foc TR4, October 2019 (Exhibit CRI-123), p. 122).

¹⁵¹ Panama's first written submission, para. 396.

¹⁵² Costa Rica's response to Panel question No. 59, para. 2.156.

¹⁵³ See, for example, the literature consulted for the OIRSA PRA for Foc TR4, October 2019 (Exhibit CRI-123), pp. 223-264.

¹⁵⁴ OIRSA PRA for Foc TR4, October 2019 (Exhibit CRI-123), p. 177.

¹⁵⁵ Appellate Body Report, *Canada – Continued Suspension*, para. 708.

¹⁵⁶ Costa Rica submitted, together with its first written submission, the following OIRSA studies: OIRSA, Contingency plan for Foc TR4 2013 (Exhibit CRI-124); OIRSA, Contingency plan for Foc TR4 2017 (Exhibit CRI-187); OIRSA PRA for Foc TR4, February 2018 (Exhibit CRI-188); OIRSA PRA for Foc TR4, December 2018 (Exhibit CRI-189); and OIRSA PRA for Foc TR4, October 2019 (Exhibit CRI-123).

¹⁵⁷ Panama's response to Panel question No. 6, para. 28.

¹⁵⁸ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.

¹⁵⁹ ISPM 2 (Exhibit CRI-101), p. 8, section 1.1.3.

¹⁶⁰ ISPM 20 (Exhibit CRI-161), p. 23.

¹⁶¹ Costa Rica's first written submission, para. 1068.

¹⁶² Resolution OAL-102-ADM-2019 (Exhibit CRI-104), Art. 2. (emphasis added)

2.89. In conclusion, there is no "rational and objective relationship"¹⁶³ between Panama's measure and available pertinent information, therefore the measure cannot be considered to have been adopted "on the basis of" this information. Thus, Panama failed to comply with the second condition under Article 5.7 of the SPS Agreement.

2.90. Third, even assuming that Panama had complied with the first two conditions under Article 5.7 of the SPS Agreement, Panama has failed to demonstrate that it meets the third requirement of this provision, namely, to "seek to obtain the additional information necessary for a more objective assessment of risk". Panama contends that it "sought to obtain information verified by the Panamanian authorities on the phytosanitary conditions of the Costa Rican banana and plantain establishments", as these "had never been assessed and approved by the Panamanian authorities in the first place".¹⁶⁴ However, there is an obvious lack of internal consistency among the various arguments that Panama makes under Article 5.7 of the SPS Agreement. Panama argues that what prompted the market closure was the possibility that Foc TR4 could be associated with plantain and banana fruit, and the lack of studies in this regard. However, according to Panama, the additional information necessary was related to the establishments or processing plants of Costa Rica (a country that does not have Foc TR4), which had never received an on-site visit.¹⁶⁵ The disconnect between the alleged scientific insufficiency on the one hand, and the additional information that Panama claimed it wanted to gather on the other hand, is complete and absolute.¹⁶⁶ Panama therefore failed to comply with the third condition under Article 5.7 of the SPS Agreement.

2.91. Fourth, even assuming that Panama had complied with the first three conditions under Article 5.7 of the SPS Agreement, Panama has failed to demonstrate that it complies with the fourth requirement of this provision, namely, to review the provisional phytosanitary measure "within a reasonable period of time". Contrary to Panama's arguments, it was not the COVID-19 pandemic, but Panama's apathy which prevented the approval of the Costa Rican packing plants that was allegedly so necessary.¹⁶⁷ On 30 January 2020, Costa Rica indicated to Panama that it was "willing to make the necessary arrangements to comply with the approval of packing plants".¹⁶⁸ Panama did not reply. Panama did not reply to Costa Rica's subsequent memoranda either. Panama remained silent until February 2021 and, when it finally responded, it did not express any intention to coordinate visits to Costa Rican packing plants.¹⁶⁹ At the time the Panel was established, Panama had accumulated 1 year and 11 months of "inactivity with no justification"¹⁷⁰, despite Costa Rica having made every arrangement for the approval of the packing plants to be undertaken. To date, Panama has maintained its prohibition on plantains and bananas from Costa Rica for more than four years, without any indication that its authorities are seeking to review the measure. Under no circumstances does this constitute a "reasonable period of time", within the meaning of Article 5.7 of the SPS Agreement.

2.92. Given that the prohibition on imports of plantains and bananas from Costa Rica does not comply with any of the four conditions under Article 5.7 of the SPS Agreement, Panama cannot use this "qualified exemption"¹⁷¹ from the obligations set out in Articles 5.1, 5.2, 5.3 and 2.2 of the SPS Agreement and, therefore, the Panel should find that Panama is in breach of those obligations.

¹⁶³ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

¹⁶⁴ Panama's opening statement at the first meeting of the Panel, para. 56.

¹⁶⁵ Panama's first written submission, paras. 411, 412 and 424.

¹⁶⁶ Costa Rica's opening statement at the first meeting of the Panel, para. 67; response to Panel question No. 79(a), para. 3.100.

¹⁶⁷ Costa Rica's opening statement at the first meeting of the Panel, para. 68.

¹⁶⁸ Memorandum DSFE-0079-2020 (Exhibit CRI-105); Memorandum DSFE-0080-2020 (Exhibit CRI-106).

¹⁶⁹ Note DNSV-0113-2021-OIAR (Exhibit CRI-109); Note DNSV-0129-2021 (Exhibit CRI-111); and Note DNSV-0207-2021 (Exhibit CRI-112).

¹⁷⁰ Panel Report, *US – Animals*, para. 7.164.

¹⁷¹ Panel Report, *Russia – Pigs (EU)*, para. 7.632 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 91; Panel Report, *US – Animals*, para. 7.290).

The measure is inconsistent with the harmonization obligation under Article 3.1 of the SPS Agreement

2.93. Panama's measure prohibiting imports of plantains and bananas from Costa Rica is also inconsistent with Article 3.1 of the SPS Agreement, as it is not based on existing international standards, guidelines or recommendations.¹⁷²

2.94. Costa Rica points to ISPM 2¹⁷³ and ISPM 20¹⁷⁴ of the IPPC. As has already been noted, ISPM 2 states that "[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".¹⁷⁵ Meanwhile, ISPM 20 provides that "[e]mergency action may be required in a new or unexpected phytosanitary situation, such as the detection of quarantine pests"¹⁷⁶ and allows for prohibition only "[i]n the case of repeated non-compliance, or where a significant non-compliance or interception warranting emergency action occurs".¹⁷⁷

2.95. In this case, Panama adopted an import prohibition on plantains and bananas from Costa Rica when there was a long-standing trading relationship, when no "new" or "unexpected" situation had occurred in relation to trade in plantains and bananas with Costa Rica, and when Panama had not reported any "detection", "repeated non-compliance" or "significant non-compliance" in respect of shipments of these fruits from Costa Rica (a country which, as Panama acknowledges, is free of Foc TR4¹⁷⁸).¹⁷⁹ The adoption of an import *prohibition* in cases where the international standard provides for the *continuation* of trade is tantamount to contradicting the international standard.¹⁸⁰ In turn, a measure that contradicts the international standard is, logically, not based on that international standard.¹⁸¹ Therefore, Panama's measure is inconsistent with Article 3.1 of the SPS Agreement.¹⁸²

2.96. Panama has not offered rebuttal arguments to Costa Rica's *prima facie* case under Article 3.1 of the SPS Agreement. The only argument it has offered is that a measure covered by Article 5.7 of the SPS Agreement cannot be inconsistent with the obligation set out under Article 3.1 of that Agreement.¹⁸³ However, this theory is not supported by the text of the SPS Agreement nor by case law. In any event, such a theory should not be addressed by the Panel because Panama has failed to demonstrate that its measure complies with the requirements under Article 5.7. In the absence of effective refutation by Panama, the Panel should, "as a matter of law"¹⁸⁴, rule in favour of Costa Rica and find that the measure is not consistent with the provisions of Article 3.1 of the SPS Agreement.

The measure is inconsistent with the obligation not to restrict trade more than required under Articles 5.6 and 2.2 of the SPS Agreement

2.97. Panama's measure prohibiting imports of plantains and bananas from Costa Rica is inconsistent with Article 5.6 of the SPS Agreement and, consequently, with Article 2.2 of the SPS Agreement, since it is more trade-restrictive than required to achieve Panama's appropriate level of protection and is not applied only to the extent necessary to protect plant life or health.¹⁸⁵

2.98. Costa Rica notes that updating the phytosanitary requirements provided for in Resolutions AUPSA-DINAN-106-2009 and AUPSA-DINAN-019-2012 is a valid alternative measure that satisfies the three conditions set out in footnote 3 to Article 5.6 of the SPS Agreement.

¹⁷² Costa Rica's panel request, p. 6; first written submission, paras. 1109-1129.

¹⁷³ ISPM 2 (Exhibit CRI-101).

¹⁷⁴ ISPM 20 (Exhibit CRI-161).

¹⁷⁵ ISPM 2 (Exhibit CRI-101), p. 8.

¹⁷⁶ ISPM 20 (Exhibit CRI-161), p. 22.

¹⁷⁷ ISPM 20 (Exhibit CRI-161), p. 23.

¹⁷⁸ Panama's response to Panel question No. 6, para. 28.

¹⁷⁹ Costa Rica's first written submission, para. 1123.

¹⁸⁰ Panel Report, *India – Agricultural Products*, paras. 7.270-7.274. See also Appellate Body Report, *India – Agricultural Products*, para. 5.111.

¹⁸¹ Appellate Body Report, *EC – Sardines*, para. 245.

¹⁸² Costa Rica's first written submission, paras. 1128-1129.

¹⁸³ Panama's first written submission, para. 438.

¹⁸⁴ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁸⁵ Costa Rica's panel request, p. 6; first written submission, paras. 1130-1161.

2.99. Costa Rica demonstrated, first, that this alternative is "reasonably available taking into account technical and economic feasibility", given that, as of October 2019, Panama had been applying Resolution AUPSA-DINAN-106-2009 to plantains from Costa Rica for nearly a decade, and Resolution AUPSA-DINAN-019-2012 to bananas from Costa Rica for more than seven years.¹⁸⁶ Similarly, Costa Rica demonstrated that this alternative is "significantly less restrictive to trade"¹⁸⁷ because, unlike a prohibition, it would allow Costa Rican plantains and bananas to enter the Panamanian market. Lastly, this alternative achieves Panama's level of protection to prevent the introduction of Foc TR4 into its territory. The application of the previous phytosanitary requirements to plantains and bananas from Costa Rica – which is a country *free* of Foc TR4 – fully achieves this ALOP. Costa Rica notes that, according to Panama, its ALOP with regard to Foc TR4 is very "restrictive" and, therefore, Panama has prohibited imports from all origins. However, this is incorrect. Costa Rica has submitted evidence that shows that Panama appears to have imported fresh plantains from the United States in the years following the prohibition imposed on Costa Rica¹⁸⁸, as well as fresh bananas from Peru – a country where Foc TR4 is *present*.¹⁸⁹

2.100. In conclusion, Panama's measure is inconsistent with Article 5.6 of the SPS Agreement and, consequently, Article 2.2 of the SPS Agreement.¹⁹⁰ Panama has not offered any rebuttal argument to Costa Rica's *prima facie* case. Its only claim in this respect is that "it follows that provisional measures adopted in accordance with the Article 5.7 requirements are also exempt from the discipline provided for in Article 5.6 of the SPS Agreement".¹⁹¹ This is not supported by the text of the SPS Agreement nor by case law.¹⁹² Ultimately, in the absence of effective refutation, the Panel should, "as a matter of law"¹⁹³, rule in favour of Costa Rica and find a violation of Articles 5.6 and 2.2 of the SPS Agreement.

Panama is incurring undue delay in a manner that is inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement

2.101. Panama has indicated that it is undertaking a process of reviewing its phytosanitary requirements for imports of plantains and bananas from Costa Rica, which includes, according to Panama, a risk assessment process and the approval of Costa Rican packing plants. However, Panama has incurred, and is incurring, "undue delay" with respect to its alleged review process, in a manner that is inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.

2.102. On 30 January 2020, Costa Rica indicated to Panama that it was "willing to make the necessary arrangements to comply with the approval of packing plants", but Panama did not provide any response. Costa Rica sent two additional memoranda to Panama in connection with the approval of packing plants.¹⁹⁴ Panama remained silent for two years and, when it finally replied to Costa Rica, it did not express any intention to coordinate visits to Costa Rican packing plants.¹⁹⁵ As of the date of the establishment of the Panel, 27 September 2021, 1 year and 11 months had elapsed since Panama initiated its alleged "technical review process" in respect of the phytosanitary requirements for imports of plantains and bananas from Costa Rica.¹⁹⁶ This period constitutes a "delay", within the meaning of Annex C(1)(a) to the SPS Agreement, which is also "undue", since there is no "legitimate reason, or justification"¹⁹⁷ to explain it. The COVID-19 pandemic does not justify Panama remaining silent in the face of Costa Rica's repeated communications and Panama also failed to explain how the pandemic would have prevented it from allegedly "carrying out a risk assessment for plantains and bananas".¹⁹⁸ Moreover, Panama has failed to address what prevented it from

¹⁸⁶ Costa Rica's first written submission, para. 1136.

¹⁸⁷ Costa Rica's first written submission, para. 1144. (emphasis original)

¹⁸⁸ See Exhibit CRI-401; also available on the official INEC website at: See [INEC - Dashboard](#) (accessed 15 January 2024).

¹⁸⁹ Press releases on exports of bananas from Peru (2023) (Exhibit CRI-407).

¹⁹⁰ Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38.

¹⁹¹ Panama's response to Panel question No. 75, para. 212.

¹⁹² See para. 3.15 above.

¹⁹³ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁹⁴ Memorandum DSFE-0348-2020 (Exhibit CRI-107); Memorandum DSFE-0110-2021 (Exhibit CRI-108).

¹⁹⁵ Note DNSV-0113-2021-OIAR (Exhibit CRI-109); Note DNSV-0129-2021 (Exhibit CRI-111); and Note DNSV-0207-2021 (Exhibit CRI-112).

¹⁹⁶ Note AUPSA-AG-392-2019 (Exhibit CRI-95); Note AUPSA-AG-424-2019 (Exhibit CRI-97).

¹⁹⁷ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.

¹⁹⁸ Panama's first written submission, para. 424.

carrying out the approval of Costa Rican packing plants, once the pandemic no longer prevented on-site inspection visits.

Panama has also maintained its complete "inactivity"¹⁹⁹ since 27 September 2021. The establishment of this Panel would not have prevented the Panamanian authorities from carrying out the on-site inspections in Costa Rican packing plants or from completing the review process that they allegedly initiated more than four years ago. The only reason there can be for failing to do so is that Panama wanted to prolong for as long as possible the application of an import prohibition on plantains and bananas that has no technical basis and is not covered by the disciplines of the SPS Agreement.

In conclusion, Costa Rica has demonstrated that Panama has incurred, and is incurring, "undue delay" with respect to its review process for the phytosanitary requirements for imports of plantains and bananas from Costa Rica. Therefore, the Panel should find that Panama is acting inconsistently with Annex C(1)(a) to the SPS Agreement and, consequently, also with Article 8 of the SPS Agreement.²⁰⁰

The measure is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement

In the light of all the inconsistencies with obligations under the SPS Agreement demonstrated by Costa Rica, the Panel should find that Panama is, consequently, also acting in a manner inconsistent with the obligations under Articles 1.1 and 2.1 of the SPS Agreement.

MEASURE CONCERNING THE IMPORTATION OF STRAWBERRIES

Introduction

Since 20 February 2020, Panama has maintained a prohibition on imports of Costa Rican strawberries as a result of the alleged detection of the pesticide oxamyl in two shipments of Costa Rican strawberries originating from the same producer, at levels that allegedly exceeded Panama's maximum residue limits (MRLs). It has done so despite the fact that the use of oxamyl is not permitted in strawberry production in Costa Rica.²⁰¹ While these two shipments were exported by a single Costa Rican producer, the prohibition imposed by Panama, which is still in effect, applies to all Costa Rican strawberry producers. Therefore, no Costa Rican producer can export strawberries to Panama at present. After carrying out their own inspections, the Costa Rican phytosanitary authorities found no oxamyl in the production process of the Costa Rican producer concerned. Costa Rica therefore asked Panama for details of its analyses. To date, Panama has refused to supply this information. In any event, Costa Rica sent the information that Panama determined was necessary to lift the prohibition.

Non-compliance with any MRL by a specific producer suggests that the producer was unlikely to have followed the good agricultural practices (GAPs) applicable to the cultivation of the product. *A priori*, there would be no reason to conclude that other producers not responsible for the non-compliance would also be failing to apply GAPs correctly in their own cultivation, harvesting, selection, packaging, storage, and transport processes. Prohibiting imports of a product from an entire country after finding that a specific producer in the country failed to comply with an MRL is therefore completely disproportionate.

It is therefore logical that neither the Codex standards nor the measures of other WTO Members recommend prohibiting imports in cases of non-compliance with MRLs. The two Codex standards identified by Costa Rica state that, in these cases, measures can be taken to change the manner in which risk is managed, such as increasing the intensity of border checks in respect of future consignments from the producer responsible for non-compliance.²⁰² The measures adopted by the European Union, the United States and Australia are concrete examples of the application of this principle. After detecting non-compliance with an MRL, the European Union imposes an increased

¹⁹⁹ Panel Report, *US – Animals*, para. 7.164.

²⁰⁰ Costa Rica's first written submission, paras. 965-969.

²⁰¹ Certification of pesticides for use in strawberries, AE-REG-C-0035-2022 (Exhibit CRI-5).

²⁰² Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems, CAC/GL 26-1997 (Exhibit CRI-126); Guidelines for Food Import Control Systems, CAC/GL 47-2003 (Exhibit CRI-127). See also Costa Rica's first written submission, paras. 339-351.

level of border controls on the producer concerned and, if the producer still fails to comply, it would then require the authorities of the exporting country to perform pre-export sampling and analysis on consignments from that producer.²⁰³ Similarly, Australia orders all future imports from the foreign producer responsible for non-compliance to undergo inspection.²⁰⁴ For its part, the United States reverses the burden of proof so that, for future consignments, the producer must demonstrate that its product complies with the MRLs of the United States.²⁰⁵ In all these cases, the additional controls are withdrawn once the importer establishes a history of compliance.

In the case at hand, Panama did not take any of the steps recommended by the Codex or by the measures of other WTO Members. Panama moved directly to the measure of last resort, which, according to the Codex standards, is reserved for serious or persistent cases.²⁰⁶ These are clearly not the circumstances of the present case. Panama confirmed that it introduced the prohibition on 20 February 2020 solely on the basis of the two instances of non-compliance identified in Note AUPSA-AG-051-2020.²⁰⁷

The measure is inconsistent with Articles 5.1, 5.2 and 2.2 of the SPS Agreement and is not covered by Article 5.7 of the SPS Agreement

Panama has acknowledged that the measure concerning strawberries, like the measures concerning pineapples and plantains and bananas, "are not based on risk assessments".²⁰⁸ The confirmation of the absence of a risk assessment leads the Panel to conclude, without the need to continue with the other elements for analysis under Article 5.1, that Costa Rica has made a *prima facie* case of violation of Articles 5.1, 5.2 and 2.2 of the SPS Agreement.

Panama's defence is that, owing to insufficient scientific evidence, this is a temporary measure covered by Article 5.7 of the SPS Agreement.²⁰⁹ It should be emphasized that by claiming that its measure is covered by Article 5.7 of the SPS Agreement, Panama "carries the burden to prove that each of the four cumulative requirements [of this provision] have been satisfied".²¹⁰ To recall, these four requirements are: (i) there must be insufficient scientific evidence; (ii) the measure must have been adopted on the basis of available pertinent information; (iii) additional information necessary for a more objective assessment of risk must be sought; and (iv) the measure must be reviewed within a reasonable period of time. Panama has failed to demonstrate that its measure meets the criteria under Article 5.7 of the SPS Agreement.

In order to satisfy the first condition under Article 5.7, Panama would have to prove that there was insufficient scientific evidence to conduct a risk assessment that would serve as a basis for introducing a measure to ensure compliance with the oxamyl MRL in future shipments of strawberries from the Costa Rican producer concerned.

At the outset, Panama offers a misguided view of what constitutes a lack of scientific evidence for the purposes of Article 5.7 of the SPS Agreement. Panama alludes to circumstances that allegedly "put into question" the conclusions underpinning its decision to allow imports of Costa Rican strawberries that comply with the oxamyl MRL.²¹¹ Panama claims that "[c]ases of non-compliance undoubtedly constitute scientific information of the kind that can put into question a Member's conclusions in relation to risk".²¹² In other words, Panama asserts that non-compliance with the oxamyl MRL in the two shipments of Costa Rican strawberries put into question its understanding that it was safe to import strawberries from Costa Rica as long as an MRL of 0.01 mg/kg of oxamyl was applied.

²⁰³ Costa Rica's first written submission, paras. 353-355.

²⁰⁴ Costa Rica's first written submission, para. 357.

²⁰⁵ Costa Rica's first written submission, para. 356.

²⁰⁶ Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems, CAC/GL 26-1997 (Exhibit CRI-126), Annex, para. 34; Guidelines for Food Import Control Systems, CAC/GL 47-2003 (Exhibit CRI-127), Appendix, para. 20. See also Costa Rica's first written submission, paras. 339-347.

²⁰⁷ Panama's response to Panel question No. 19(a), para. 83.

²⁰⁸ Panama's response to Panel question No. 9(b), para. 32.

²⁰⁹ Panama's first written submission, para. 166.

²¹⁰ Panel Report, *US – Animals*, para. 7.293.

²¹¹ Panama's first written submission, paras. 203-204; response to Panel question No. 77(c), para. 225.

²¹² Panama's opening statement at the first meeting of the Panel, para. 75.

In making this argument, Panama draws a false analogy with the *US/Canada – Continued Suspension* dispute. In that dispute, the Appellate Body found that there could be insufficient scientific evidence where there is "a qualified and respected scientific view that puts into question the relationship between the relevant scientific evidence and the conclusions in relation to risk, *thereby not permitting the performance of a sufficiently objective assessment of risk on the basis of the existing scientific evidence*".²¹³

Panama cites these findings of the Appellate Body to argue that the cases of non-compliance with the oxamyl MRL put into question its conclusions regarding its decision to allow imports of Costa Rican strawberries subject to an MRL of 0.01 mg/kg of oxamyl. However, Panama does not address the most important question: how this rendered previous scientific evidence insufficient in such a way that it was impossible to conduct a new risk assessment.

It is worth recalling that imports were prohibited because of the detection of oxamyl residues in two shipments of strawberries from the same Costa Rican producer. In this context, there is no indication that the scientific evidence was insufficient for Panama to conduct a risk assessment. Panama had information on the two strawberry shipments in question, the pesticide in question, the exact quantities of residue, the name of the Costa Rican producer in question, and the producer's history of compliance. It was also aware that the use of oxamyl was prohibited in strawberry cultivation in Costa Rica.²¹⁴ Panama does not explain why this information was insufficient for a risk assessment. To satisfy the first condition under Article 5.7, Panama would have to "identify the insufficiencies in the relevant scientific evidence".²¹⁵ It did not do so.

Panama also failed to demonstrate that the second condition under Article 5.7, i.e. that the import prohibition on strawberries was based on available pertinent information, has been met. According to Article 5.7, pertinent information includes information "from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members". In this case, the available pertinent information includes two specific Codex guidelines and the measures taken by the European Union, the United States and Australia.

The relevant Codex guidelines²¹⁶ are clear that, in case of non-compliance with food safety requirements, the measures taken by the importing country must be proportionate and gradual. First, the importing country may change the manner in which risk is managed by holding the food pending final judgment or enhancing sampling and testing from the establishment involved. If the exporting country has evidence of a systemic problem, it could extend the measures to other establishments. The suspension of imports is a last resort and is justifiable only in the most serious or persistent cases, after confirming that the previous measures were insufficient to ensure compliance with the safety requirements.

According to Article 5.7, available pertinent information also includes information from "sanitary or phytosanitary measures applied by other [WTO] Members". In the case at hand, this covers measures taken by the European Union, the United States and Australia. In cases of nonconformity of imported products with MRLs, the European Union²¹⁷, the United States²¹⁸ and Australia²¹⁹ do not suspend future imports from the foreign producer concerned, let alone from any other producer in that same country. The measures taken by these three WTO Members consist of tighter controls on the foreign producer responsible for non-compliance in order to manage risk in future consignments, and not on all exporters or the entire exporting country. Imports are still permitted provided that the importer demonstrates that the consignment complies with the relevant MRLs. The measures

²¹³ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 677. (emphasis added)

²¹⁴ Costa Rica's first written submission, para. 332.

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²¹⁶ Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems, CAC/GL 26-1997 (Exhibit CRI-126), paras. 34-35; Guidelines for Food Import Control Systems, CAC/GL 47-2003 (Exhibit CRI-127), Appendix, para. 20.

²¹⁷ European Union Regulation No. 2018/1660 (Exhibit CRI-129), recitals (2) and (6). In the case of the products originating in Türkiye and Viet Nam, the increased level of controls was approved by Regulation No. 1295/2014 (Exhibit CRI-130). In the case of the product from India, the increased level of controls was approved by Regulation No. 885/2014 (Exhibit CRI-131).

²¹⁸ *Import Operations and Actions* (Exhibit CRI-132), section 9-8-2, p. 36 and section 9-8-8, p. 38.

²¹⁹ *Failing food reports*, Australia (Exhibit CRI-134) ("If the failing food is a surveillance food, we can apply a holding order. 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").

taken by these Members are not permanent, as the additional controls can be withdrawn when the producer demonstrates a history of compliance.

According to the third Article 5.7 requirement, the importing 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".²²⁰ In Note AUPSA-AG-051-2020, through which Panama introduced the import prohibition on strawberries, Panama did not request any pertinent information to conduct a risk assessment. Panama stated only that the prohibition on imports of Costa Rican strawberries would remain in effect until Costa Rica "indicates the corrective measures implemented". This does not satisfy the requirement to "make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research". The subsequent exchange of communications between the parties shows that Costa Rica, not Panama, initiated the process of gathering information. On 5 May 2020, Costa Rica provided Panama with information on the outcome of the visit by the Costa Rican authorities to the strawberry producer responsible for the nonconformities, indicating, *inter alia*, that no evidence of oxamyl use was found at the producer's premises or in the two strawberry samples taken at the place of production. As Panama did not respond, Costa Rica contacted Panama on 12 June 2020²²¹ and again on 19 February 2021.²²² Finally, on 17 March 2021, more than a year after imposing the import prohibition, Panama sent Note AUPSA-AG-151-2021, clarifying the type of information that it required from Costa Rica. In response, on 18 May 2021, Costa Rica provided the required information in Memorandum DSFE-0393-2021, attaching a total of 23 annexes containing exhaustive and detailed documentation.

The fourth requirement under Article 5.7 of the SPS Agreement obliges the importing Member to review the provisional measure within a reasonable period of time. Panama did not review the import prohibition on strawberries within a reasonable period of time. Panama introduced the prohibition on 20 February 2020 and, since then, Panama has not reviewed this measure. In other words, it has not carried out any "formal assessment ... with the intention of instituting change if necessary".²²³

For these reasons, Costa Rica submits that the import prohibition on strawberries is inconsistent with the obligation under Articles 5.1, 5.2 and 2.2 to conduct a risk assessment, which is not covered by Article 5.7 of the SPS Agreement.

The measure is inconsistent with the harmonization obligation under Article 3.1 of the SPS Agreement

When it imposed the prohibition on imports of Costa Rican strawberries, Panama did not use the relevant international standards as a basis and therefore violated Article 3.1 of the SPS Agreement. As explained above in the context of Article 5.7, Costa Rica identified two relevant sets of Codex guidelines: *Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems* (CAC/GL 26-1997)²²⁴, and *Guidelines for Food Import Control Systems* (CAC/GL 47-2003).²²⁵ Both sets of guidelines establish that, in cases of non-compliance with food safety requirements, the appropriate measure is to change the manner in which risk is managed. This can be achieved by, for example, increasing the frequency of controls on consignments from the foreign producer responsible for non-compliance. According to these Codex standards, import prohibitions are a measure of last resort, valid only in serious or persistent cases and applicable only when it has been demonstrated that measures to change the manner in which risk is managed were ineffective.

Given that Panama imposed an import prohibition in a case not provided for in the relevant Codex guidelines, it can be asserted that this measure does not have "a very strong and very close relationship" with the Codex guidelines. It can therefore be said that these guidelines do not form "the basis" for the import prohibition on strawberries. The adoption of an import prohibition in cases where the international standard provides for the continuation of trade is tantamount to contradicting

²²⁰ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.

²²¹ Memorandum DSFE-0525-2020 (Exhibit CRI-11).

²²² Memorandum DSFE-0108-2021 (Exhibit CRI-12), p. 2.

²²³ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3257.

²²⁴ Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems, CAC/GL 26-1997 (Exhibit CRI-126), Annex, paras. 34 and 35.

²²⁵ Guidelines for Food Import Control Systems, CAC/GL 47-2003 (Exhibit CRI-127), Appendix, para. 20.

the international standard. In turn, a measure that contradicts the international standard is, logically, not based on that international standard.

Costa Rica also submits that Panama acted in violation of Article 3.1 of the SPS Agreement by refusing to provide data on the sampling and analytical methods used to detect the nonconformities in the two shipments of Costa Rican strawberries. In this respect, Costa Rica referred to the *Guidelines for the Exchange of Information between Countries on Rejections of Imported Food* (CAC/GL 25-1997). These guidelines establish that, where imported food is rejected on the basis of analysis performed in the importing country, the importing country should make available, at the request of the interested party, details of the sampling and analytical methods employed, the results obtained and the details of the testing laboratory. Costa Rica, on two occasions²²⁶, sent Panama written requests for details of the sampling and analytical methods used in the detection of oxamyl residues in the two shipments of Costa Rican strawberries. On 18 May 2021, Costa Rica explained in Memorandum DSFE-0393-2021 that even though Panama had provided some information on 17 March 2021 in response to Costa Rica's first request, that information was insufficient. Costa Rica therefore repeated its request regarding the sampling and analytical methods, stressing that the information was needed to verify the validity of Panama's results. As of the date of establishment of this Panel, 27 September 2021, Panama had not responded to Costa Rica's request for information. By refusing to make the sampling and analytical methods available, Panama failed to use the relevant international standards as a basis.

As Panama did not offer any specific rebuttal argument in response to Costa Rica's *prima facie* case, the Panel must find a violation of Article 3.1 of the SPS Agreement.

The measure is inconsistent with the obligation not to restrict trade more than required under Articles 5.6 and 2.2 of the SPS Agreement

The import prohibition on strawberries is inconsistent with Article 5.6 of the SPS Agreement, which requires WTO Members to ensure that their sanitary or phytosanitary 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".

Panama had, as an alternative to prohibiting strawberry imports, the option of changing the manner in which it managed risk with respect to shipments from the Costa Rican producer responsible for non-compliance.²²⁷ It will be recalled that this measure is recommended by two sets of Codex guidelines. Furthermore, other WTO Members, such as the European Union, the United States and Australia, routinely take measures to change the manner in which risk is managed.

This alternative measure meets the three requirements under footnote 3 to Article 5.6 of the SPS Agreement.

First, the alternative measure is reasonably available taking into account technical and economic feasibility. Measures to change the manner in which risk is managed are part of the functions attributed to the food safety authorities pursuant to Panamanian regulations.²²⁸ The fact that Panama's regulations assign its government agencies functions that include the application of the alternative measure suggests that this measure is reasonably available to Panama in terms of technical and economic feasibility.

Second, the alternative measure would achieve Panama's ALOP. Costa Rica notes that, although the import prohibition on strawberries is a sanitary measure (protection of human life or health)²²⁹, the ALOP cited by Panama covers plant health.²³⁰ In any event, as Costa Rica explained in its first written

²²⁶ Costa Rica's first request was made on 1 March 2021 in Memorandum DSFE-0128-2021 (Exhibit CRI-17). The second request was made on 18 May 2021 in Memorandum DSFE-0393-2021 (Exhibit CRI-21).

²²⁷ Costa Rica's first written submission, para. 449.

²²⁸ Decree-Law No. 11 (Exhibit CRI-2), Article 39(3), (4) and (8), and Article 40(1) and (2).

²²⁹ Costa Rica's first written submission, para. 299. See also Panama's first written submission, para. 210 ("[T]he specific risk to which Panama was referring was the potential for adverse effects on human health from oxamyl residues in strawberries from Costa Rica." (emphasis added)).

²³⁰ In its response to Panel question 95(a), Panama stated that, in the case of the measure concerning strawberries, the ALOP for plant health applies.

submission, the alternative measure – changing the manner in which risk is managed – would achieve the ALOP described by Panama.²³¹ Panama has given no reason indicating otherwise.

Third, the alternative measure is significantly less restrictive to trade than the import prohibition imposed by Panama. A change in the manner in which risk is managed would permit imports of Costa Rican strawberries provided, of course, that the oxamyl MRL for strawberries is respected. Conversely, with the import prohibition, no consignments of Costa Rican strawberries can be imported into Panama, even if they comply with the oxamyl MRL. An alternative measure that permits imports, albeit conditionally, "would still be significantly less restrictive to trade than an outright prohibition".²³²

Panama did not offer any specific rebuttal argument in response to Costa Rica's *prima facie* case under Article 5.6 of the SPS Agreement. Panama only repeated that "it follows that provisional measures adopted in accordance with the Article 5.7 requirements are also exempt from the discipline provided for in Article 5.6 of the SPS Agreement".²³³ As Costa Rica explained previously, Panama's argument is baseless.²³⁴ In any event, as the measure concerning strawberries does not meet the Article 5.7 requirements, the Panel will not have to address Panama's theory.

Panama is incurring undue delay in a manner that is inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement

Panama acted inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement by incurring undue delay in the procedure relating to the measure concerning strawberries. The procedure in question pertains to Panama's consideration of Costa Rica's request to lift the import prohibition on strawberries imposed on 20 January 2020. Costa Rica recalls that the panel in *Russia – Pigs (EU)* concluded that "Russia's process of consideration of the European Union's request for the recognition of ASF-free areas" was a procedure covered by Article 8 and Annex C(1) of the SPS Agreement.²³⁵

Costa Rica demonstrated that, in relation to the procedure in question, Panama incurred undue delay within the meaning of Annex C(1)(a) to the SPS Agreement. Costa Rica identified two periods that constitute "delay" pursuant to Annex C(1)(a) as they are "[periods of] time lost by inaction or inability to proceed".²³⁶

The first delay spans the period from 20 February 2020 (date of adoption of the measure) to 22 February 2021 (the date on which Panama resumed communication).²³⁷ Over this period of 1 year and 2 days, Panama remained completely silent; it neither responded to Costa Rica's requests to withdraw the measure, nor commented on the information provided by Costa Rica.

The second delay spans the period from 20 February 2020 (the date of adoption of the measure) to 27 September 2021 (the date of establishment of this Panel).²³⁸ In terms of timing, the second delay overlaps with the first delay, as both begin on 20 February 2020 with the adoption of the measure.

The second delay is characterized by Panama's slowness in examining the information provided by Costa Rica. Over this period, Panama maintained contact with Costa Rica, but Panama's actions continued to show delays in the consideration of Costa Rica's request. As has been noted, after Panama finally clarified the information that it required, Costa Rica provided, on 18 May 2021, the information requested by Panama regarding, *inter alia*, Costa Rica's control programmes for good agricultural practices.²³⁹ However, to date, Panama still has not given any opinion on the information provided by Costa Rica or completed the procedure of consideration of Costa Rica's request to lift the import prohibition on strawberries.

²³¹ Costa Rica's first written submission, paras. 462-463.

²³² Panel Report, *Russia – Pigs (EU)*, para. 7.829.

²³³ Panama's response to Panel question No. 75, para. 212.

²³⁴ See para. 3.15 above.

²³⁵ Panel Report, *Russia – Pigs (EU)*, para. 7.516 (see also para. 7.518).

²³⁶ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.495.

²³⁷ Costa Rica's first written submission, paras. 476-482.

²³⁸ Costa Rica's first written submission, paras. 483-484.

²³⁹ Memorandum DSFE-0393-2021 (Exhibit CRI-21).

Costa Rica considers the two delays described above to be undue within the meaning of Annex C(1)(a), as they are "unjustifiable" and "[go] beyond what is warranted".²⁴⁰ With regard to the first delay, there is no reason that can justify Panama's total silence for more than a year.²⁴¹ During this period, Costa Rica contacted Panama on three occasions, with no response from Panama.²⁴² The second delay was also unjustified. Panama had in its possession all the information that it had requested from Costa Rica. Even so, Panama did not respond, and still has not responded, to Costa Rica's request to lift the import prohibition. Costa Rica fails to understand the connection between these facts and Panama's assertion that it "did not delay in reviewing or responding to any" of the communications sent by Costa Rica in relation to the measure concerning strawberries.²⁴³

In view of the above, Costa Rica requests the Panel to find that Panama violated Article 8 and Annex C(1)(a) of the SPS Agreement in relation to undue delay in the procedure associated with the measure concerning strawberries.

The measure is inconsistent with Articles 1.1 and 2.1 of the SPS Agreement

In the light of all the inconsistencies demonstrated by Costa Rica in relation to the import prohibition on strawberries, the Panel should find that Panama failed to comply with the obligations under Articles 1.1 and 2.1 of the SPS Agreement.

CLAIMS UNDER THE GATT 1994 AND THE AGREEMENT ON AGRICULTURE

Costa Rica demonstrated that the import prohibition on dairy and meat products and the import prohibition on pineapples are inconsistent with the non-discrimination obligations under Articles 2.3 and 5.5 of the SPS Agreement. These two measures are also inconsistent with the most-favoured-nation (MFN) treatment obligation under Article I:1 of the GATT 1994. Both measures result in discrimination based solely on the products' origin. The products subject to these two measures (i.e. dairy and meat products and pineapples) originating in Costa Rica and in other WTO Members can be considered "like products". Panama does not "immediately and unconditionally" accord Costa Rica the advantage that it accords Peru, Mexico and New Zealand (in the case of the measure concerning dairy and meat products) or the United States and Colombia (in the case of the measure concerning pineapples), namely, the competitive opportunity to enter the Panamanian market.

Furthermore, the four measures at issue are inconsistent with Article XI:1 of the GATT 1994, which establishes that WTO Members must not institute import prohibitions or restrictions. Consequently, these measures are also inconsistent with the obligation not to resort to quantitative restrictions on imports of agricultural products under Article 4.2 and footnote 1 of the Agreement on Agriculture.

REQUEST FOR RULINGS

In the light of all the above, Costa Rica requests the Panel to find the violations listed below.

With respect to the import prohibition on **dairy and meat products**, Panama has acted inconsistently with the following provisions:

Articles 5.1, 5.2 and 5.3 of the SPS Agreement and, consequently, Article 2.2 of the Agreement. The measure is not covered by Article 5.7 of the SPS Agreement;
Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;
Article 2.3 of the SPS Agreement;
Article 5.5 of the SPS Agreement;
Article 8 and Annex C(1)(a) of the SPS Agreement;
Article 8 and Annex C(1)(c) of the SPS Agreement; and
consequently, Articles 1.1 and 2.1 of the SPS Agreement.

²⁴⁰ Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

²⁴¹ Costa Rica's first written submission, paras. 487-489.

²⁴² Memorandum DSFE-0343-2020 (Exhibit CRI-9); Memorandum DSFE-0525-2020 (Exhibit CRI-11); and Memorandum DSFE-0108-2021 (Exhibit CRI-12).

²⁴³ Panama's response to Panel question No. 11(a)(i), para. 39.

With respect to the import prohibition on **pineapples**, Panama has acted inconsistently with the following provisions:

Articles 5.1, 5.2 and 5.3 of the SPS Agreement and, consequently, Article 2.2 of the Agreement. The measure is not covered by Article 5.7 of the SPS Agreement;
Article 3.1 of the SPS Agreement;
Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;
Article 2.3 of the SPS Agreement;
Article 5.5 of the SPS Agreement;
Article 8 and Annex C(1)(a) of the SPS Agreement; and
consequently, Articles 1.1 and 2.1 of the SPS Agreement.

With respect to the import prohibition on **plantains and bananas**, Panama has acted inconsistently with the following provisions:

Articles 5.1, 5.2 and 5.3 of the SPS Agreement and, consequently, also Article 2.2 of the Agreement. The measure is not covered by Article 5.7 of the SPS Agreement;
Article 3.1 of the SPS Agreement;
Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;
Article 8 and Annex C(1)(a) of the SPS Agreement; and
consequently, Articles 1.1 and 2.1 of the SPS Agreement.

With respect to the import prohibition on **strawberries**, Panama has acted inconsistently with the following provisions:

Articles 5.1 and 5.2 of the SPS Agreement and, consequently, also Article 2.2 of the Agreement. The measure is not covered by Article 5.7 of the SPS Agreement;
Article 3.1 of the SPS Agreement;
Article 5.6 and, consequently, Article 2.2 of the SPS Agreement;
Article 8 and Annex C(1)(a) of the SPS Agreement; and
consequently, Articles 1.1 and 2.1 of the SPS Agreement.

Costa Rica further requests the Panel to find the violations demonstrated by Costa Rica of Articles I:1 and XI:1 of the GATT 1994, and Article 4.2 and footnote 1 of the Agreement on Agriculture.

Considering the nature and quantity of the violations demonstrated above, Costa Rica respectfully requests the Panel, by virtue of the powers conferred on it under Article 19.1 of the DSU, to recommend that Panama withdraw the contested measures so as to allow trade in the affected Costa Rican products to resume.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF PANAMA****I. INTRODUCTION**

1. This dispute concerns four measures: three provisional measures that temporarily suspend imports of bananas, plantains, pineapples and strawberries from Costa Rica, and one measure consisting of alleged delays in the operation of Panama's inspection and approval procedures for 16 Costa Rican dairy and meat establishments.
2. These four measures share a common characteristic. They are all conditional on Costa Rica providing the Panamanian authorities with additional information on sanitary or phytosanitary risks so that Panama can achieve its appropriate level of protection ("ALOP"). Regrettably, Costa Rica decided to determine for itself whether or not the information requested by Panama was necessary, and consistently refused to provide such information, even after this dispute had been initiated.
3. It would have been simpler and more efficient if Costa Rica had simply provided the information that Panama requested from the beginning. If Costa Rica had done so, this dispute could have been resolved without unnecessarily overburdening WTO resources.
4. In any event, Costa Rica's claims in this dispute are flawed. Instead of bringing legal claims solely under the SPS disciplines that apply to the specific measures at issue, Costa Rica distorts the underlying facts, invents alleged "import prohibitions", and brings claims under a wide variety of SPS disciplines that simply *do not apply* to the measures at issue.
5. With regard to the three provisional measures suspending imports of certain fruits from Costa Rica, the only provision that applies is Article 5.7 of the SPS Agreement, which establishes a qualified right for Members to act in a precautionary manner in cases where scientific evidence is insufficient to make an assessment of risk. In respect of the renewal procedures for 16 Costa Rican dairy and meat establishments, the only applicable provisions are Article 8 and Annex C of the SPS Agreement, which specifically govern the operation of control, inspection and approval procedures. The Panel therefore does not need to address any claims brought by Costa Rica under *other* provisions of the SPS Agreement that are inapplicable to the measures at issue.
6. Costa Rica's arguments in this dispute, if accepted, would undermine the right of WTO Members under the SPS Agreement to mitigate sanitary and phytosanitary risks.
7. *First*, Costa Rica erroneously considers that any request for updated information in the context of renewal procedures for establishment authorizations constitutes a broad "import prohibition" that is: (i) adopted with no assessment of risk; (ii) discriminatory in respect of the treatment accorded to other countries; and (iii) more trade restrictive than necessary, in violation of Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5 and 5.6 of the SPS Agreement. Costa Rica's position is untenable.
8. *Second*, Costa Rica erroneously considers that scientific evidence remains in a permanent state of sufficiency, in such a way that Panama's previous conclusions regarding sanitary or phytosanitary risk are valid in perpetuity, as long as there is a "body of scientific evidence" concerning the relevant risk. Costa Rica's position lacks merit and does not align with the Appellate Body's guidance.
9. *Third*, Costa Rica's arguments imply that the COVID-19 pandemic had *no impact at all* on the administrative procedures of WTO Members. Panama trusts that this Panel will not ignore the extraordinary burden that COVID-19 placed on the resources of a developing country like Panama.
10. Panama requests that the Panel carefully consider the systemic implications of Costa Rica's arguments in this dispute and issue findings that adequately preserve the balance of rights and obligations reflected in the SPS Agreement.

II. PANAMA'S REQUEST FOR A PRELIMINARY RULING

11. There are two preliminary claims concerning the Panel's terms of reference. The *first* concerns the inconsistency of the panel request with the requirement in Article 6.2 of the DSU to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

12. Costa Rica's panel request claims that "each and every one of the measures" described in Section I are inconsistent with "each and every one" of the provisions of the covered agreements that are paraphrased in Section II.¹ Costa Rica's use of the convenient phrase "each and every one" in its panel request introduced considerable uncertainty as to which measure or group of measures Costa Rica considers to be causing which problems. In particular, Costa Rica's panel request does not "plainly connect" the specific measures at issue with the provisions of the covered agreements that were allegedly violated by explaining succinctly how or why each individual measure violates each of the provisions of the covered agreements identified by Costa Rica.² The Appellate Body has previously considered the same flaw to be inconsistent with Article 6.2 of the DSU.³

13. The *second* preliminary matter concerns Costa Rica's introduction, in its first written submission, of new claims under Annex B(5)(b) and B(6)(a) of the SPS Agreement. These claims were not identified in Costa Rica's panel request and, for this reason, necessarily fall outside the terms of reference of the Panel under Articles 6.2 and 7.1 of the DSU.

III. THE ALLEGED "IMPORT PROHIBITION" ON DAIRY AND MEAT PRODUCTS ORIGINATING IN COSTA RICA

14. The measure described by Costa Rica in its panel request consists of a broad "import prohibition" on all animal products from Costa Rica, stemming from Panama's alleged refusal to renew the sanitary approvals of "various" Costa Rican establishments.⁴ Costa Rica makes two sets of claims with respect to this "import prohibition". *First*, Costa Rica alleges that the prohibition is a *substantive* SPS measure inconsistent with Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5 and 5.6 of the SPS Agreement. *Second*, Costa Rica claims, based on *the same* arguments and evidence, that this alleged measure is also an establishment *approval procedure* that is inconsistent with Article 8 and Annex C(1)(a) and (c) of the SPS Agreement.

15. Panama considers that a single measure cannot be both a substantive sanitary and phytosanitary measure and a control, inspection and approval *procedure* through which a WTO Member seeks to check and ensure the fulfilment of that measure. In Panama's view, Costa Rica's description of the alleged "import prohibition" leaves no doubt that Costa Rica's challenge refers *exclusively* to the operation of Panama's inspection and approval procedures for 16 Costa Rican dairy and meat establishments.⁵ This measure therefore falls exclusively within the

¹ Costa Rica thus claims that four different measures are each inconsistent with the same 23 different treaty provisions under three different covered agreements. However, nothing in the description of the measures or in the legal basis of the complaint suggests that Costa Rica was in fact making 92 separate claims of inconsistency. It was only after reading Costa Rica's first written submission that it became clear which measures were actually being challenged and under which provisions of the covered agreements. This flaw in Costa Rica's request seriously prejudiced Panama's due process rights and, in particular, its right to know the precise contours of the case to which it was required to respond at the earliest possible opportunity (Panama's request for a preliminary ruling, paras. 30-33).

² Panama's request for a preliminary ruling, para. 12.

³ Panama's request for a preliminary ruling, paras. 19-20; Appellate Body reports, *China – Raw Materials*, para. 231 (footnote omitted).

⁴ The products covered by this alleged import ban were: (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. See Costa Rica's panel request, p. 3. See also Costa Rica's first written submission, para. 41.

⁵ Panama's opening statement at the second substantive meeting of the Panel, paras. 24-26; response to Panel question No. 157, para. 155; and comments on Costa Rica's responses to question No. 105, para. 25. Costa Rica's arguments under Articles 2.3 and 5.5 of the SPS Agreement further corroborate the *procedural nature* of the measure it challenges. Costa Rica argues, in essence, that the situation in Peru, Mexico and New Zealand is "comparable" to the situation in Costa Rica because these countries are in a similar situation with respect to the *procedures* for the renewal of establishment approvals (Panama's opening statement at the second substantive meeting of the Panel, paras. 24-26; response to Panel question No. 157, paras. 24-26; response to Panel question No. 157, para. 155; and comments on Costa Rica's responses to question No. 105, para. 25).

scope of Article 8 and Annex C of the SPS Agreement. Costa Rica is requesting this Panel to open up new paths for distinguishing a substantive SPS measure from the operation of establishment approval procedures.

A. Costa Rica's challenge refers exclusively to the operation of the approval procedures under Article 8 and Annex C of the SPS Agreement.

16. The SPS Agreement contains separate disciplines governing substantive SPS measures, on the one hand, and the control, inspection and approval procedures that enforce them, on the other. Substantive SPS measures are measures applied by WTO Members to mitigate sanitary and phytosanitary risk. Such measures are subject to the disciplines of Articles 2 to 7 of the SPS Agreement. Control, inspection and approval procedures are measures that WTO Members apply to check and ensure the fulfilment of *other* substantive SPS measures. The text of Article 8 makes clear that the *operation* of control, inspection and approval procedures is subject *exclusively* to the disciplines of Annex C to the SPS Agreement.⁶

17. Costa Rica described the alleged import prohibition on dairy and meat products as stemming from Panama's failure to undertake and complete inspection and approval procedures for 16 Costa Rican dairy and meat establishments.⁷ Such an omission is *precisely* the type of measure that the Appellate Body considered in *Australia – Apples* to constitute a control, inspection and approval procedure subject to Article 8 and Annex C of the SPS Agreement.⁸ The Panel in *EC – Approval and Marketing of Biotech Products* reached the same conclusion.⁹

18. Costa Rica's convenient response is that the measure it is challenging has two distinct but "interrelated" "aspects". One *procedural* "aspect" comprising the non-renewal of sanitary authorizations for 16 Costa Rican dairy and meat establishments pending on-site audits, and another *substantive* "aspect" comprising the alleged "decision by Panama to revoke Costa Rica's sanitary eligibility".¹⁰ However, there is simply no basis in the *text* of the SPS Agreement for confusing the operation of control, inspection and approval procedures and the substantive SPS measures they seek to enforce as "interrelated aspects" of a single measure.¹¹ The "substantive aspect of the approval procedures" theory proposed by Costa Rica is also not supported by the relevant case law.

19. In *EC – Approval and Marketing of Biotech Products*, the complainants challenged a decision by the EU to delay final approval decisions as a "general *de facto* moratorium" on biotech products. Like Costa Rica in the case at hand, the complainants brought claims under Articles 2.2, 2.3, 5.1, 5.5 and 5.6, and Article 8 and Annex C of the SPS Agreement. The complainants claimed that the *same measure* (delays in approval decisions) reflected both substantive and procedural "aspects" that gave rise to violations of the relevant provisions of the SPS Agreement. The Panel *rejected* the complainants' argument that the decision to apply a general *de facto* moratorium on approvals converted the measure into a definitive import prohibition.¹² The Panel reasoned that the "procedural decision to delay final approval decisions does not cease to be procedural merely because it has a substantive impact. Indeed, procedural decisions virtually always have some substantive impact."¹³ Subsequent panels have continued to maintain the basic distinction between the operation of

⁶ In this respect, Article 8 of the SPS Agreement provides that WTO Members shall observe the provisions of Annex C "in the *operation of control, inspection and approval procedures*". In turn, Annex C defines control, inspection and approval procedures as "*any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures*". Annex C(1) stipulates in subparagraphs (a)-(i) the disciplines governing the implementation of control, inspection and approval procedures by a Member. Each of the subparagraphs of Annex C(1) makes explicit reference to the term "procedures". Subparagraph (a) requires WTO Members to undertake and complete control, inspection and approval procedures without "undue delay", while subparagraph (c) sets out the obligation to limit information requirements "to what is necessary for appropriate control, inspection and approval procedures".

⁷ Costa Rica's first written submission, para. 528.

⁸ Appellate Body Report, *Australia – Apples*, para. 438.

⁹ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

¹⁰ Costa Rica's response to Panel question No. 68, para. 3.35.

¹¹ Panama's second written submission, paras. 26-30.

¹² Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1356.

¹³ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1361.

inspection, control and approval procedures, the substantive SPS requirements they seek to enforce, and the disciplines that apply to these two types of SPS measures.¹⁴

20. The panel report in *Russia – Pigs (EU)* does not support Costa Rica's bizarre theory that the *same* measure can comprise both substantive and procedural "aspects". In that dispute, the panel determined whether the EU had demonstrated the existence of a *substantive* sanitary measure consisting of an EU-wide and country-specific import prohibition.¹⁵ The panel then assessed a *wholly different* measure – the operation of Russia's procedures for recognizing disease-free areas – and concluded that these procedures were aimed at "checking and ensuring fulfilment" of Russia's sanitary regulation on animal diseases.¹⁶ It should be noted that the panel in *Russia – Pigs (EU)* found that excessive information requirements were actions through which Russia impeded the undertaking and completion of procedures for the recognition of disease-free areas, thus constituting "undue delay" within the meaning of Annex C(1)(a) of the SPS Agreement.¹⁷ These are *precisely* the same types of actions that, according to Costa Rica, constitute a substantive "aspect" in the context of the present dispute.

B. Costa Rica failed to establish the "substantive aspect" it is challenging

21. In any event, Costa Rica has failed to demonstrate the existence of the alleged "substantive aspect" of the challenged measure. Specifically, Costa Rica failed to demonstrate that Panama had revoked its sanitary eligibility to export all animal products to Panama. The *only* evidence Costa Rica submitted to establish the alleged revocation of its sanitary eligibility are three letters in which Panama referred to "animal health eligibility" and indicated that it needed to consider Costa Rica's animal health situation.¹⁸

22. Costa Rica's argument is based entirely on the premise that the term "animal health eligibility" in these letters is interchangeable with the term "sanitary eligibility" under the *AUPSA manual on sanitary eligibility*, such that any investigation on Costa Rica's animal health status is tantamount to a revocation of Costa Rica's "sanitary eligibility". This is simply incorrect.

23. "Animal health eligibility" and "sanitary eligibility" are different concepts under Panamanian legislation.¹⁹ Sanitary eligibility refers to food-borne risks, while animal health eligibility refers to livestock (animal health) risks.²⁰ Animal health eligibility is not a precondition for sanitary eligibility under Panamanian law.²¹ The fact that the Scientific and Technical Food Safety Council (CCTSA) may consult the National Animal Health Directorate (DINASA) on "animal health eligibility" if the foodstuff exported by the applicant in question poses animal health risks, does not mean that the "sanitary eligibility" of the exporting country is revoked. Costa Rica's arguments have no factual or legal basis.

24. As a matter of law, revoking a country's "sanitary eligibility" requires an amendment to Resolution AUPSA-028-09. Without an amendment, Costa Rica's sanitary eligibility, as evidenced in the update to Resolution 092-2007, will remain in effect under Panamanian law.²² In fact, the two establishments whose approvals were renewed – Central Veterinaria and Biomar – continued exporting their animal products to Panama, which proves that the country's sanitary eligibility remains in effect.²³

25. Lastly, even if the Panel were to conclude that Costa Rica had demonstrated that Panama had somehow decided to "revoke" Costa Rica's sanitary admissibility for all animal products, the sanitary admissibility procedures at issue are the type of measure that, by their very nature, fall within the

¹⁴ Panel Report, *Australia – Apples*, paras. 7.1474, 7.1459 and 7.1468; Appellate Body Report, *Australia – Apples*, paras. 421, 435, 436, 439 and 440; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.156.

¹⁵ Panel Report, *Russia – Pigs (EU)*, para. 7.60.

¹⁶ Panel Report, *Russia – Pigs (EU)*, paras. 7.521 and 7.522.

¹⁷ Panel Report, *Russia – Pigs (EU)*, para. 7.538.

¹⁸ 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 Annex to Note AUPSA-AG-100-2021, Exhibit CRI-268).

¹⁹ Panama's response to Panel question No. 142, paras. 105-111.

²⁰ Panama's response to Panel question No. 142, para. 111.

²¹ Panama's response to Panel question No. 142, paras. 108-111.

²² Second written submission, para. 59.

²³ Panama's second written submission, para. 58; response to Panel question No. 143, para. 117.

scope of the control, inspection and approval procedures governed by Article 8 and Annex C(1) of the SPS Agreement.²⁴

C. Costa Rica failed to demonstrate a violation of Article 8 and Annex C(1)(a) and (c) of the SPS Agreement.

26. Turning to the provisions that *do* apply to the challenged measure, Costa Rica has failed to establish a *prima facie* case that Panama acted inconsistently with Article 8 and Annex C(1)(a) and (c) of the SPS Agreement. In particular, there was no "delay", let alone "undue delay", in undertaking and completing the approval procedures to renew the sanitary approvals of 16 Costa Rican dairy and meat establishments.

1. Relevant period for the Panel's analysis

27. The relevant period for the Panel's analysis of the alleged "undue delay" is the period between 30 June 2020, when the establishment approvals expired, and 27 September 2021, when this Panel was established. Costa Rica does not dispute the fact that the sanitary authorizations of the 16 establishments in question were renewed until 30 June 2020. Costa Rica also does not dispute that trade in the products at issue was not interrupted until 30 June 2020.²⁵ However, Costa Rica argues that the successive renewals of the sanitary approvals for the 16 establishments in question until 30 June 2020 are *not relevant* to the Panel's analysis. Costa Rica characterizes these renewals as "automatic and informal" and requests that the Panel disregard all evidence relating to these renewals.²⁶ Costa Rica's argument is without merit.

28. Simply put, the SPS Agreement does not require competent authorities to communicate their approval decisions in any particular manner or to follow any particular formality. In the same way, no legal basis exists in the SPS Agreement to exclude any evidence from the Panel's review.²⁷ Under Panamanian law, establishment renewal procedures begin with a formal application from the relevant establishment and end with a decision to renew or not to renew the applicant's sanitary authorization. Whether communicated on the AUPSA website or through the publication of a resolution, any decision to renew the establishment's approval *completes* such procedures until a new renewal procedure is requested.²⁸

29. The relevant period for the Panel's assessment of the alleged "delay" in the establishment authorization procedures is therefore 30 June 2020 to 27 September 2021.

2. There was no undue delay during the relevant period

30. As Panama explained, the outbreak of the COVID-19 pandemic substantially restricted Panama's ability to undertake and complete the relevant renewal procedures during the period concerned.²⁹ Costa Rica expressly admits that during the period 16 March 2020-15 October 2020 its borders were closed to Central American nationals.³⁰ Panamanian inspectors were therefore simply *unable to travel* to conduct audits at the relevant Costa Rican dairy and meat establishments during this period. Costa Rica also recognizes that the COVID-19 pandemic negatively affected the ability of the health authorities to conduct on-site audits of dairy and meat establishments, at least during the period *16 March 2020-16 April 2022*.³¹

31. Panama has also established that Costa Rica's refusal to provide information on its animal health system prevented Panama from completing the procedures for the renewals.³² In fact, Costa Rica did not provide the information *until 3 June 2021*.³³ The issue before the Panel is

²⁴ Panama's second written submission, paras. 61-64.

²⁵ AUPSA, Resolution No. 145-AG-2019, Exhibit PAN-2. *See also* Costa Rica's first written submission, para. 164; second written submission, paras. 130 and 132.

²⁶ Costa Rica's second written submission, para. 132. *See also* Costa Rica's opening oral statement at the second substantive meeting, para. 33.

²⁷ Panama's response to Panel question No. 145, para. 124.

²⁸ Panama's response to Panel question No. 145, para. 123.

²⁹ Panama's first written submission, paras. 133-149; second written submission, paras. 74-80.

³⁰ Costa Rica's responses to Panel question No. 3, paras. 2.1 and 2.2.

³¹ Costa Rica's responses to Panel question No. 3, para. 2.11.

³² Panama's first written submission, paras. 150-154; second written submission, paras. 81-84.

³³ Memorandum SENASA-DG-725-2021, Exhibit CRI-63.

therefore whether the lapse of time between 3 June 2021 and 27 September 2021 constitutes a delay. In Panama's view, and in line with previous panels, a period of *less than three months* in the circumstances of this case could hardly be qualified as a "delay", let alone an "undue delay", as it falls within the normal course of any such approval procedure.³⁴

32. The Panel should therefore conclude that the alleged "import prohibition" on dairy and meat products is an approval procedure that falls exclusively within the scope of Article 8 and Annex C of the SPS Agreement, and that Costa Rica has failed to demonstrate a violation of Annex C(1)(a) of the Agreement.

33. Costa Rica has also failed to demonstrate that Panama acted inconsistently with Article 8 and Annex C(1)(c) of the SPS Agreement. Costa Rica's argument presupposes that Panama's requests for animal health information are excessive in the context of establishment approval procedures. However, when a product such as fresh milk carries both sanitary and animal health risks, Panama's animal health authorities must request the necessary information to check and ensure the fulfilment of its animal health legislation.³⁵

IV. Provisional measures concerning certain fruits from Costa Rica

34. Panama's temporary suspension of imports of strawberries, pineapples, bananas and plantains from Costa Rica has been adopted in full conformity with Article 5.7 of the SPS Agreement. Article 5.7 establishes a qualified right to temporarily derogate from the SPS Agreement's basic obligations to base SPS measures on scientific evidence and to minimize trade-restricting effects. As Panama acted in full accordance with Article 5.7, its provisional measures are *not*, contrary to Costa Rica's claims, inconsistent with Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.3, 5.5 and 5.6 of the SPS Agreement.

35. Moreover, because Panama's provisional measures do not fall within the scope of "control, inspection and approval procedures" under Article 8 and Annex C(1)(a) of the SPS Agreement, Costa Rica has failed to establish that these provisional measures are inconsistent with these provisions.³⁶

36. Panama establishes below that each of its provisional measures is consistent with the four cumulative requirements of Article 5.7 of the SPS Agreement.³⁷

A. The suspension of imports of Costa Rican strawberries is consistent with Article 5.7 of the SPS Agreement

37. The detection of oxamyl residues in two different shipments of strawberries from Costa Rica on 6 and 18 February 2020 called into question Panama's earlier conclusions regarding the potential for adverse effects on human health arising from the importation of Costa Rican strawberries. Oxamyl is a carbamate pesticide that has been classified as an "extremely hazardous substance" in many countries and is subject to strict notification requirements. It is extremely toxic for humans if they ingest or inhale it or if it comes into contact with their skin. Oxamyl poisoning can cause dizziness, sweating, headaches, nausea, vomiting, abdominal pain, miosis with blurred vision, respiratory paralysis and death.³⁸

38. The detection of oxamyl residues indicated, at the very minimum, a potential risk that this pesticide was being used in the production of strawberries in Costa Rica, and the alarming quantities detected (8.6 times the MRL) gave rise to substantial concerns about adverse effects on the health

³⁴ Panel Report, *US – Animals*, paras. 7.113-7.114.

³⁵ Executive Decree No. 49 of 16 April 2001.

³⁶ Panama's second written submission, paras. 241-243.

³⁷ A provisional measure may be adopted under Article 5.7 of the SPS Agreement where (i) relevant scientific evidence is insufficient to conduct a risk assessment; (ii) the provisional measure is adopted on the basis of available pertinent information; (iii) the WTO Member seeks to obtain the additional information necessary for a more objective assessment of risk; and (iv) the measure is reviewed within a reasonable period of time.

³⁸ Panama's first written submission, paras. 199-200.

of Panamanian consumers. It suggested that these risks seemed to be far greater than expected due to possible problems with Costa Rican health controls.³⁹

39. Acting in a precautionary manner, by virtue of the right conferred on it by Article 5.7 of the SPS Agreement, Panama adopted a provisional SPS measure suspending imports of strawberries from Costa Rica. In so doing, Panama fully complied with the four requirements of Article 5.7.

1. Costa Rica failed to demonstrate that there was sufficient scientific evidence to conduct a risk assessment

40. Costa Rica argues that there was sufficient scientific evidence for Panama to conduct a risk assessment simply because Panama had information on the producer concerned, the non-compliant shipments, and the pesticide and residue levels detected.

41. According to Costa Rica, evidence regarding the adequacy and effectiveness of the sanitary system in the exporting country is *not* relevant for the purpose of conducting a risk assessment in the circumstances of this case. Costa Rica is mistaken. The Codex guidelines that Costa Rica itself considers relevant confirm that information on the reliability and effectiveness of Costa Rican control systems is necessary for a risk assessment. Paragraph 17 of the guidelines for imported food inspection based on risk provides that the importing authority must take into account "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 effectively enforce food safety requirements".⁴⁰ Furthermore, the *Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems* also list the "reliability of checks made by the country of origin" as information to be taken into account when addressing risks arising from cases of non-compliance.⁴¹

42. Thus, in the absence of information on the reliability and effectiveness of Costa Rican control systems, the scientific evidence available to Panama was insufficient to conduct a risk assessment. Therefore, Costa Rica has failed to demonstrate that, contrary to the first requirement of Article 5.7, the provisional measure concerning Costa Rican strawberries was adopted in a situation in which there was sufficient scientific evidence to conduct an objective assessment of the risk.

2. Costa Rica failed to demonstrate that the suspension of imports is not based on "available pertinent information"

43. Panama's decision to temporarily suspend imports of strawberries from Costa Rica was based on available pertinent information, namely: (i) the repeated instances of non-compliance with MRLs; (ii) the systemic importance of the infringing supplier, including the quantity of its exports in relation to total Panamanian imports of strawberries from Costa Rica; (iii) the harmfulness of the pesticide in question; (iv) the extent to which the MRL for oxamyl had been exceeded (8.6 times the MRL); and (v) the absence of adequate information on Costa Rica's national production and control system at the time that the temporary measure was adopted.⁴²

44. Costa Rica submits that the temporary suspension of imports of Costa Rican strawberries is not based on "available pertinent information", within the meaning of Article 5.7, because the only appropriate measure for mitigating the risk to the safety of the foodstuff in question is to strengthen border controls in the importing country. In support of this flawed argument, Costa Rica refers to the CODEX guidelines and the practices of other Members.⁴³

45. Costa Rica refers to the CODEX *Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems* and *Guidelines for Food Import Control Systems* as pertinent information. Even assuming that these guidelines

³⁹ Panama's second written submission, para. 110.

⁴⁰ *Guidelines for Food Import Control Systems*, Exhibit CRI-127, Appendix, para. 6.

⁴¹ *Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems*, Exhibit CRI-126, para. 34.

⁴² Panama's response to Panel question No. 123.

⁴³ Costa Rica's first written submission, paras. 339-359.

constitute "pertinent information" within the meaning of Article 5.7⁴⁴, the Appendix to the *Guidelines for Food Import Control Systems* (Appendix on principles and guidelines for imported food inspection based on risk) expressly includes – as measures to mitigate the risks of contaminants and potentially harmful residues in imported food – the temporary suspension of imports "until it is confirmed that corrective measures have been introduced and are being implemented effectively".⁴⁵

46. In a similar vein, paragraph 35 of the guidelines on inspection and certification systems (CAC/GL 26-1997) explicitly lists the temporary suspension of imports from the producer or country in question as a specific measure that importing countries may apply in the most serious or persistent cases of non-compliance.⁴⁶ Paragraph 34 of the same document sets out three criteria that must be taken into account in order to ensure the proportionality of the measure adopted under paragraph 35, namely: (i) repeated non-conformity in the same product or in the same category of products; (ii) history of non-conformity of those responsible for handling the products; and (iii) reliability of checks made by the country of origin. A situation such as the one in question – repeated non-conformity in relation to an extremely hazardous substance, coupled with the inability to verify the reliability of checks made by the exporting country – would constitute a serious and persistent case of non-compliance.⁴⁷

47. Costa Rica admits that evidence of systemic problems may constitute a circumstance that justifies the provisional import prohibition. However, it argues that in this case there is no evidence of a systemic problem. In order to support this argument, Costa Rica attempts to create the impression that the non-compliance in question pertains *only* to two shipments from one producer, as if it were a *sporadic occurrence* among tonnes of shipments from multiple producers.⁴⁸ That is not the case. The data provided by Costa Rica show that the quantity of imports from the non-compliant producer amounted to 2.85 tonnes in 2020. This import quantity is equivalent to almost *all* trade in strawberries between Costa Rica and Panama during the three preceding years, and corresponded to almost the totality of imports at the time that the measure at issue was adopted. The repeated non-compliance with MRLs by that producer is clearly enough to reasonably generate a systemic concern.⁴⁹

48. The national practices cited by Costa Rica also fail to support its argument that there is a standard regulatory response in food safety cases. In the European Union, the European Commission may suspend imports of food from all or part of the territory of an exporting country if new information or a reassessment of existing information indicate that pesticide residues may endanger human or animal health and require immediate action.⁵⁰ Panama has also submitted examples from other WTO Members which show that the authorities of importing countries enjoy broad discretion in determining the seriousness of cases of non-compliance, and that it is not uncommon for temporary import prohibitions to be adopted in response to repeated violations of MRLs.⁵¹

49. Accordingly, Costa Rica failed to demonstrate that Panama's temporary suspension of imports of strawberries from Costa Rica is not based on "available pertinent information" within the meaning of Article 5.7 of the SPS Agreement.

⁴⁴ Panama points out that these documents do *not* say *anything* at all about the specific risk that Panama is evaluating, namely, the potential for adverse effects on human health arising from the presence of oxamyl in strawberries from Costa Rica. The generic guidelines on the operation of inspection, certification and control systems are simply *not* equivalent to an international food safety standard that assesses the risk to human health arising from the presence of oxamyl residues in strawberries. See Panama's first written submission, paras. 211-214.

⁴⁵ *Guidelines for Food Import Control Systems*, Exhibit CRI-127, Appendix, para. 15.

⁴⁶ *Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems*, Exhibit CRI-126, p. 133.

⁴⁷ Panama's response to Panel question No. 117.

⁴⁸ Costa Rica's second written submission, para. 479. See also Costa Rica's opening statement at the first meeting of the Panel, para. 80.

⁴⁹ Panama's opening statement at the second substantive meeting of the Panel, para. 96; response to Panel question No. 125.

⁵⁰ Panama's opening statement at the second substantive meeting of the Panel, para. 94; response to Panel question No. 117, para. 52.

⁵¹ Panama's response to Panel question No. 117, paras. 53-54.

3. Costa Rica failed to demonstrate that Panama did not seek to obtain the additional information necessary for a risk assessment

50. Costa Rica argues that Panama did not seek to obtain the additional information necessary for a more objective assessment of risk. According to Costa Rica, Panama's request for Costa Rica to apply remedies does not meet the third requirement of Article 5.7, which requires the Member that adopts a provisional measure to make every effort to remedy the insufficiencies in the relevant scientific evidence.

51. Article 5.7 does not establish explicit prerequisites regarding the additional information to be collected, nor does it specify what actual results must be achieved. In contrast, the obligation imposed by the third requirement of Article 5.7 is to "seek to obtain" additional information so that the Member can conduct "a more objective assessment of risk".⁵²

52. It is undisputed that Panama asked Costa Rica for the additional information necessary for a more objective assessment of risk *immediately* after the adoption of the provisional measure.⁵³ Instead of providing information and evidence about the remedies it adopted in response to Panama's request, Costa Rica merely stated that it had conducted an inspection of the Gego strawberry farm on an unspecified date, that it had not seen evidence of the use of the active ingredient oxamyl, and that it had issued unspecified "recommendations to the producer". This information was manifestly inadequate to satisfy Panama's request for additional information necessary for a more objective assessment of risk.⁵⁴ Panama also provided a follow-up communication to Costa Rica, reiterating the information it desired.⁵⁵

53. The record therefore clearly demonstrates that Panama complied with its duty under Article 5.7 to identify insufficiencies in the relevant scientific evidence and the steps necessary to perform a more objective assessment of risk. Consequently, Costa Rica has failed to demonstrate non-compliance with the third requirement of Article 5.7.

4. Costa Rica failed to demonstrate that Panama did not review its measure within a "reasonable period of time"

54. Costa Rica claims that Panama did not review the temporary suspension of imports of strawberries from Costa Rica within a reasonable period of time, as required by Article 5.7 of the SPS Agreement. Costa Rica submits that Panama remained "completely inactive" for one year and two days after adopting the measure, with no justification, and that it had been inactive for one year and seven months at the time of the establishment of the Panel.⁵⁶

55. The Appellate Body held that "what constitutes a 'reasonable period of time' [under Article 5.7] has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure." ⁵⁷

56. In this case, the relevant information that was necessary for Panama to conduct a more objective assessment of risk was only available to Costa Rica. However, Costa Rica's superficial response of 5 May 2020, and its subsequent responses of 12 June 2020 and 19 February 2021, did not provide the necessary information. It was not until 18 May 2021, i.e. one year and two months after Panama's request for information, that Costa Rica finally sought to provide the necessary

⁵² Panama's first written submission, paras. 221-222; Appellate Body Report, *Japan – Agricultural Products II*, para. 92; and Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.

⁵³ Panama's first written submission, paras. 220-235. See also Panama's second written submission, paras. 122-127.

⁵⁴ Panama's second written submission, para. 125.

⁵⁵ Panama's second written submission, para. 126.

⁵⁶ Costa Rica's first written submission, paras. 385 and 388.

⁵⁷ Appellate Body Report, *Japan – Agricultural Products II*, para. 93 (emphasis original). For this reason, the previous conclusions of panels regarding what constituted a "reasonable period of time" in the context of another WTO dispute are, by definition, specific to each case and have limited instructive value. See Panama's first written submission, para. 238.

information. In fact, only three months elapsed between Costa Rica's response and its premature request for the establishment of a panel in this dispute.⁵⁸

57. Moreover, Panama's ability to process the additional information provided by Costa Rica was impaired by the effects of the COVID-19 pandemic, which, from 16 March 2020 onwards, caused substantial delays in Panama's administrative procedures. This is an important circumstance that this Panel must take into account when determining Panama's compliance with the fourth requirement of Article 5.7, to review its provisional measures within a reasonable period of time.⁵⁹

58. In view of the foregoing, the Panel must conclude that Costa Rica failed to demonstrate that Panama's temporary suspension of imports of strawberries from Costa Rica is inconsistent with Article 5.7 of the SPS Agreement.

B. The suspension of imports of Costa Rican pineapples is consistent with Article 5.7 of the SPS Agreement

59. Panama adopted phytosanitary requirements for the importation of pineapples from Costa Rica more than a *decade* ago, in July 2008.⁶⁰ At the time, it was *not* known that pineapple was a host of *Maconellicoccus hirsutus* (*M. hirsutus*). This pest was not detected in Costa Rica until at least 2014, and it is still present today.⁶¹

60. Since 2008, scientific studies have emerged showing that pineapples are indeed hosts of *M. hirsutus*. This scientific evidence, together with the subsequent detection of *M. hirsutus* in Costa Rican territory and the lack of further technical information on pineapple production areas in Costa Rica, called into question Panama's previous conclusions regarding the risk of transmission of *M. hirsutus* through the importation of Costa Rican pineapples. Consequently, Panama notified Costa Rica that it had decided to temporarily suspend the importation of Costa Rican pineapples "pending further information on the phytosanitary status of pineapple production areas, with regard to the pink mealybug pest".⁶² In making this decision, Panama acted in conformity with all the requirements under Article 5.7 of the SPS Agreement.⁶³

1. Costa Rica failed to demonstrate that the scientific evidence was sufficient to conduct a risk assessment

61. Costa Rica relies *exclusively* on its pest status report submitted to the IPPC, which consists of a single page, to argue that the Panamanian authorities had at their disposal all the *specific* information from Costa Rica to assess the risk of transmission of *M. hirsutus* through the importation of Costa Rican pineapples. However, it is clear that Costa Rica's pest status report is clearly insufficient for this purpose.⁶⁴

62. Costa Rica's pest status report informs the risk assessor that, at a *given point*⁶⁵, *M. hirsutus* was present in an area of Costa Rica; that it was not widely distributed and under official control; and that its host in Costa Rica was the hibiscus plant.⁶⁶ However, Costa Rica's pest status report does not provide the risk assessor with the further technical information necessary to assess the risk of *further* spread of *M. hirsutus* in other areas of Costa Rica in other hosts, including pineapple.⁶⁷

⁵⁸ Panama's first written submission, para. 242.

⁵⁹ Panama's first written submission, paras. 243-244.

⁶⁰ Resolution AUPSA-DINAN-116-2008, Exhibit CRI-66.

⁶¹ Panama's opening statement at the first meeting of the Panel, para. 61.

⁶² Note AUPSA-AG-032-2019, Exhibit CRI-65.

⁶³ Panama's opening statement at the first meeting of the Panel, para. 62.

⁶⁴ Panama's opening statement at the second substantive meeting of the Panel, paras. 64-67.

⁶⁵ According to ISPM 5: "There is a degree of uncertainty attached to any categorization of distribution" and "[t]he categorization may also change over time" (ISPM 5, Exhibit CRI-75, p. 26).

⁶⁶ Report to the IPPC, Exhibit CRI-69.

⁶⁷ Given that pineapple is a confirmed host of *M. hirsutus*, the risk of the pest further spreading to pineapple-producing areas in Costa Rica is absolutely relevant in assessing the likelihood of entry, establishment and spread of the pest through the importation of Costa Rican pineapples (Panama's opening statement at the second meeting of the Panel, paras. 68-69).

63. For example, Costa Rica's pest status report lacks basic information such as the specific location and a description of the geographical areas in Costa Rica that produce and export pineapples. It *does not* provide further technical information on the phytosanitary status of *these areas* with respect to *M. hirsutus*. It *does not* provide information on survey procedures. It *does not* describe the phytosanitary surveillance and control measures taken in areas where the pest is present and at pineapple production sites. And it *does not* contain information on current risk mitigation or risk management strategies.⁶⁸ This is exactly the kind of information that the Panamanian authorities requested from Costa Rica in order to conduct a risk assessment. At the close of these proceedings, Costa Rica has still not explained precisely how a risk assessment could be conducted without the further technical information requested by the Panamanian authorities.⁶⁹

64. Consequently, Costa Rica has failed to demonstrate that the scientific evidence was sufficient for the Panamanian authorities to assess the risk of transmission of *M. hirsutus* through the importation of Costa Rican pineapples.

2. Costa Rica failed to demonstrate that the suspension of imports was not based on "available pertinent information"

65. Panama based its temporary suspension of imports of Costa Rican pineapples on the following: (i) the *presence* of *M. hirsutus* in hibiscus in a particular area of Costa Rica, *as confirmed* by Costa Rica's pest status report; (ii) the indisputable fact that pineapples *are* a confirmed host of the pest; and (iii) the absence of the further technical data necessary, including in Costa Rica's pest status report, to assess the risk of further spread of the pest in Costa Rican pineapples.⁷⁰ These elements constitute "available pertinent information" within the meaning of Article 5.7 because they provide "some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment".⁷¹

66. Costa Rica relies on ISPM 2 and ISPM 20 to argue that the provisional measure at issue is not based on "available pertinent information" within the meaning of Article 5.7.⁷² Costa Rica admits that ISPM 2 and ISPM 20 are generic guidelines that "do not address any specific pest".⁷³ Costa Rica argues, however, that these *general* guidelines in some way *preclude* Panama's right to take an provisional measure in response to a specific risk, unless there is "a new or unforeseen situation due to the detection of the pink mealybug in shipments from Costa Rica".⁷⁴

67. However, neither ISPM 2 nor ISPM 20 constitute "available pertinent information" within the meaning of Article 5.7. According to the Appellate Body, "available pertinent information" refers to "*some evidentiary basis indicating the possible existence of a risk*, but not enough to permit the performance of a risk assessment".⁷⁵ ISPM 2 and ISPM 20 are generic guidelines that say absolutely nothing about the specific phytosanitary risk in question. As such, they are unable to provide "some evidentiary basis indicating [or denying] the possible existence of a risk"⁷⁶ of transmission of *M. hirsutus* associated with the importation of pineapples from Costa Rica.⁷⁷

68. Costa Rica further relies on measures applied by other WTO Members in support of its argument that the temporary suspension of imports of Costa Rican pineapples is not based on "available pertinent information" within the meaning of Article 5.7 of the SPS Agreement. For example, Costa Rica suggests that Panama apply to Costa Rican pineapples the same measure that Peru applies to avocado and pineapple imports from Colombia, where the presence of *M. hirsutus* has been confirmed.⁷⁸ Costa Rica's argument is incorrect from a legal point of view. The measures applied by other importing Members with a phytosanitary status similar to that of Panama with respect to *M. hirsutus* are relevant, but not determinative, for the purposes of Article 5.7. The ALOP of each importing Member is pertinent under Article 5.7, particularly where, as in this case, there is

⁶⁸ Panama's opening statement at the second substantive meeting of the Panel, para. 67.

⁶⁹ Panama's closing statement at the second meeting of the Panel, para. 13.

⁷⁰ Panama's opening statement at the second meeting of the Panel, para. 77.

⁷¹ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

⁷² Panama's opening statement at the second meeting of the Panel, paras. 73-76.

⁷³ Costa Rica's second written submission, para. 223.

⁷⁴ Costa Rica's second written submission, para. 223.

⁷⁵ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678 (emphasis added).

⁷⁶ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

⁷⁷ Panama's response to Panel question Nos. 183 and 225, paras. 203-209 and 328-332.

⁷⁸ Costa Rica's second written submission, para. 224.

no international standard for the pest at issue. Panama is not *required* to adopt phytosanitary measures that are the same as or similar to those of other Members. However, in the light of evidence that indicates a risk of transmission of *M. hirsutus* and yet is insufficient to conduct a risk assessment, Panama is entitled, under Article 5.7, to adopt a provisional measure while it seeks the information it needs to conduct a risk assessment in accordance with its own ALOP.⁷⁹

69. For these reasons, Costa Rica has failed to demonstrate that the temporary suspension of imports of Costa Rican pineapples is not based on "available pertinent information" within the meaning of Article 5.7 of the SPS Agreement.

3. Costa Rica failed to demonstrate that Panama did not seek to obtain the additional information necessary for a risk assessment

70. Costa Rica's argument that Panama did not seek to obtain the additional information necessary for a more objective assessment of risk derives largely from its mischaracterization of the facts surrounding the temporary suspension of imports of Costa Rican pineapples. In particular, Costa Rica asserts that, "assuming that Panama would have considered it imperative" to have the technical information it requested, it is unclear why Panama waited until March 2021, more than two years, before requesting such information from Costa Rica.⁸⁰

71. As established in the record, on 29 January 2019 Panama alerted Costa Rica to the insufficiencies of the relevant evidence, and informed Costa Rica precisely what information it required from Costa Rica in order to conduct a more objective assessment of risk.⁸¹ Costa Rica initially claimed to be compiling the information required, and subsequently decided to keep this information hostage until Panama lifted the temporary suspension of imports of Costa Rican pineapples.⁸² Panama also notes that Costa Rica only reluctantly provided further technical information on 28 April 2021, after *two years* of refusing to provide the requested information.

72. Based on all the evidence in the record, the Panel must conclude that Costa Rica has failed to demonstrate that Panama did not seek to obtain the additional information necessary for a more objective assessment of risk, as required under Article 5.7 of the SPS Agreement.

4. Costa Rica failed to demonstrate that Panama did not review its measure within a "reasonable period of time"

73. With respect to the fourth requirement of Article 5.7, Panama and Costa Rica agree that what constitutes a "reasonable period of time" depends on the difficulty of obtaining the additional information necessary for the review.⁸³ In this case, Panama faced great difficulty because the required information was solely in the hands of the Costa Rican authorities, and Costa Rica refused to provide it.

74. The evidence in the record does not support Costa Rica's argument that Panama never encountered any difficulties in obtaining the requested information. The Panel's objective assessment of the record will demonstrate that Costa Rica refused to provide any of the further technical information requested by Panama for *more than two years*. When Costa Rica finally provided some further technical information, Costa Rica rushed to initiate this dispute without giving the Panamanian authorities time to assess that information. Costa Rica cannot rely on delays of its own making to support its claim that Panama failed to review the provisional measure concerning Costa Rican pineapples within a reasonable period of time.⁸⁴

75. In support of its claim that Panama failed to review its provisional measure within "a reasonable period of time", Costa Rica also argues that the type and amount of additional information that Panama requested from Costa Rica was excessive.⁸⁵ This argument is without merit. Panama

⁷⁹ Panama's response to Panel question Nos. 180 and 181, paras. 197-199.

⁸⁰ Costa Rica's opening statement at the first meeting of the Panel, para. 52.

⁸¹ Panama's first written submission, paras. 311-322; second written submission, paras. 168-171.

⁸² Panama's second written submission, paras. 172-175; opening statement at the second substantive meeting of the Panel, para. 81.

⁸³ Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

⁸⁴ Panama's first written submission, paras. 324-336.

⁸⁵ Panama's second written submission, para. 182.

has placed on the record a table comparing the information recommended in ISPM 11 for a risk assessment with: (i) the information that Panama requested from Costa Rica on 10 March 2021; and (ii) the information contained in Costa Rica's pest status report⁸⁶, which, according to Costa Rica, contains all the information required by Panama to conduct a risk assessment.⁸⁷ The comparison clearly shows that (i) Panama requested *less* information than recommended in ISPM 11; and that (ii) Costa Rica's pest status report fell far short of the information required to conduct a risk assessment.⁸⁸

76. Consequently, Costa Rica has failed to demonstrate that, with respect to the temporary suspension of imports of Costa Rican pineapples, Panama acted inconsistently with the requirement under Article 5.7 to review the provisional measures within "a reasonable period of time".

77. In view of the foregoing, the Panel must conclude that Costa Rica has failed to demonstrate that the temporary suspension of imports of Costa Rican pineapples is inconsistent with Article 5.7 of the SPS Agreement.

C. The suspension of imports of Costa Rican bananas and plantains is consistent with Article 5.7 of the SPS Agreement

78. Foc TR4 is considered the greatest current threat to banana production. It has caused a huge amount of economic damage in Asia, where it was first detected, and has spread rapidly to the Middle East and Africa. An earlier variant of the disease, Foc race 1, decimated banana production in Panama more than 60 years ago, leaving the *Gros Michel* variety of banana practically extinct in the country. Panama's experience was so devastating that the disease became commonly known as "Panama disease".⁸⁹

79. Phytosanitary authorities in Latin America – the global epicentre of banana production – were on high alert in June 2019 following the suspected detection of Foc TR4 in Colombia. Determined not to let history repeat itself, Panama issued a national alert and launched a review of its phytosanitary requirements for banana and plantain imports. During this review, the Panamanian authorities discovered that Costa Rican banana and plantain establishments and packing plants had never been approved by AUPSA. Consequently, Panama notified Costa Rica that it was *temporarily* suspending the importation of bananas and plantains pending the evaluation and approval of Costa Rican establishments and packing plants. In adopting this provisional measure, Panama acted in conformity with all the requirements under Article 5.7.⁹⁰

1. Foc TR4 is not an *ex post* rationalization of the provisional measure

80. Costa Rica conveniently argues that the considerations regarding Foc TR4 constitute an *ex post* rationalization for the temporary suspension of imports of bananas and plantains from Costa Rica. This argument is based entirely on the fact that Panama's first notifications to Costa Rica in October 2019 did not explicitly mention Foc TR4 as the reason for the adoption of the provisional measures.⁹¹

81. However, even if Costa Rica *did not understand* in October 2019 that the phytosanitary requirements for the importation of bananas and plantains had been inactivated to mitigate Foc TR4 (*quod non*)⁹², this reason was explicitly made clear to Costa Rica on 18 December 2019, not long after the adoption of the measures, and almost two years before the establishment of this Panel. *Moreover*, Costa Rica *explicitly recognized* this reason for the provisional measures at issue and engaged with the Panamanian authorities *on precisely* this basis. In fact, Costa Rica explicitly recognized "the serious economic consequences that [the pest Foc TR4 subject to the measures]

⁸⁶ Report to the IPPC, Exhibit CRI-69.

⁸⁷ Panama's response to Panel question No. 179, paras. 188-196.

⁸⁸ 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.

⁸⁹ Costa Rica's opening statement at the first meeting of the Panel, para. 45.

⁹⁰ Costa Rica's opening statement at the first meeting of the Panel, paras. 47-48.

⁹¹ Panama's second written submission, para. 192.

⁹² Panama's response to Panel question No. 60(a), paras. 166-170; response to Panel question No. 206, paras. 272-275.

may have on the production of bananas and plantains"⁹³, and expressed its willingness to adopt the measures necessary "*to obtain approval for the packing plants for both products*".⁹⁴ Thus, Costa Rica's convenient assertion in its first written submission that the mitigation of Foc TR4 constitutes an *ex post* rationalization is simply not credible.

2. Costa Rica failed to demonstrate that the scientific evidence was sufficient to conduct a risk assessment

82. There is ample evidence in the record to show that at the time Panama adopted the temporary suspension of imports of Costa Rican bananas and plantains, there was insufficient scientific evidence regarding the transmission of Foc TR4 through the importation of fresh banana and plantain fruit.⁹⁵

83. In support of its argument that the scientific evidence was sufficient to conduct a risk assessment, Costa Rica relies primarily on the OIRSA PRA. However, the OIRSA PRA *confirms* the insufficiency of scientific information to assess the risk of transmission of Foc TR4 through the importation of Costa Rican bananas and plantains. In this connection, the OIRSA PRA confirms a relationship between, on the one hand, phytosanitary conditions and practices in banana and plantain production establishments in an exporting country and, on the other hand, a risk of transmission of Foc TR4 through the importation of banana and plantain fruit.⁹⁶ Specifically, the OIRSA PRA assigns a very low risk to the establishment and spread of Foc TR4 through the importation of fresh banana fruit *on the condition* that processes are in place in the exporting country to ensure that food is free from physical, chemical and biological contamination, including washing and packaging processes.⁹⁷

84. Consequently, the scientific evidence establishes that information on phytosanitary conditions and practices in banana and plantain establishments in an exporting country is relevant for an assessment of the risk of transmission of Foc TR4 through the importation of banana and plantain fruit. How such relevant information is obtained or verified depends on the ALOP of an importing Member, which it is the importing Member's sovereign prerogative to establish. A lower ALOP may be satisfied by information obtained and verified by means other than physical inspections by the importing country's authorities in the country of origin. However, Panama's highly restrictive ALOP for Foc TR4 requires Panama to inspect and verify phytosanitary conditions and practices on site at banana and plantain production sites and packing plants in Costa Rica.⁹⁸

85. At the time when Panama adopted the provisional measure at issue, the Panamanian authorities had never inspected and approved Costa Rican banana and plantain establishments and packing plants.⁹⁹ Costa Rica has therefore failed to demonstrate that the provisional measure was not adopted in a situation where scientific evidence was sufficient to more objectively assess the risk of transmission of Foc TR4 through the importation of Costa Rican bananas and plantains.

3. Costa Rica failed to demonstrate that the suspension of imports is not based on "available pertinent information"

86. The provisional measure at issue is based on scientific evidence confirming the possible existence of a risk of transmission of Foc TR4 through the importation of bananas and plantains, and on the absence of verified information on the phytosanitary conditions in Costa Rican banana and plantain establishments.¹⁰⁰ These elements constitute "available pertinent information" within the meaning of Article 5.7 because they provide "some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment".¹⁰¹

⁹³ Memorandum DSFE-0533-2021, Exhibit CRI-113.

⁹⁴ Memorandum DSFE-0079-2020, Exhibit CRI-105 (emphasis added).

⁹⁵ Panama's response to Panel question No. 209, paras. 282-286.

⁹⁶ Panama's comments on Costa Rica's responses to Panel question No. 212, paras. 181-183.

⁹⁷ OIRSA PRA for Foc TR4, October 2019, Exhibit CRI-123, pp. 165 and 173.

⁹⁸ Panama's comments on Costa Rica's responses to Panel question No. 212, paras. 181-183.

⁹⁹ Panama's response to Panel question No. 216(b), para. 302.

¹⁰⁰ Panama's first written submission, para. 398; second written submission, para. 215.

¹⁰¹ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

87. Costa Rica refers to ISPM 2 and ISPM 20, the OIRSA PRA and measures applied by other Members to mitigate the spread of Foc TR4 in support of its argument that the provisional measures at issue are not based on "available pertinent information" within the meaning of Article 5.7.

88. However, ISPM 2 and ISPM 20 are generic guidelines that say absolutely nothing about the specific phytosanitary risk in question. As such, they are unable to provide "some evidentiary basis indicating [or denying] the possible existence of a risk"¹⁰² of Foc TR4 transmission associated with the importation of banana and plantain fruit. Furthermore, neither ISPM 2 nor ISPM 20 take into account *any* ALOP for Foc TR4, let alone the highly restrictive ALOP that Panama has adopted under the circumstances.¹⁰³

89. Moreover, Costa Rica fails to appreciate that Panama's provisional measure is in fact based on the pertinent evidence contained in the OIRSA PRA. Specifically, it is based on the evidence contained in the PRA that establishes the potential risk of transmission of Foc TR4 through the importation of fresh banana and plantain fruits when appropriate practices and conditions are not adopted at production sites and packing plants. Based on this evidence in the OIRSA PRA, Panama's highly restrictive ALOP for Foc TR4 requires the on-site inspection and approval of production sites and packing plants to assess the risk of Foc TR4 transmission through the importation of bananas and plantains from Costa Rica.¹⁰⁴

90. Lastly, the fact that Panama applies a different or more restrictive provisional measure than those applied by other WTO Members does not mean that Panama's provisional measure is not based on "available pertinent information" within the meaning of Article 5.7. It simply reflects the fact that Panama adopts a higher ALOP than that adopted by other Members.¹⁰⁵ In this sense, the ALOP of each importing Member is pertinent under Article 5.7, particularly where, as in this case, there is no international standard for the pest or disease at issue.

91. For these reasons, Costa Rica has been unable to demonstrate that the temporary suspension of imports of Costa Rican bananas and plantains was not adopted on the basis of "available pertinent information" within the meaning of Article 5.7 of the SPS Agreement.

4. Costa Rica failed to demonstrate that Panama did not seek to obtain the additional information necessary for a risk assessment

92. Panama has demonstrated that it sought to obtain the additional information necessary to assess the risk of transmission of Foc TR4 through the importation of banana and plantain fruit from Costa Rica. In particular, Panama sought to verify, on-site, the phytosanitary conditions in Costa Rican banana and plantain establishments in order to assess the risk of transmission of Foc TR4.¹⁰⁶

93. Costa Rica's claim that Panama did not seek to obtain the additional information necessary for a risk assessment in contravention of the third requirement of Article 5.7 is based on an alleged "disconnect" between, on the one hand, the insufficiency of scientific evidence alleged by Panama and, on the other hand, the information that Panama requested in order to conduct a risk assessment.¹⁰⁷ However, there is no such disconnect.¹⁰⁸ As OIRSA makes clear, information on existing phytosanitary conditions and practices in banana establishments is pertinent for assessing the risk of transmission of Foc TR4 from an exporting country through the importation of banana fruit.¹⁰⁹ This is precisely the information that Panama tried to verify on-site, but was unable to because physical inspections were impossible during the COVID-19 pandemic.

¹⁰² Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

¹⁰³ Panama's opening statement at the second substantive meeting of the Panel, para. 51; response to Panel question No. 183; and response to Panel question No. 225.

¹⁰⁴ Panama's response to Panel question No. 188, paras. 322-323.

¹⁰⁵ Panama's second written submission, paras. 217-219; opening statement at the second substantive meeting of the Panel, paras. 52-54.

¹⁰⁶ Panama's opening statement at the second substantive meeting of the Panel, para. 55.

¹⁰⁷ Panama's second written submission, para. 222.

¹⁰⁸ Panama's second written submission, paras. 223-225.

¹⁰⁹ Panama's opening statement at the second substantive meeting of the Panel, para. 57.

94. Consequently, Costa Rica has failed to establish that Panama did not seek to obtain "the additional information necessary" for a risk assessment within the meaning of Article 5.7 of the SPS Agreement.

5. Costa Rica failed to demonstrate that Panama did not review its measure within a "reasonable period of time"

95. Costa Rica appears to recognize that, at least during the period 16 March 2020-16 April 2022, the COVID-19 pandemic adversely affected the ability of the Panamanian authorities to conduct on-site audits.¹¹⁰ Consequently, the only question before the Panel is whether Panama was obliged to reduce its level of protection and accede to Costa Rica's request to reinstate the relevant phytosanitary requirements until on-site verifications of Costa Rican banana and plantain establishments were possible. It is clear that Panama was not obliged to do so, especially at a time when Panama was facing the adverse consequences of the COVID-19 pandemic.¹¹¹

96. Costa Rica has therefore failed to demonstrate that Panama did not review the temporary suspension of imports of Costa Rican bananas and plantains within "a reasonable period of time", as required under Article 5.7 of the SPS Agreement.

97. In view of the foregoing, the Panel must conclude that Costa Rica failed to demonstrate that the temporary suspension of imports of bananas and plantains from Costa Rica is inconsistent with Article 5.7 of the SPS Agreement.

V. Conclusion and request for rulings

98. Panama respectfully requests the following conclusions with respect to the alleged "import prohibition" on products of animal origin from Costa Rica:

- The measure challenged by Costa Rica in these proceedings relates exclusively to the operation of "approval procedures" within the meaning of Article 8 and Annex C(1) of the SPS Agreement, and is therefore 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. Consequently, Costa Rica's claims under these provisions must fail.
- Costa Rica failed to demonstrate that Panama did not undertake and complete approval procedures "without undue delay" within the meaning of Article 8 and Annex C(1)(a) of the SPS Agreement, with respect to 16 Costa Rican dairy and meat establishments.
- Costa Rica failed to demonstrate that Panama requested more information than was necessary for the approval procedures for dairy and meat establishments in Costa Rica and, therefore, failed to demonstrate that Panama acted inconsistently with Article 8 and Annex C(1)(c) of the SPS Agreement.
- Consequently, Costa Rica failed 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.

99. Panama further requests that the Panel reach the following conclusions with respect to the temporary suspension of imports of strawberries, pineapples, bananas and plantains from Costa Rica:

- Costa Rica failed to demonstrate that Article 5.7 of the SPS Agreement is inapplicable to these measures and Panama has successfully demonstrated that all of these measures fully comply with the requirements of Article 5.7.
- Consequently, Costa Rica failed 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.
- Costa Rica has also failed to demonstrate that the temporary suspension of pineapple imports from Costa Rica is inconsistent with Articles 2.3 and 5.5 of the SPS Agreement.
- 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.

¹¹⁰ Panama's second written submission, paras. 74-80.

¹¹¹ Panama's opening statement at the second substantive meeting of the Panel, para. 61.

- Consequently, Costa Rica failed to demonstrate 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.
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ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA¹**

Thank you Chair and distinguished Members of the Panel. Australia appreciates the opportunity to participate as a third party in this dispute, and to make an oral statement at this session.

1. Before proceeding to set out Australia's views on the legal issues in this dispute, Australia would like to provide a statement concerning Russia's invasion of Ukraine. Australia affirms its ongoing support for Ukraine and again condemns Russia's unilateral, illegal and immoral aggression against the people of Ukraine. Russia's invasion is a gross violation of international law, including the Charter of the United Nations, and is inconsistent with the global rules and norms that underpin multilateral organisations such as the WTO. There is no other place within the WTO system where the rules-based nature of the organisation is more important than in the dispute settlement system and through disputes such as the one we are here for today. That is why we cannot talk about the rules without mentioning Russia's gross violation of such rules.
2. Turning to the issues in these proceedings, Australia welcomes the opportunity to present its views. In this oral statement, Australia does not take a view on the particular facts at issue. Rather, we will comment on certain systemic issues raised by these proceedings. First, we provide some observations on Panama's request for a preliminary ruling and the proper interpretation of Article 6.2 of the DSU. Second, Australia will provide its views on the interpretation of Article 5.7 of the SPS Agreement.²

"How or why" is not the relevant standard under Article 6.2 of the DSU

3. First, some observations on Panama's request for a preliminary ruling that Costa Rica has not, in its panel request, provided a brief summary of the legal basis of its complaint sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU.
4. Australia agrees with both Panama and Costa Rica that a panel request only needs to include the claims underlying a complaint, and there is no requirement to include arguments supporting those claims.³
5. However, both Panama and Costa Rica have referred to the "how or why" standard in their submissions on this issue.⁴ In Australia's view this is not the relevant standard that should be applied under Article 6.2 of the DSU. We note the Appellate Body in *Korea – Pneumatic Valves* expressly rejected the assertion that a complainant must state in its panel request "how or why" a measure infringed WTO obligations.⁵ The Appellate Body also said that overreliance on a "how and why" standard would require "a level of detail going beyond setting out the claim underlying the complaint", including potentially requiring detailed arguments that are more properly included in a written submission.
6. In Australia's view the relevant standard for compliance with Article 6.2 of the DSU is whether a complainant has *plainly connected* the measure at issue with the obligation allegedly infringed under the covered agreement⁶, in a manner sufficient to present the problem clearly. In this

¹ Australia requested that its oral statement serves as its executive summary.

² Agreement on the Application of Sanitary and Phytosanitary Measures.

³ Costa Rica's response to Panama's preliminary ruling request, para. 50; Panama's preliminary ruling request, para. 11.

⁴ Costa Rica's response to Panama's preliminary ruling request, paras. 11, 42-44; Panama's preliminary ruling request, para. 11.

⁵ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.7-5.33; see also Appellate Body Reports, *EC – Selected Customs Matters*, para. 130 ; *China – Raw Materials*, para. 226; *US – Countervailing Measures (China)*, para. 4.9; *Russia – Railway Equipment*, para. 5.28.

⁶ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para 5.6 citing Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.15 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8, in turn quoting

respect, we note that identifying the treaty provision claimed to have been violated is the "minimum prerequisite". Paraphrasing the obligation may be, in certain circumstances, sufficient to present the problem clearly.⁷

Article 5.7 of the SPS Agreement

7. Turning now to Australia's comments on Article 5.7 of the SPS Agreement, which allows for provisional SPS measures. The overarching requirement under the SPS Agreement is that SPS measures are based on a risk assessment, as defined in Annex A. One purpose of Article 5.7 is to allow WTO Members the flexibility to revise SPS measures where there are scientific developments, but not enough "relevant scientific evidence" for an adequate risk assessment.⁸
8. Article 5.7 has four requirements.⁹ First, a member may provisionally adopt an SPS measure only if it is imposed where relevant scientific evidence is insufficient.¹⁰ Second, where such evidence is insufficient, a Member is permitted to adopt a provisional measure – but this must be on the basis of "available pertinent information"¹¹ – "including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members".¹² Third, once a measure that meets these requirements has been adopted, the measure may not be maintained unless the Member "seek[s] to obtain the additional information necessary for a more objective assessment of risk", and fourth "review[s] the measure accordingly within a reasonable period of time"¹³. Australia will provide views on the first and fourth of these elements.

When is there "insufficient scientific evidence"?

9. A Member may only provisionally adopt an SPS measure if it is imposed where relevant scientific evidence is insufficient to perform an adequate risk assessment.¹⁴ The Appellate Body has said that such insufficiency can arise if "the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement".¹⁵
10. Accordingly, Australia agrees with Brazil that the analysis of whether scientific evidence is insufficient should not be limited to only the amount of data.¹⁶ The Appellate Body, confirming the approach of the Panel in *Japan – Apples*, noted that "Article 5.7 would be applicable to a situation where a lot of scientific research has been carried out on a particular issue without yielding reliable evidence".¹⁷
11. Australia notes that in respect of the facts of the case, the relevant assessment of risk, against which the sufficiency of relevant scientific evidence should be analysed, is defined in Annex A of the SPS Agreement, as "the evaluation of the potential for adverse effects on human... health arising from the presence of... contaminants [or] toxins... in food". Accordingly in Australia's view, Panama will meet the first requirement of Article 5.7 if it can show that the relevant scientific evidence is insufficient to allow for an adequate assessment of the potential for

Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162). See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

⁷ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.9; see Costa Rica's response to Panama's preliminary ruling request, para. 9; Panama's preliminary ruling request, paras. 15, 29.

⁸ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 701; and Appellate Body Report, *Japan – Apples*, para. 179.

⁹ Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

¹⁰ SPS Agreement, Article 5.7. While para 89 of *Japan – Agricultural Products II* refers to "scientific information", we note it was quoting the first sentence of Article 5.7 which states "relevant scientific evidence is insufficient".

¹¹ Set out as the first group of requirements (1) and (2) in Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

¹² SPS Agreement Article 5.7

¹³ Set out as the second group of requirements (1) and (2) in Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

¹⁴ SPS Agreement, Article 5.7; Appellate Body Report, *Japan – Agricultural Products II*, para 89.

¹⁵ Appellate Body Report, *Japan – Apples*, para. 179.

¹⁶ Brazil's third party written submission, para 6.

¹⁷ Appellate Body Report, *Japan – Apples*, para. 189.

adverse effects on human health *from the presence of a particular Oxamil residue level* in food. This is distinct from whether strawberries from Costa Rica would comply with the maximum residue limit Panama has set to address the risks associated with Oxamil for human health.

What is a "reasonable period of time"

12. The fourth requirement is that the measure may not be maintained unless the Member reviews the measure within a "reasonable period of time". Measures put in place using Article 5.7, which are identified by the article as provisional in nature, are meant to be temporary.¹⁸ They are temporary because the article requires these measures to be reviewed once the additional information necessary for "a more objective assessment" is obtained. The SPS Agreement does not put a specific time limit on this review except to the extent that this be conducted within a reasonable period of time.
13. The Appellate Body has said that a "reasonable period of time" must be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure.¹⁹
14. When interpreting a particular phrase, Panels and the Appellate Body have found interpretations of the same or similar phrase in another covered agreements to be instructive, though not authoritative.²⁰ Accordingly, Australia submits that the Panel might have reference to interpretations of "reasonable period of time" in other covered agreements.
15. In the context of the Anti-Dumping Agreement the Appellate Body in *US – Hot Rolled Steel* said that the phrase "reasonable period" must "be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case".²¹ In Australia's view, several of the factors relevant in that case to consideration of whether information was submitted within a reasonable period of time might also be relevant factors in the context of a review of a provisional SPS measure. For example, the nature and quantity of information required; difficulties in obtaining the information; and the verifiability of the information and ease with which it can be used by the reviewing authorities. Australia notes some of these factors have been considered relevant to the interpretation of Article 5.7 of the SPS Agreement by Panels previously.²²

Conclusion

16. Australia thanks the panel for the opportunity to present these views.

¹⁸ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2971.

¹⁹ Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

²⁰ Discussed in, for example, *US – Wheat Gluten*; *US – Upland Cotton*; and *EC – Bananas III*.

²¹ Appellate Body Report, *US – Hot Rolled Steel*, para. 85.

²² Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL¹

INTRODUCTION

2.103. Brazil welcomes the opportunity to present its views on the issues raised in these panel proceedings. While it does not wish to delve into the complex technical issues involved, Brazil will present its views on what it considers to be the proper interpretation of Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) regarding its scope and requirements. The fact that this submission addresses some of the arguments advanced by the parties should not be interpreted as acquiescence to other points not mentioned herein.

Article 5.7 of the SPS regarding its scope and requirements

2.104. At the outset, Brazil understands that, in line with the report by the Appellate Body in *US/Canada – Continued Suspension*², Article 5.7 of the SPS should not be interpreted as an absolute or unqualified right. Rather, Article 5.7 establishes a qualified right, with limited scope and clear requirements that must be met during and after the imposition of provisional SPS measures.

2.105. This understanding has impacts on the attribution of the burden of proof between the parties. While a complainant does have an obligation to establish a *prima facie* case of inconsistency with Article 5.7, a respondent "[...] bears the burden of proving that Article 5.6 is applicable to its measures"³. More generally, as affirmed by the panel in *US – Animals*:

"nothing in the case law on Article 5.7 or other provisions which establish exemptions or provide the ability to derogate from certain WTO obligations supersedes the basic premise that the party asserting something bears the burden of proving it."⁴

In technical and fact-intensive disputes as the present one, Brazil considers that a panel should carefully analyze how to ascribe the burden of proof with regard to the applicability and the requirements of Article 5.7, taking into account, in particular, which party is in a better position to provide evidence.

2.106. In procedural and sequencing terms, Article 5.7 contains four cumulative requirements to be fulfilled in order for a Member to adopt and maintain a provisional SPS measure under that provision. Accordingly, a Member may provisionally adopt an SPS measure if the measure is: (i) taken with regard to a situation where "relevant scientific information is insufficient"; and (ii) based on the "available pertinent information [...]". Moreover, pursuant to the second part of Article 5.7, following the adoption of the provisional SPS measure, Members shall (iii) "seek to obtain additional information necessary for a more objective assessment of risk"; and (iv) "review the sanitary or phytosanitary measure accordingly within a reasonable period of time".

2.107. Brazil recalls that, in *Japan – Agricultural Products II*⁵, the Appellate Body held that those four conditions are cumulative in nature and are equally fundamental for determining consistency of a measure with this Article 5.7. Therefore, if one of the four requirements is not met, the measure at issue will not meet the required threshold under that provision.

2.108. Regarding the first requirement, Brazil would like to refer to the Appellate Body finding, in *US – Continued Suspension*, that: "[...] there may be situations where there is no pertinent scientific information available indicating a risk such that an SPS measure would be unwarranted even on a provisional basis"⁶. There must be at least some scientific *indicia* of the existence of a sanitary or

¹ Brazil requested that its third-party submission serves as its executive summary.

² Appellate Body Reports, *US/Canada – Continued Suspension*, para. 677.

³ Appellate Body Report, *Korea – Radionuclides (Japan)*, para 7.75.

⁴ Panel Report, *US – Animals*, para. 7.292.

⁵ Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

⁶ Appellate Body Report *US/Canada – Continued Suspension*, para. 681.

phytosanitary risk, even if such *indicia* may be insufficient for a full-fledged risk assessment. Concerning the insufficiency of relevant scientific information, Brazil believes that this means that the evidence available to the sanitary authority must be insufficient not necessarily in quantitative terms, but rather in that such information is in itself incapable of leading to reliable or conclusive results⁷.

2.109. As regards the "pertinent information available indicating a risk", as reasoned by the Appellate Body, Brazil recalls that the word "pertinent" means "pertaining or relating to the matter at hand; relevant; to the point; apposite"⁸. In the context of the SPS Agreement, this implies that the available information should have at least a logical link to the potential risks to be addressed by the provisional SPS measure. Overly broad data – geographical, epidemiological or otherwise – may not meet that level of scrutiny.

2.110. As to the third requirement, Brazil understands that, if a Member's authority adopts such a provisional measure, it has the immediate obligation to "seek to obtain the additional information necessary for a more objective assessment of risk", lest such measure be in violation of Article 5.7.

2.111. This obligation is not restricted to just submitting requests of additional information from an exporting Member. It encompasses the active search of information necessary or "[...] germane to the conduct of a more objective risk assessment, i.e., the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest"⁹. Therefore, it seems that a Member would not meet its obligation with only a perfunctory analysis or a mere request for more information from one or more exporting Members.

2.212. Regarding the fourth requirement, Brazil recalls that, after applying the provisional SPS measure, the authority must review it within a "reasonable period of time". The Panel may wish to elucidate the content of that requirement in light of the *Russia – Pigs (EU)* panel's finding that the term "undue delay" in Annex C(1)(a) of the SPS Agreement is not "*dependent on the length of the delay, but rather on whether any delay is legitimate and justifiable as opposed to unwarranted or excessive*"¹⁰. This seems to imply that such requirement mainly concerns timely, good faith attempts to review the provisional SPS measure, within the technical and legal constraints of the situation in question.

2.113. Finally, Brazil would like to highlight that, by the very nature of Article 5.7, any measure adopted under that provision must be provisional. As a logical consequence, a measure adopted a long time ago will less likely be a provisional one¹¹. Brazil thus invites the panel to ponder carefully this factor so as not give an indefinite *carte blanche* to the Member applying the measure.

CONCLUSION

2.114. Brazil appreciates the opportunity to comment on these issues in these proceedings and hopes that the viewpoints presented in this submission will prove helpful to the Panel in assessing the subject matter brought before it.

⁷ Appellate Body Reports, *Japan – Measures Affecting the Importation of Apples*, para. 185.

⁸ Oxford Advanced Learner's Dictionary.

⁹ Appellate Body Report, *Japan – Agricultural Products II*, para. 92.

¹⁰ Panel Report, *Russia – Pigs (EU)*, para. 7.1182.

¹¹ Panel Report, *Australia – Salmon*, para. 8.57.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA¹****I. INTRODUCTION**

1. Canada thanks the Panel for the opportunity to present its views on legal interpretative issues arising in this dispute.

2. Before doing this, Canada notes that the Russian Federation is also participating as a third party. Canada informs the Panel that it will not be engaging with the Russian Federation in this proceeding. Canada expresses its solidarity with the Ukrainian people, and condemns in the strongest terms the Russian Federation's unjustifiable and unprovoked invasion of Ukraine. The Russian Federation's unlawful campaign of aggression violates international law and the United Nations Charter, and gravely threatens international peace and security and the rules-based order. Canada demands that the Russian Federation immediately and unconditionally cease the illegal use of force against Ukraine, and withdraw its military forces from within Ukraine's internationally recognized borders. We also call on the Russian Federation to uphold its obligations under international humanitarian law and human rights law, and to protect all civilian populations and infrastructure.

3. Turning to the case at hand, our statement today will address Panama's argument that control, inspection, and approval procedures are subject only to the disciplines under Article 8 and Annex C of the SPS Agreement.

II. CONTROL, INSPECTION AND APPROVAL PROCEDURES THAT ARE SPS MEASURES CAN BE SUBJECT TO THE SUBSTANTIVE OBLIGATIONS IN THE SPS AGREEMENT

4. In its first written submission, Panama asserts that "control, inspection, and approval procedures" are exclusively subject to the disciplines under Article 8 and Annex C of the SPS Agreement, and are not subject to the disciplines of Articles 2 to 6 of the Agreement".² Canada submits that Panama's position is neither supported by the text of the SPS Agreement nor does it have any basis in previous panel or Appellate Body reports.

5. The SPS Agreement applies to sanitary or phytosanitary measures that may, directly or indirectly, affect international trade.³ Annex A(1) of the SPS Agreement defines a sanitary or phytosanitary measure as any measure applied "to protect" at least one of the listed interests in subparagraphs a to c of paragraph 1 or "to prevent or limit" a damage specified in subparagraph d.⁴ Further, Annex A(1) of the SPS Agreement specifies that SPS measures include "relevant laws, decrees, regulations, requirements and procedures". The Panel in *US – Animals* found that "the reference to "procedures" [...] is broad enough to encompass both procedures of general application as well as the specific implementation of a procedure in a particular instance."⁵

6. Article 8 of the SPS Agreement requires WTO Members to observe the provisions of Annex C in the operation of control, inspection, and approval procedures, and to ensure that such procedures are not inconsistent with the provisions of the SPS Agreement. Control, inspection, and approval procedures cover a "broad range of procedures".⁶ The list of procedures referred to in Article 8 and Annex C are "merely illustrative"⁷ of the types of procedures that fall within that range. Thus, there is no "*a priori*"⁸ exclusion of procedures from the scope of application of Annex C, "so long as that

¹ Canada requested that its oral statement serves as its executive summary.

² Panama's first written submission, para. 75.

³ Article 1(1) SPS Agreement.

⁴ Appellate Body Report, *Australia – Apples*, para. 172.

⁵ Panel Report, *US – Animals*, para. 7.40.

⁶ Panel Reports, *Russia – Pigs (EU)*, para. 7.514; *US – Animals*, para. 7.68; and *Korea – Radionuclides*, para. 7.368.

⁷ Panel Report, *US – Animals*, para 7.68.

⁸ Panel Report, *US – Poultry*, para. 7.363.

procedure is aimed at checking and ensuring the fulfilment of sanitary or phytosanitary measures, and is undertaken in the context of control, inspection, or approval".⁹

7. There is nothing in Article 8 or Annex C that precludes other provisions in the SPS Agreement from applying to control, inspection, and approval procedures if those procedures are SPS measures. On the contrary, in addition to requiring WTO Members to observe the provisions of Annex C in the operation of control, inspection, and approval procedures, Article 8 also requires Members to "otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement". As the first obligation under Article 8 is focused on compliance with Annex C, the phrase "with the provisions of this Agreement" in the second obligation must be interpreted as referring to provisions other than those in Annex C. In our view, the text of Article 8 clearly requires Members to ensure that their control, inspection, and approval procedures comply with the applicable provisions of the SPS Agreement.

8. Canada notes that there is also nothing in other provisions of the SPS Agreement to suggest that they cannot apply to operation, control, or inspection procedures that fall within the definition of SPS measures. For example, Article 2.2 of the SPS Agreement applies to "any" SPS measure. In the light of this term, the Panel in *US – Poultry (China)* stated that there was nothing in Article 2.2 that would "somehow exempt an SPS measure from its scope".¹⁰ When considering what are the "SPS measures" that are subject to each provision in the Agreement, panels should look both to the definitions set out in Annex A(1) and, the provision at issue; in particular to "the specific context within which that term appears".¹¹ A determination of "what provisions of the SPS Agreement may apply to a given measure should be done on a case-by-case basis".¹²

9. The Panel Report in *Korea – Radionuclides* serves as an example where obligations other than what are in Annex C have been applied to procedural measures. In that dispute, the Panel found that the additional testing requirements were SPS measures within the meaning of Article 1 and Annex A(1) of the SPS Agreement¹³ as well as "procedures to check and ensure the fulfilment of Korea's SPS measures within the meaning of Article 8 and Annex C".¹⁴ The Panel then proceeded to determine whether these measures were consistent with Articles 2 and 5 of the Agreement, and also with the obligations in Annex C.

10. Before concluding, Canada takes note of the panel and Appellate Body reports cited by Panama to support its position that control, inspection, and approval procedures are exclusively subject to the disciplines under Article 8 and Annex C of the SPS Agreement. Although the Panel Report in *Australia – Salmon* and the Appellate Body Report in *Australia – Apples* are informative in clarifying the types of measures that are subject to Article 8 and Annex C, they do not address whether such procedures can also be subject to other provisions in the SPS Agreement.

11. Panama refers to the statement of the Appellate Body in *Australia – Apples* that¹⁵: "[M]any provisions of the SPS Agreement, such as Articles 2 and 5.1, focus directly on SPS measures, as such. In contrast, the obligations of Annex C(1) and Article 8 are expressed as relating to procedures."¹⁶ However, contrary to the position put forward by Panama, this statement is not equivalent to saying that the obligations under Articles 2.2 and 5.1 do not apply to the control, inspection, and approval procedures that fall under Annex C. In fact, the Panel in *Australia – Apples* appears to suggest that procedural measures may be subject to other provisions of the Agreement when it stated that control, inspection, and approval procedures may be "measures in their own right; they may even qualify as SPS measures".¹⁷

12. In sum, Canada would caution the Panel against finding that control, inspection, and approval procedures are, *per se*, exclusively subject to the disciplines under Article 8 and Annex C of the SPS Agreement and not subject to the disciplines of Articles 2 to 7 of the Agreement. Such a

⁹ Ibid.

¹⁰ Panel Report, *US – Poultry*, para. 7.144.

¹¹ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1387.

¹² Panel Report, *US – Poultry*, para. 7.140.

¹³ Panel Report, *Korea – Radionuclides*, para. 7.32

¹⁴ Ibid, para. 7.384

¹⁵ Panama's first written submission, para 38.

¹⁶ Appellate Body Report, *Australia – Apples*, para. 435.

¹⁷ Panel Report, *Australia – Apples*, para. 7.1470.

finding would not be supported by the text of the SPS Agreement and previous panel and Appellate Body reports.

III. CONCLUSION

13. This concludes Canada's oral statement. Gracias.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union makes the third party submissions in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents and the multilateral nature of the rights and obligations contained therein, notably the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).
2. Costa Rica claims that an import ban of dairy and meat products resulted from Panama's refusal to renew the sanitary authorizations of Costa Rican establishments that produce and export food (dairy and meat products) for human and animal consumption.
3. Similarly, in *Russia – Pigs (EU)* the European Union described Russia's measure as an "EU-wide ban", while Russia labelled it as its "provisional compliance" with the current bilateral veterinary certificates, explaining that, in light of the African Swine Fever (ASF) outbreaks, it was the European Union that was unable to comply with the requirements in the certificates. The panel agreed with the European Union.
4. The European Union considers that such an import ban may fall within the scope of various provisions of the SPS Agreement, in particular those related to risk assessment and non-discrimination.
5. The European Union will focus on Article 5.7 and on Article 8 and Annex C(1)(a) and C(1)(c) of the SPS Agreement.

II. CLAIMS

A. Claims about international standards

1. Article 3 of the SPS Agreement

6. A panel should normally start its analysis with Article 3.2 of the SPS Agreement. If the measures at issue do not "conform to" the relevant international standards, then a panel should check whether they are at least "based on" such standards.
7. The "base on" requirement in Article 3.1 is different from "conform to" in Article 3.2 and it means that the measures are "supported" by the international standards. Contrary to Article 3.2, there is no presumption of consistency in Article 3.1.
8. Therefore, a panel's analysis would rather pass through these provisions before reaching other relevant provisions of the SPS Agreement, such as those concerning the risk assessment.
9. However, panels enjoy a certain margin with regard to the order of analysis, as long as that does not lead to unreasonable results. One such unreasonable result may be to make a legal provision *de facto* redundant.
10. Costa Rica refers to the following Codex Alimentarius guidelines regarding food control:
 - Guidelines for the design, operation, assessment and accreditation of food import and export inspection and certification systems (CAC/GL 26 1997);
 - Guidelines for food import control systems (CAC/GL 47 2003);

- Guidelines for the exchange of information between countries on rejections of imported food (CAC/GL 25-1997).
11. In addition, in the context of its fresh pineapple claims, it also refers to the following IPPC guidelines:
- ISPM No. 2, Guidelines for pest risk analysis;
 - ISPM No. 20, Guidelines for a phytosanitary import regulatory system.
12. The guidelines mentioned by Costa Rica are issued by the Codex Alimentarius and the IPPC and are certainly relevant for the horizontal aspects of controls in food.

B. Claims related to approval procedures

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

13. Article 8 of the SPS Agreement mandates that Members observe the provisions of Annex C in the operation of control, inspection and approval procedures. Therefore, a violation of the obligations contained in Annex C entails a violation of Article 8.
14. A panel assessing the consistency of a measure with the first clause of Annex C(1)(a) needs to determine: (1) that the challenged measure is an SPS control, inspection, or approval procedure subject to Annex C; (2) that there has been a delay in a Member undertaking or completing such SPS procedure; and (3) that such delay is undue.
15. Panama does not dispute that the procedures related to the 16 Costa Rican dairy and meat establishments are "approval procedures" subject to Article 8 and Annex C of the SPS Agreement. However, Panama maintains that it was unable to complete those procedures because of its limitations in conducting physical audits of the relevant establishments amid the COVID-19 pandemic. Costa Rica argues that the COVID-19 pandemic had no impact on Panama's ability to collect information for a more objective risk assessment, and to complete establishment approval procedures.
16. The European Union recalls that in *Indonesia — Chicken* the panel found that there was an undue delay in Indonesia's consideration of Brazil's proposed veterinary health certificate for chicken, as it was not persuaded by the argument concerning the incompleteness of the application the SPS approval procedure, where Indonesia did not argue that there was any outstanding SPS information which was due, and only pointed towards halal information being due, which was non-SPS related.
17. In *US — Animals* the panel found that APHIS' application of the procedures under 9 CFR 92.2 to Argentina's requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free incurred certain undue delays. To reach that conclusion, the panel considered that the determination of whether a delay exists should be made in light of the nature and complexity of the procedure to be undertaken and completed. The panel examined each of the time-periods identified by Argentina as delays to determine whether they were periods when the procedure did not move forward because of inaction or inability to proceed and concluded that only one period (between September 2006 and January 2013) amounted to undue delays. The panel did not agree with the US that a WTO Member could indefinitely postpone the completion of a procedure by invoking the need to reconfirm information that had become outdated by virtue of its very own inaction.
18. Similarly, in the present case the Panel should examine on a case-by-case basis whether the periods of inaction by Panama amount to undue delays within the meaning of Article 8 and Annex C(1)(a) of the SPS Agreement.
19. Costa Rica alleges that Panama incurred delays in completing the approval procedures because Panama "never formally processed" the renewal applications that Costa Rica submitted at the end of the original establishment authorizations. Costa Rica further submits that the alleged delays in Panama's establishment approval procedures are "undue" because

Panama did not conduct the required on-site establishment audits for reasons solely attributable to it, such as administrative delays or the large volume of applications.

20. Panama contends that Costa Rica did not establish that Panama incurred any "delay" in its establishment authorization renewal procedures before 30 June 2020. Panama maintains that the postponement is linked to two specific factors "that significantly impeded its ability to finalize the necessary procedures for the renewal of Costa Rica's meat and dairy establishment approvals": (i) the COVID-19 pandemic and (ii) Costa Rica's refusal to provide information about its animal health system.
21. It seems that the contentious period between the parties is in particular that after 15 October 2020. The European Union considers that not only Costa Rica's official travel restrictions should play a role in the Panel's analysis, but also the actual travel possibilities of the Panama's inspectors during the relevant period. In that respect, the Panel should assess whether the relevant inspectors were prevented from travelling because of COVID-19 related reasons for the entirety of the relevant period.
22. Finally, Panama also contends that during the period 10 July 2020-20 August 2021 Costa Rica prevented Panama from carrying out the approval and inspection procedures by refusing to provide information related to its animal health system.
23. The European Union invites the Panel to assess whether the information requested by Panama is of a relevant nature for the overall assessment of the 16 establishments, as the conclusion on this matter has a direct implication for the existence or not of undue delays. The European Union recalls that in *Russia – Pigs*, for instance, the panel found with regard to the European Union's claims under Annex C(1)(c) that "Russia requested information that went beyond what was necessary for undertaking and completing the procedure for the verification of the presence of ASF in the territory of the non-affected EU member States" and thus it found "no basis in the evidence on record to support Russia's assertion that all of the information it requested was "germane" to conducting a more objective assessment".

C. Claims related to risk assessment

1. Article 5.7 of the SPS Agreement

24. The case-law refers to Article 5.7 as a "qualified exemption" from the provisions of Article 5.1 or as an autonomous right. The European Union is of the view that the claimant in an Article 5.7 claim has to adduce evidence with regard to the violation of the provisions of the said article by the defendant.
25. According to the panel in *EC — Approval and Marketing of Biotech Products* the provisional adoption of an SPS measure is not a condition for the applicability of Article 5.7, as the measure at issue has to satisfy all the criteria set forth in Article 5.7 in order to be provisionally adopted.
26. The Appellate Body held that four cumulative requirements are imposed upon a Member having recourse to this provision:

Pursuant to the first sentence of Article 5.7, a Member may provisionally adopt an SPS measure if this measure is:

(1) imposed in respect of a situation where 'relevant scientific information is insufficient'; and

(2) adopted 'on the basis of available pertinent information'.

Pursuant to the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:

(3) 'seek[s] to obtain the additional information necessary for a more objective assessment of risk'; and

- (4) 'review[s] the ... measure accordingly within a reasonable period of time'.
27. These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever one of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.
28. With regard to the first condition, the application of Article 5.7 is triggered by the insufficiency of scientific evidence and not by the existence of scientific uncertainty.
29. The Appellate Body determined in *Japan – Apples* that the relevant scientific evidence is "insufficient" within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement:
30. The Appellate Body noted the fact that although further scientific investigation is possible, this does not equate to the insufficiency of the relevant scientific evidence.
31. In SPS cases is not uncommon that there is scientific controversy. However, such controversy should not lead to the conclusion that the relevant scientific evidence is "insufficient". Divergent or minority views that are from respected and qualified sources may provide the basis for the adoption of provisional SPS measures under Article 5.7.
32. The 'insufficiency' of the scientific evidence is not a perennial state, but rather a transitory one, which lasts only until such time as the imposing Member procures the additional scientific evidence which allows the performance of a more objective assessment of risk.
33. Even if scientific evidence was considered sufficient at a certain stage, it may become insufficient if there are new relevant scientific developments. Health science is evolving over time, as it is our understanding of the natural world, and the provisions of the SPS Agreement offer the flexibility to adapt measures so as to keep the pace with science.
34. With regard to the second condition, namely that the measure should be adopted on the basis of the available pertinent information. According to the Appellate Body the information is pertinent when there is a rational and objective relationship between the information and the measure.
35. The *category* of information or data (defined in abstract terms) to be considered in a risk assessment is the same under Article 5.1 and Article 5.7. In both cases, it is contextually informed by the language of Articles 5.1, 5.2 and 5.3 and the definition of risk assessment in Annex A(4). In the "provisional" context of Article 5.7 what weighs particularly heavily in the assessment are the need for urgent action and the objective of avoiding loss to the protected interest. Science and other information, whilst relevant to the extent present, carry less weight, simply because they are less complete.
36. The difference between an Article 5.1 situation and an Article 5.7 situation does not relate to the abstract delimitation of the category of data that might be relevant, but rather relates to the extent to which the category is *populated by data*. If the category is heavily populated by data, then one is likely to be in an Article 5.1 situation. If the category is sparsely populated by data, even to the extent of there being little or no data, then one is likely to be in an Article 5.7 situation. This difference is captured particularly by the term "available pertinent information" in Article 5.7.
37. The other two conditions of Article 5.7 require that the importing Member seeks to obtain the additional information necessary for a more objective assessment of risk and review the sanitary measure accordingly within a reasonable period of time. Again, there is no mechanistic distinction between the two provisions. In an Article 5.7 scenario, it is likely that there is a pending request or application and that the administrative file remains open whilst additional information is sought. Once the category of information is sufficiently complete, and the ball has come to rest with the authorities of the importing Member, one may expect

a decision within a reasonable period of time, which decision may well be better assessed through the prism of Article 5.1.

38. The additional information sought must be relevant for conducting a more objective risk assessment. However, if the information sought is irrelevant for the purposes of the risk assessment, the defending Member cannot provisionally shelter its measures under Article 5.7. Further, it will likely be in breach of Article 8 and Annex C(1) of the SPS Agreement, that is, the provisions that are designed to protect against abuses in control, assessment and approval procedures.
39. Compliance with the fourth condition, with regard to a "reasonable period of time" has to be established on a case-by-case basis.
40. In the cases where science remains insufficient to form a definitive view because the disease is new and not sufficiently studied, the reasonable period of time could last for many years or decades, depending on the nature of the problem. However, when the alleged incomplete information refers to a well-known disease it is expected that the lack of sufficient relevant information will be rectified sooner rather than later.
41. Costa Rica alleges that Panama breaches several provisions of the SPS Agreement, and in particular Articles 5.1, 5.2 and 5.7. Costa Rica contends that Panama's previous risk assessments and their respective conclusions regarding sanitary risk must remain valid. Therefore, the Costa Rican strawberries, pineapples, bananas and plantains should continue enjoying access to the Panamanian market.
42. While not taking a position on the facts of this case, the European Union invites the Panel to assess whether Panama's response complies with Article 5.7. In particular, the Panel should assess whether the kind and quantity of additional information requested by Panama and the lack of which is used to justify the delays is indeed pertinent for establishing the risks to human health in the fruits at issue.
43. A previous panel has found, for instance, that Russia formulated information requirements that were not limited to what is necessary for the procedure at issue. The moment a Member asks for information that is not necessary for a more objective assessment of risk, including the type of information characterized by the individual experts in *Russia- Pigs (EU)* as an "overkill" or as an attempt to "muddy the water", that Member can no longer benefit from the provisional shelter of Article 5.7. Such information requests are a clear warning sign that the Member is not genuinely seeking to perform a more objective risk assessment (objective in the sense of being based on the pertinent information available).
44. The relationship between Article 5.7 and Articles 2.3, 5.5 and 5.6 has to take into account the following considerations.
45. Article 2.3 of the SPS Agreement contains a general obligation of non-discrimination and has a broader scope than Article 5.5. Articles 5.5 and 5.6 refer to the non-discriminatory application of the appropriate level of protection (ALOP) and the fact that the measures should not go beyond what is necessary to achieve the ALOP.
46. With regard to the obligations contained in Article 2.3, the panel in *India – Agricultural Products* noted that the same facts that inform the assessment of whether or not discrimination is arbitrary or unjustifiable may also inform the assessment of whether or not identical or similar conditions prevail. It also found that the relevant "conditions", for the purpose of a given analysis, may be the presence of a disease within a territory (and the respective risk associated with that disease).
47. Article 5.7 does not expressly preclude discrimination between WTO Members, and indeed such discrimination may be justified or even required under various provisions of the SPS Agreement, when the relevant prevailing conditions differ (health risks due to the presence of a disease).

48. Nevertheless, the existence of such discrimination in a provisional measure is not irrelevant to an assessment under Article 5.7, since one would expect to find some basis for it in the available pertinent information, failing which, one of the conditions set out in Article 5.7 would not be complied with.

III. CONCLUSION

49. The European Union hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the SPS Agreement.

ANNEX C-5**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES**

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on certain issues related to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and certain issues related to WTO sanitary and phytosanitary disciplines, in particular, the proper interpretation of Article 8 and Annex C of the *WTO Agreement on Sanitary and Phytosanitary Measures* ("SPS Agreement"). The United States may address other matters in its subsequent oral or written submissions.

2. As a general matter, the Panel should evaluate whether Costa Rica's panel request satisfied the two basic requirements in Article 6.2: (i) identify the specific measure at issue and (ii) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. If Costa Rica's panel request satisfies these basic requirements with respect to its claims, then it would meet the standard.

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

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

4. The relevant text of Article 6.2 is that a panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." According to the text, two basic requirements in Article 6.2 are that the panel request (i) identify the specific measure at issue and (ii) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. To provide the brief summary of the legal basis of the complaint required by Article 6.2, the panel request need only specify the legal claims under the WTO provisions that it considers are breached by the identified measure. Article 6.2 does not require that a panel request include arguments. Instead, the DSU indicates that a complaining party's arguments are to be made in the submissions, oral statements, and other filings with a panel.

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

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

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

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

9. Paragraph 1(a) of Annex C of the SPS Agreement notes that WTO Members shall ensure that any control, inspection, or approval procedure related to the fulfilment of its sanitary or phytosanitary measures "are undertaken and completed without undue delay."

10. The plain meaning of the text of paragraph (1)(a) of Annex C is useful for determining the meaning of "without undue delay" as intended in the SPS Agreement. "Undue" is defined, as relevant, "not appropriate or suitable; improper," "unreasonable," and "not in accordance with what is just and right, unjustifiable; illegal." "Delay," as a noun, means "the action of deferring or postponing something; procrastination; waiting," "an instance or episode of being held up or kept waiting; a period of time during which action is held up," and a "hindrance to progress." Thus, the plain meaning of the phrase "without undue delay" suggests that any control, inspection, or approval procedure be undertaken and completed without any unjustifiable deferment or postponement.

11. Consistent with the plain meaning of the words "undue delay", the reasoning in *EC – Biotech* provides valuable insight for the correct interpretation of that phrase. The panel understood that "Members are required to begin, or start, approval procedures after receiving an application for approval;" and reasoned that based on the ordinary meaning of the phrase "without undue delay," Annex C(1)(a), first clause, requires that approval procedures be undertaken and completed with no justifiable loss of time." This interpretation is consistent with the plain meaning of the words "undue delay" in the view of the United States.

Executive Summary of U.S. Third Party Responses to Questions

1. Response on Question 1: Article 6.2 thus requires two elements to be included in a panel request, namely: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint. To provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, the panel request need only specify the legal claims under the WTO provisions that the complainant considers are breached by the identified measure. These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU. Article 6.2 does not require that a panel request include arguments. Instead, the DSU provides that a complaining party's arguments are to be made in the submissions, oral statements, and other filings with a panel.

2. As noted, to provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, the panel request need only specify the legal claims under the WTO provisions that a Member considers are breached by the identified measure. The omission from a panel request of a provision of a covered agreement that contains a commitment would take that provision outside a panel's terms of reference. The omitted provision, and the relevant commitment, would not form part of the "matter" referred to the DSB, and that the DSB has established the panel to examine. There would thus not be a basis for a panel to make findings or recommendations with respect to a provision not cited in the panel request.

3. Response on Question 6: There are three elements to consider in answering this question: (1) the scope of the term "scientific evidence"; (2) the meaning of the term "relevant," which modifies "scientific evidence"; and (3) "a more objective assessment of risk."

4. First, "scientific evidence" is accepted to consist of the full range of scientific information. The adjective "scientific" refers to "of, relating to, or exhibiting the methods or principles of science" or "conducted in the manner of science or according to results of investigation by science"

5. Second, Article 5.7 qualifies "scientific evidence" with the term "relevant." In the context of Article 5.7, "relevance" defined as "relation to the matter at hand" or "the ability to retrieve material that satisfies the needs of the user, must be understood in terms of Article 5.1's obligation to perform a risk assessment. Accordingly, "relevant scientific evidence" is scientific evidence that is used for purposes of a risk assessment consistent with Article 5.1.

6. The definition of "relevant scientific evidence" for purposes of Article 5.7 is not limited by the list of factors in Article 5.2 and Article 5.3. In Article 5.2, Members, in conducting the assessment of risks "shall take into account" factors including "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."

7. Third, the phrase "a more objective assessment of risk" must be read in light of the whole sentence in which it appears: "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." The "objective assessment of risk" has been interpreted to refer to a risk assessment as defined by Annex A(4). The use of the adjective "more" reflects, in the words of the panel in *EC – Biotech*, "a movement in a certain direction, that is, towards the eventual 'objective assessment of risk as defined in Annex A(4)."

8. The use of the phrase "a more objective assessment of risk" does not obligate a Member to have a risk assessment that would meet the definition set forth in Annex A(4) at the time that the provisional measure is in place. 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).

9. Response to Question 8: Article 5.7 states that a Member has an obligation to "seek to obtain the additional information necessary for a more objective assessment of risk," and this means that the importing Member must take steps to cure the insufficiency of the relevant scientific evidence. Where an importing Member has sought additional information from the exporting Member, the timeliness and quality of evidence provided by the exporting Member may be relevant to assess whether the importing Member has sought additional information to make a more objective assessment, and whether the review of the provisional measure was undertaken in a reasonable time.

10. Response to Question 10: It is possible that, if scientific evidence is sufficient to conduct a proper risk assessment at one point in time, it will later be insufficient to conduct such an assessment. Such a situation may arise, for example, when evidence of a new pathway for risk comes to light, but the data concerning that pathway, while sufficient to identify it, is not adequate to perform a risk assessment as required under Article 5.1 and as defined in Annex A. Alternatively, 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., testing across shipments, information on exporting country conditions, etc.). This would be less than the scientific evidence previously relied upon became "insufficient" than that circumstances have changed that require collection and evaluation of sufficient evidence. In either circumstance, the Member invoking Article 5.7 would have the onus of demonstrating that the available relevant scientific evidence is now insufficient in light of new circumstances.

11. Response to Question 11: The United States understands that the respondent bears the burden of showing the applicability of Article 5.7 of the SPS Agreement. Under this provision, a Member may exercise a right ("may provisionally adopt") in a particular circumstance ("[i]n cases where relevant scientific evidence is insufficient"). And in that circumstance, the Member incurs an obligation to "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." It is reasonable, then, for the respondent to claim the applicability of Article 5.7 and to

demonstrate how the provisional measure satisfies the cumulative elements set out in Article 5.7 of the SPS Agreement.

ANNEX D

PRELIMINARY RULING OF THE PANEL

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ANNEX D-1**PRELIMINARY RULING BY THE PANEL****1 PROCEDURAL BACKGROUND**

1.1. On 13 June 2022, Panama submitted a request for a preliminary ruling asking the Panel to find that the request for the establishment of a panel (panel request) by Costa Rica¹ is inconsistent with Article 6.2 of the Dispute Settlement Understanding (DSU). Panama argues in this regard that Costa Rica's panel request does not meet the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".²

1.2. Pursuant to its Working Procedures³, 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.⁴

1.3. On 14 July 2022, Costa Rica submitted its response to Panama's request, asking the Panel to dismiss the request in its entirety.⁵

1.4. In its first written submission of 12 September 2022, Panama reiterated its first preliminary ruling request⁶ and raised a second issue relating to the Panel's terms of reference, in respect of which it also requested a preliminary ruling.⁷ Panama submits that Costa Rica introduced in its first written submission new claims under Annex B(5)(b) and Annex B(6)(a) to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) that were not identified in its panel request. Thus, Panama considers these claims to fall outside the Panel's terms of reference pursuant to Articles 6.2 and 7.1 of the DSU.⁸

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

1.6. 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 United States, and the European Union submitted their third-party responses to the questions regarding the request. On 1 March 2023, Costa Rica submitted its responses.

1.7. In sum, Panama has raised two issues relating to the Panel's terms of reference, and requests the Panel to rule on:

- a. whether Costa Rica's panel request provides 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 fall outside the Panel's terms of reference.

¹ Request for the establishment of a panel by Costa Rica, WT/DS599/4 (Costa Rica's panel request).

² Panama's preliminary ruling request, para. 1.

³ Paragraph 4.1(a) of the Panel's Working Procedures states, in relevant part, that: "Costa Rica shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request." Paragraph 4.1(d) of the Procedures states, in relevant part, that: "[t]he Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately."

⁴ Panel communication to the parties, 15 June 2022, p. 2.

⁵ Costa Rica's response to Panama's preliminary ruling request, para. 59.

⁶ Panama's first written submission, paras. 23-48.

⁷ Panama's first written submission, paras. 49-55 and 58.

⁸ Panama's first written submission, paras. 22 and 49.

1.8. The Panel has decided to issue a single preliminary ruling to address both issues. This Panel's preliminary ruling, including its reasoning, is set out below.

1.9. The Panel will first address the relevant legal standard. The Panel will then examine the two issues raised by Panama in the light of the legal standard.

2 THE RELEVANT LEGAL STANDARD

2.1. Article 6.2 of the DSU sets forth the requirements for a panel request within the WTO dispute settlement process. The Panel will begin its analysis by identifying the requirements set out in this provision, and will subsequently examine the legal standard presented by Panama in its first preliminary ruling request.

2.1 Requirements for the panel request under Article 6.2 of the DSU

2.2. Article 6.2 provides, in relevant part, that:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.3. This provision establishes four requirements for all panel requests. They must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.⁹ The specific measures at issue and the legal basis taken together constitute the matter referred to the Dispute Settlement Body (DSB)¹⁰, which forms the basis for a panel's terms of reference under Article 7.1 of the DSU. In this regard, a panel request delimits the scope of a panel's jurisdiction.¹¹ In addition, by establishing and defining such jurisdiction, the panel request fulfils a due process objective by providing the respondent and third parties with notice regarding the nature of the complainant's case and enabling them to respond accordingly.¹²

2.4. It follows from the above that, as a general rule, the measures and claims not identified in the panel request fall outside the Panel's terms of reference.¹³ Defects in the panel request cannot be "cured" subsequently, and the measures not identified and claims not included or included deficiently in the panel request cannot be the subject of consideration by the Panel.¹⁴ To permit otherwise would undermine the due process rights enshrined in Articles 6.2 and 7.1 of the DSU.¹⁵ Consequently, panels must assess whether a panel request meets the requirements of Article 6.2 on a case-by-case

⁹ Appellate Body Report, *Korea – Dairy*, para. 120.

¹⁰ Appellate Body Reports, *Guatemala – Cement I*, para. 72; *US – Carbon Steel*, para. 125.

¹¹ Appellate Body Reports, *China – HP SSST (Japan) / China – HP SSST (EU)*, para. 5.12.

¹² Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.6 and 4.10; *Korea – Pneumatic Valves (Japan)*, para. 5.4 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7, in turn referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *Chile – Price Band System*, para. 164; *Thailand – H-Beams*, para. 88; and *US – Continued Zeroing*, para. 161).

¹³ See Panel Reports, *EU – Energy Package*, circulated to WTO Members 10 August 2018, appealed 21 September 2018, para. 7.103 (where the panel concluded that a claim made in the Russian Federation's first written submission fell outside its terms of reference, as it was not the same as the matter presented in the panel request); *India – Agricultural Products*, para. 7.103 (where the panel found that certain health certificates not included in the panel request were not measures at issue). See also Appellate Body Report, *Australia – Apples*, para. 416.

¹⁴ Panel Report, *Colombia – Textiles (Article 21.5 – Panama)*, para. 7.368. Although the subsequent submissions, in particular the complainant's first written submission, may be consulted in order to confirm the meaning of the words used in the panel request and to assess whether the ability of the respondent to defend itself was prejudiced, these submissions cannot "cure" any defects in the panel request. (Appellate Body Reports, *US – Carbon Steel*, para. 127; *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9; *China – HP SSST (Japan) / China – HP SSST (EU)*, para. 5.13; and *Korea – Pneumatic Valves (Japan)*, para. 5.5).

¹⁵ Panel Report, *EU – Energy Package*, circulated to WTO Members 10 August 2018, appealed 21 September 2018, para. 7.98.

basis by making an objective¹⁶ and thorough examination of the language of the request read as a whole.¹⁷

2.5. The requirement to "provide a brief summary of the legal basis of the complaint" has been interpreted as requiring a summary of the *claims*¹⁸ underlying the complaint, and not the *arguments* in support thereof.¹⁹ This summary of the legal basis may be "brief", but it must, at a minimum, list (i.e. identify) the provisions of the covered agreements claimed to have been violated.²⁰

2.6. Considering that the brief summary of the legal basis has to be "sufficient to present the problem clearly", the degree of brevity that is permissible depends on its clarity in presenting the problem.²¹ The purpose of the requirement to specify the claims clearly is to allow the respondent and any third parties to know the legal basis of the complaint and thus safeguard their due process rights.²² Therefore, where a provision contains multiple and/or distinct obligations²³, the panel request should specify which of these obligations is being challenged.²⁴ Also, in cases where a number of measures are being challenged on the basis of multiple provisions, providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly "may depend on whether it is sufficiently clear which 'problem' is caused by which measure or group of measures".²⁵ To meet the requirement "to present the problem clearly", a panel request must therefore "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".²⁶

2.7. Given that the sufficiency of a panel request must be considered on the face of the request itself and on a case-by-case basis, what is considered sufficient to "plainly connect" the measure at issue with the provision of the covered agreements claimed to have been infringed will depend on the circumstances of each case. Such circumstances may include the nature of the measure and the manner in which it is described in the panel request, as well as the nature of the provision alleged to have been breached.²⁷

¹⁶ Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Countervailing Measures (China)*, para. 4.10.

¹⁷ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.10; *Korea – Pneumatic Valves (Japan)*, para. 5.5 (quoting Appellate Body Reports, *China – HP SSST (Japan) / China – HP SSST (EU)*, para. 5.13, in turn quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562); and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641).

¹⁸ For the purposes of Article 6.2 of the DSU, a claim refers to an allegation that the respondent has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8). In other words, the "claim" pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. (Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.12 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130)).

¹⁹ Appellate Body Reports, *Korea – Dairy*, para. 123; *Korea – Pneumatic Valves (Japan)*, paras. 5.6 and 5.31 (quoting Appellate Body Reports, *China – HP SSST (Japan) / China – HP SSST (EU)*, para. 5.14; *US – Countervailing Measures (China)*, para. 4.9). (emphasis original) In previous disputes, the significant difference has been recognized between the *claims* identified in the panel request, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties. (Appellate Body Report, *EC – Bananas III*, para. 141). (emphasis original)

²⁰ Appellate Body Reports, *Korea – Dairy*, paras. 123-124; *US – Carbon Steel*, para. 130; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.

²¹ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6.

²² Appellate Body Report, *EC – Bananas III*, para. 143.

²³ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.

²⁴ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9, in turn quoting Appellate Body Reports, *China – Raw Materials*, para. 220).

²⁵ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220).

²⁶ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (quoting Appellate Body Reports, *China – HP SSST (Japan) / China – HP SSST (EU)*, para. 5.15; *China – Raw Materials*, para. 220; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8, in turn quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162). See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

²⁷ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9).

2.2 The legal standard articulated by Panama in respect of its first request for a preliminary ruling

2.8. Before considering whether Costa Rica's panel request meets 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"²⁸, the Panel considers it necessary to examine Panama's arguments regarding the applicable legal standard, and the comments submitted by Costa Rica and third parties in that respect.

2.9. The Panel notes that the parties and third parties agree that Article 6.2 requires the panel request to plainly connect the specific measures at issue with the provisions claimed to have been infringed.²⁹ However, they disagree as to whether the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly also entails a succinct explanation of "how or why" the measures at issue violate the relevant provisions. The positions of the parties and third parties on this matter are set out below.

2.10. **Panama** submits that Costa Rica's panel request is inconsistent with the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" because it fails to "plainly connect" the challenged measures with the provisions claimed to have been infringed, and it does not explain succinctly "how or why" the specific measures violate the numerous legal provisions identified in the panel request.³⁰

2.11. Panama agrees that the phrase "how or why" does not imply that a complainant is required to include legal arguments in its panel request. However, Panama does not consider Costa Rica's obligation under Article 6.2 of the DSU to be limited to setting out the claim underlying the complaint; it also involves explaining succinctly "how or why" the challenged measures violate the relevant legal provisions.³¹

2.12. **Costa Rica** submits that the phrase "how or why" to which Panama alludes does not entail an obligation to include a level of detail going beyond setting out the claim underlying the complaint and does not imply a new and different legal standard with respect to Article 6.2 of the DSU. For Costa Rica, the applicable legal standard entails the consideration of whether the panel request plainly connects the measure with the provision of the covered agreements claimed to have been infringed³², and does not imply that arguments supporting its complaints must be added.³³

2.13. The **United States** asserts in its third-party submission that, as the Appellate Body in *Korea – Pneumatic Valves (Japan)* explained, Article 6.2 does not require the complaining party to explain "how" or "why" a measure breaches an identified WTO commitment.³⁴ According to the United States, to provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, the panel request need only specify the legal claims under the provisions that it considers are breached by the measure; it does not need to include arguments.³⁵ The United States considers that the text of Article 6.2 does not support a requirement to explain "how" or "why" a measure is inconsistent.³⁶

²⁸ Panama's preliminary ruling request, para. 1.

²⁹ Panama's preliminary ruling request, para. 10 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162); Costa Rica's response to Panama's preliminary ruling request, para. 11 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8).

³⁰ Panama's request for a preliminary ruling, para. 12 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; *EC – Selected Customs Matters*, para. 130).

³¹ Panama's first written submission, para. 43. See also Panama's preliminary ruling request, para. 23.

³² Costa Rica's response to Panama's preliminary ruling request, paras. 44-45 (quoting Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.7 and 5.33). See also *Ibid.* para. 11.

³³ Costa Rica's response to Panama's preliminary ruling request, paras. 50-52.

³⁴ United States' third-party submission, para. 12 (referring to Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.12).

³⁵ The United States notes that the DSU indicates that a complaining party's arguments are to be made in the submissions, oral statements, and other filings with a panel. See United States' third-party submission, para. 8.

³⁶ United States' third-party submission, paras. 9-11 and 13. (The United States refers to the Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures, from which the text for Article 6.2 was drawn, and to dispute settlement practice under the GATT 1947).

2.14. **Australia** asserts in its third-party statement that the "how or why" standard presented by Panama is not relevant under Article 6.2 of the DSU, and notes that this was the finding of the Appellate Body in *Korea – Pneumatic Valves (Japan)*.³⁷ In Australia's view, the relevant standard for compliance with Article 6.2 is whether a complainant has plainly connected the measure at issue with the obligation allegedly infringed, in a manner sufficient to present the problem clearly.³⁸

2.15. **The Panel** notes that the dispute between the parties on the applicable legal standard under Article 6.2 of the DSU revolves around the fact that Panama presents the "how or why" standard as an additional obligation to the requirement to plainly connect the measures at issue and the provisions alleged to have been breached.³⁹

2.16. In *EC – Selected Customs Matters*, the Appellate Body considered that "[a] brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question."⁴⁰ The Appellate Body revisited the notion of "how or why" in other reports.⁴¹

2.17. Subsequently, in its report in *Korea – Pneumatic Valves (Japan)*, the Appellate Body clarified that, contrary to the panel's interpretation in that dispute, its references to "how or why" in previous cases did not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU.⁴² The Appellate Body explained that its use of the phrase "how or why" to meet the requirement to present the problem clearly did not entail that a complainant would be required to include in the narrative of its panel request a level of detail going beyond setting out the claim underlying the complaint.⁴³ The Appellate Body confirmed that the relevant legal standard requires the panel request to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", and that this involves "plainly connect[ing]" the measure with the provision of the covered agreements claimed to have been infringed.⁴⁴

2.18. The Panel agrees with the Appellate Body's analysis that the phrase "how or why", which does not appear in the text of Article 6.2 of the DSU, does not constitute an additional requirement to those set out in this provision. As the Panel mentioned above, the requirement under Article 6.2 of the DSU for the panel request to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" implies that the panel request must plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed.⁴⁵ For this, the complainant is not required to include in the panel request a level of detail going beyond setting out the claims⁴⁶ underlying its complaint. Based on this understanding, the Panel will consider whether Costa Rica's panel request fails to meet the requirement to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly".

3 WHETHER COSTA RICA'S PANEL REQUEST PROVIDES "A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY"

3.1. The Panel will now examine Panama's first preliminary ruling request, which addresses whether Costa Rica's panel request meets the requirement under Article 6.2 of the DSU to provide a brief

³⁷ Australia's third-party statement, para. 5 (quoting Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, paras. 5.7-5.33; *EC – Selected Customs Matters*, para. 130; *China – Raw Materials*, para. 226; *US – Countervailing Measures (China)*, para. 4.9; and *Russia – Railway Equipment*, para. 5.28).

³⁸ Australia's third-party statement, para. 6 (quoting, *inter alia*, Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6).

³⁹ See Panama's preliminary ruling request, para. 23, where Panama states that: "In addition to Costa Rica's inability to 'plainly connect' the four measures at issue with the 23 legal grounds of the complaint, Costa Rica's request for the establishment of a panel does not explain succinctly *how* or *why* each particular measure violates each of the provisions." (Ibid.) (emphasis original)

⁴⁰ Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)

⁴¹ See, for example, Appellate Body Reports, *China – Raw Materials*, para. 226; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26; and *US – Countervailing Measures (China)*, para. 4.9.

⁴² Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.7. See also Ibid. para. 5.12.

⁴³ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.7 and 5.33.

⁴⁴ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.7.

⁴⁵ See para. 2.6 above.

⁴⁶ The Panel recalls that a claim, for the purposes of Article 6.2 of the DSU, refers to "an allegation 'that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement'". (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (quoting Appellate Body Report, *Korea – Dairy*, para. 139)).

summary of the legal basis of the complaint sufficient to present the problem clearly. The arguments of the parties and third parties in this respect are presented below, followed by the Panel's analysis.

3.1 Arguments of the parties and third parties

3.2. **Panama** submits that Costa Rica's panel request fails to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".⁴⁷ According to Panama, Costa Rica's panel request fails to plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed.⁴⁸

3.3. Panama notes that Section I of the panel request sets out the four measures at issue while Section II lists under 20 different bullet points a total of 23 legal provisions from three different agreements, namely the SPS Agreement, the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Agriculture.⁴⁹ According to Panama, each bullet point under Section II contains a brief and generic narrative that merely paraphrases the language of the relevant legal provision, without identifying which of the various measures described in Section I of the panel request relates to the specific claims in Section II of the request.⁵⁰

3.4. Panama submits that the panel request suffers from the same fundamental flaws identified by the Appellate Body in *China – Raw Materials*.⁵¹ First, the generic description in Section II of the panel request makes it impossible for Panama to discern which of the alleged violations was caused by each of the measures in question. Second, the 23 legal provisions identified by Costa Rica in its panel request cover a wide array of dissimilar obligations, and the diverse nature of these obligations prevents Panama from discerning what the "problem" is. Lastly, Costa Rica describes the various allegations of violation in a generic manner, without making clear which measures or group of measures are allegedly inconsistent with each treaty provision.⁵²

3.5. Panama asserts that Costa Rica does not clearly identify which of the four specific measures have caused the 23 different violations of the covered agreements and that this is insufficient for providing "a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required under Article 6.2 of the DSU. Panama notes that meeting this requirement requires the complainant to "plainly connect" the challenged measures with the provisions of the covered agreements claimed to have been infringed.⁵³ Panama believes that Costa Rica is attempting to circumvent this requirement by asserting that "each and every one of the measures" ("*todas y cada una de las medidas*") are inconsistent with "each and every one" ("*todas y cada una*") of the obligations paraphrased in Section II of its panel request.⁵⁴

3.6. Panama notes that the phrase "*todos y cada uno*" ("each and every one") does not plainly connect the measures with the relevant provisions, and requires it to "guess" which of the alleged violations of the covered agreement applies to each of the measures.⁵⁵ Panama adds that the Appellate Body has cautioned against the use of "convenient" phrases in panel requests, in light of

⁴⁷ Panama's preliminary ruling request, para. 1.

⁴⁸ Panama's preliminary ruling request, para. 12. See also Panama's first written submission, para. 25.

⁴⁹ Panama's preliminary ruling request, paras. 14-15.

⁵⁰ Panama's preliminary ruling request, para. 15. See also *Ibid.* para. 25. Panama considers that it is clear from the descriptions in Section I of the panel request that the measures in question are distinct, as they are characterized by different sets of alleged facts. (*Ibid.* paras. 14 and 24).

⁵¹ In that dispute, the panel requests listed 37 legal instruments as the measures at issue and alleged them to be inconsistent with 13 provisions of the covered agreements. Panama notes that the Appellate Body concluded that the panel requests did not meet the requirements of Article 6.2 of the DSU because: (1) it was impossible to discern, from the description of the legal basis of the complaint, which of the allegations of violation were caused by which of the measures at issue; (2) the panel requests covered a "wide array of dissimilar obligations", which made it impossible to discern what the particular "problem" was; and (3) the narrative part of the panel requests described "in a general manner" the allegations of violation without making clear which measure or group of measures was allegedly inconsistent with which treaty provision. (Panama's preliminary ruling request, para. 16 (quoting Appellate Body Reports, *China – Raw Materials*, paras. 226-229)).

⁵² Panama's preliminary ruling request, paras. 16-17.

⁵³ Panama's preliminary ruling request, para. 18 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; *Korea – Pneumatic Valves (Japan)*, para. 5.6; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; and *Indonesia – Iron or Steel Products*, para. 5.81).

⁵⁴ Panama's preliminary ruling request, para. 19.

⁵⁵ Panama's preliminary ruling request, para. 20.

the high level of precision required under Article 6.2.⁵⁶ Panama considers that if the Panel were to support the use of the phrase "*todas y cada una*" in Costa Rica's panel request, it would not only render meaningless the requirement to "plainly connect" the challenged measures with the provisions claimed to have been infringed, but would eviscerate the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".⁵⁷ Panama adds that the question before the Panel is not whether the phrase "*todas y cada una*" establishes an unequivocal connection between the measures at issue and the legal basis, as suggested by Costa Rica, but whether, in the circumstances of this case, the use of this phrase to formally connect different measures and claims is "sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.⁵⁸

3.7. In Panama's view, it is clear that Costa Rica is not claiming that each of the measures in question violates each of the provisions identified.⁵⁹ Panama submits that, as in *China – Raw Materials*, nothing in the description of the measures in Section I of the panel request or in the description of the legal basis of the complaint in Section II suggests that Costa Rica is claiming that *each* of the four measures at issue violates *each* of the 23 provisions identified⁶⁰, which would be confirmed in Costa Rica's first written submission.⁶¹ Panama agrees with Costa Rica that the complainant is not required to include legal arguments in its panel request, but considers that the "mere reaffirmation" of the relevant treaty provision is clearly insufficient to explain succinctly "how or why" each of the measures at issue is allegedly inconsistent with each and every one of the 23 provisions listed, which cover a wide array of dissimilar legal obligations.⁶² By way of example, Panama asserts that the description of the measures in Section I of the panel request does not refer to the discrimination issues that are under consideration under Articles 5.5 and 2.3 of the SPS Agreement and Article I:1 of the GATT 1994, or clarify how each and every one of the measures "involve or relate to" the control, inspection and approval procedures under Annex C(1)(a)-(c) to the SPS Agreement.⁶³

3.8. Panama considers that Costa Rica was late to connect the measures and claims in question in a way that was "sufficient to present the problem clearly".⁶⁴ In this connection, Panama notes that in its first written submission, Costa Rica does not develop all the claims identified in its panel request.⁶⁵ Panama asserts that Costa Rica, in its panel request, sought to connect the measures and claims including in cases where they could not be connected in the first instance⁶⁶ as, according to Panama, is the case for the claim under Article 5.3 of the SPS Agreement in relation to the measure

⁵⁶ Panama's preliminary ruling request, para. 21 (quoting Appellate Body Report, *US – Carbon Steel*, para. 126). Panama refers to the phrases "including but not necessarily limited to" and "especially (but not exclusively)" in the panel requests in *India – Patents (US)* and *EC – Tube or Pipe Fittings*, respectively. (Ibid. (quoting Appellate Body Reports, *India – Patents (US)*, para. 90; *EC – Fasteners (China)*, para. 597; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14)).

⁵⁷ Panama's preliminary ruling request, para. 22 (referring to Appellate Body Reports, *India-Patents (US)*, para. 90; *EC – Fasteners (China)*, para. 597). See also Ibid. para. 31.

⁵⁸ Panama's first written submission, paras. 26-28. See also Panama's opening statement at the first meeting of the Panel, para. 15.

⁵⁹ Panama's preliminary ruling request, para. 22.

⁶⁰ Panama's preliminary ruling request, para. 19; first written submission, paras. 24 and 29-31. See also Panama's preliminary ruling request, para. 20, where Panama uses the example of the measure concerning the importation of strawberries; opening statement at the first meeting of the Panel, para. 19.

⁶¹ Panama's first written submission, paras. 31-32. See also Ibid. paras. 33-41; Panama's opening statement at the first meeting of the Panel, para. 18.

⁶² Panama's preliminary ruling request, para. 29.

⁶³ Panama's preliminary ruling request, paras. 27-28; first written submission, para. 44.

⁶⁴ Panama's first written submission, para. 32. See also Panama's opening statement at the first meeting of the Panel, para. 18.

⁶⁵ Panama's first written submission, paras. 33-36. Panama notes that Costa Rica's first written submission does not contain any claim under: (i) Articles 2.3, 5.3, 5.4, 5.5, 5.8, 6.1 and 9 and Annex B(1), Annex C(1)(b) and Annex C(1)(c) of the SPS Agreement and Articles I:1 and X:3(a) of the GATT 1994 with regard to the measure concerning the importation of strawberries; (ii) Articles 3.1, 5.4, 5.8 and 6.1 and Annex B(1) and Annex C(1)(b) of the SPS Agreement and Article X:3(a) of the GATT 1994 with regard to the measure concerning the importation of dairy and meat products; (iii) Articles 5.4, 5.8 and 6.1 and Annex B(1), Annex C(1)(b) and Annex C(1)(c) of the SPS Agreement and Article X:3(a) of the GATT 1994 with regard to the measure concerning the importation of pineapples; and (iv) Articles 2.3, 5.4, 5.5 and 6.1 and Annex B(1), Annex C(1)(b) and Annex C(1)(c) of the SPS Agreement and Articles I:1 and X:3(a) of the GATT 1994 with regard to the measure concerning the importation of plantains and bananas. (Ibid.)

⁶⁶ Panama's first written submission, para. 40.

concerning the importation of strawberries.⁶⁷ Panama adds that Costa Rica waited until its first written submission to clearly explain which measures it considered to be in violation of the disciplines of Articles 2.3 and 5.5 of the SPS Agreement and Article I:1 of the GATT 1994.⁶⁸

3.9. Lastly, with regard to its due process rights, Panama submits that the lack of precision in Costa Rica's panel request "has fundamentally compromised" them.⁶⁹

3.10. **Costa Rica** submits that it is clear from the reading of its panel request that it claims that each and every one of the four measures at issue (described in Section I) have infringed each and every one of the provisions of the covered agreements presented (identified in Section II).⁷⁰

3.11. Costa Rica argues that the phrase "*todas y cada una*" ("each and every one"), which seeks to improve readability⁷¹, plainly and in an "unequivocal" manner connects each challenged measure in Section I with each legal provision in Section II.⁷² Costa Rica asserts that the meaning of the terms in this phrase alludes to all the members of a set considered individually. According to Costa Rica, in this case, all four measures infringe, "individually", all of the 23 legal obligations cited.⁷³ Costa Rica adds that the phrase "*todas y cada una*" is similar to phrases that have been endorsed by other panels and the Appellate Body.⁷⁴

3.12. Costa Rica argues that the relevant obligations can be identified through a reading of the panel request as a whole. For Costa Rica, the reference to the provisions of the violated covered agreements and its narrative explanation is sufficient to provide "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.⁷⁵

3.13. Costa Rica believes that Panama is wrong to assert that its panel request suffers from the same flaws as the panel requests in *China – Raw Materials*.⁷⁶ Costa Rica argues that the Appellate Body correctly found that the panel requests in *China – Raw Materials* infringed Article 6.2 of the DSU because the complainants failed to provide "the basis on which the Panel and China could determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures". In that respect, the panel requests in that dispute did not clarify (i) which allegations pertained to which particular measure or set of measures identified in the requests, (ii) whether each of the listed measures related to one specific allegation described in the narrative paragraphs, or to several or even all of these allegations, or (iii) whether each of the listed measures allegedly violated one specific provision of the covered agreements, or several of them.⁷⁷

3.14. According to Costa Rica, nothing in the panel requests made it possible to discern the connection between the 37 challenged measures of different kinds and the list of invoked provisions. Costa Rica argues that the factual circumstances in *China – Raw Materials* are different to those in this dispute and that therefore the Appellate Body's reasoning does not apply in the present case. Costa Rica notes that in the present dispute only four measures are challenged and not 37. Costa Rica also asserts that, in contrast to the total absence of any linkage between the challenged

⁶⁷ Panama notes that Costa Rica's first written submission does not contain any claim under Article 5.3 of the SPS Agreement in relation to the measure concerning the importation of strawberries, since Article 5.3 does not apply in the case of this measure. (Panama's first written submission, paras. 38-39).

⁶⁸ Panama's first written submission, para. 44.

⁶⁹ Panama's preliminary ruling request, para. 30. See also Panama's first written submission, paras. 45 and 47.

⁷⁰ Costa Rica's response to Panama's preliminary ruling request, paras. 17 and 54-56.

⁷¹ Costa Rica's response to Panama's preliminary ruling request, para. 20.

⁷² Costa Rica's response to Panama's preliminary ruling request, paras. 18-19. See also *Ibid.* para. 25.

⁷³ Costa Rica's response to Panama's preliminary ruling request, para. 18 (where Costa Rica refers to the definition of the phrase "*cada uno/a*" and the adjective "*todo/a*").

⁷⁴ Costa Rica's response to Panama's preliminary ruling request, para. 23. Costa Rica refers to the phrases "each instance" and "any and all determinations or actions" in the panel requests in *US – Countervailing Measures (China)* and *US – Countervailing and Anti-Dumping Measures (China)*, respectively. (Costa Rica's response to Panama's preliminary ruling request, paras. 23-24 (quoting Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.17-4.18; and *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.13-4.14 and 4.35)).

⁷⁵ Costa Rica's response to Panama's preliminary ruling request, para. 25.

⁷⁶ Costa Rica's response to Panama's preliminary ruling request, paras. 26-27 and 34.

⁷⁷ Costa Rica's response to Panama's preliminary ruling request, paras. 29-30 (quoting Appellate Body Reports, *China – Raw Materials*, para. 226).

measures and the legal basis in the panel requests in *China – Raw Materials*, its panel request clearly links the four challenged measures and the legal basis by indicating that "each and every one" of the measures described in Section I are inconsistent with "each and every one" of the legal claims set out in Section II.⁷⁸

3.15. Costa Rica submits that Panama's assertion that the description of the claims is generic, and that the 23 identified legal provisions contain a wide array of dissimilar obligations that are not sufficiently connected with the measures, has no merit. According to Costa Rica, the 23 provisions are listed individually, and together with each legal provision is a description of the reasons why each of Panama's measures has infringed each of the provisions.⁷⁹ Costa Rica cites the example of Article 5.1 of the SPS Agreement, in respect of which it explained that Panama acted inconsistently with this provision, "because none of the measures at issue 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".⁸⁰ Costa Rica submits that, therefore, the descriptions of the infringed provisions are sufficiently detailed to identify the obligations in question.⁸¹

3.16. Costa Rica asserts that Panama's due process rights are not affected⁸² because its panel request complies with Article 6.2 of the DSU by clearly presenting the measures at issue, connecting them with the provisions violated, and explaining succinctly the grounds for each violation.⁸³

3.17. The **United States** and **Australia** commented as third parties on the legal standard presented by Panama under Article 6.2 of the DSU. These comments are reflected in Section 2.2, which addresses this matter.⁸⁴

3.2 Analysis by the Panel

3.18. The Panel will now assess 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. To this end, and following the legal standard set out above, the Panel will examine whether Costa Rica has, in its panel request, plainly connected the challenged measures with the provisions of the covered agreements claimed to have been infringed.⁸⁵

3.19. Costa Rica's panel request is divided into two main sections: Section I, entitled "Specific Measures at Issue", and Section II, entitled "Brief Summary of the Legal Basis of the Complaint". Section I provides a description of each of the four measures at issue. This section, reproduced in part below, includes the facts that, according to Costa Rica, are related to the adoption and maintenance of the measures:

1. Measure restricting or prohibiting the importation of strawberries originating in Costa Rica

On 20 February 2020, through communication AUPSA-AG-051-2020, and without prior notice, Panama took the decision to prohibit imports of strawberries from Costa Rica. The only reason given by Panama was the alleged detection of oxamyl residues that exceeded Panama's maximum residue levels (MRLs) in two shipments of Costa Rican strawberries sent in February 2020. ...

Despite the information and explanations provided by Costa Rica, Panama continues to maintain the prohibition on imports of Costa Rican strawberries indicated in communication AUPSA-AG-051-2020 of 20 February 2020, which is baseless and lacks scientific evidence, a risk analysis or any other valid justification under WTO rules.

⁷⁸ Costa Rica's response to Panama's preliminary ruling request, paras. 31-33.

⁷⁹ Costa Rica's response to Panama's preliminary ruling request, paras. 35-37.

⁸⁰ Costa Rica's response to Panama's preliminary ruling request, para. 38 (quoting Costa Rica's panel request, p. 6).

⁸¹ Costa Rica's response to Panama's preliminary ruling request, para. 39.

⁸² Costa Rica's response to Panama's preliminary ruling request, para. 58.

⁸³ Costa Rica's response to Panama's preliminary ruling request, para. 55. See also *Ibid.* paras. 54 and 56.

⁸⁴ See paras. 2.13-2.14. above.

⁸⁵ See para. 2.18 above.

2. 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

As stated in a number of communications and in spite of the renewal requests submitted in advance by Costa Rica, Panama decided not to renew the sanitary approvals for various exporting establishments, which expired on 30 June 2020. Until the date of expiry, these establishments had been exporting the following products to Panama for decades: ... Exports of animals products from Costa Rica to Panama were prohibited from 30 June 2020, without there having been a change in Costa Rica's sanitary status, an emergency situation or an increase in the risks associated with the products. Panama's decision not to renew the establishments' approvals thus meant that the market closed down due to the application of a measure that is unsubstantiated and lacks sufficient scientific evidence, a risk analysis or any other justification, thereby constituting a disguised restriction on trade. ...

3. Measure restricting or prohibiting the importation of fresh pineapples originating in Costa Rica

On 29 January 2019, through communication AUPSA-AG-032-2019, and without prior notice, Panama took the decision to prohibit imports of fresh pineapples from Costa Rica. These exports had previously been permitted in line with the requirements established by Panama in Resolution AUPSA-DINAN-116-2008 of 4 July 2008. Panama stated that the reason for the prohibition was the presence of the pest *Maconellicoccus hirsutus* (pink mealybug) in Costa Rica. ...

To date, Panama has maintained the prohibition on imports of fresh Costa Rican pineapples notified in communication AUPSA-AG-032-2019 of 29 January 2019.

4. Measure restricting or prohibiting the importation of plantains and bananas originating in Costa Rica

In October 2019, Panama prohibited imports of plantains and bananas from Costa Rica, without any scientific justification, through communications AUPSA-AG-392-2019 of 10 October 2019 and AUPSA-AG-424-2019 of 25 October 2019, respectively. In these communications, 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. ...⁸⁶

To date, Panama has maintained the prohibition on imports of Costa Rican plantains and bananas notified in communications AUPSA-AG-392-2019 of 10 October 2019 and AUPSA-AG-424-2019 of 25 October 2019.

3.20. Section II begins with an introductory paragraph that precedes the list of legal provisions allegedly violated by Panama. This paragraph reads as follows:

Each 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 agreements⁸⁷:

3.21. The Panel notes that the parties disagree as to whether the phrase "*todas y cada una*" ("each and every one") in Section II of Costa Rica's panel request makes it possible to establish a plain connection between the measures at issue and the provisions allegedly violated. Panama argues that "*todas y cada una*" is a generic phrase that requires it to "guess" which of the alleged violations of the covered agreement applies to each of the specific measures.⁸⁸ For Costa Rica, however, this phrase establishes an unequivocal connection between the measures at issue and the legal basis and plainly connects each of the challenged measures with each of the legal provisions.⁸⁹

⁸⁶ Costa Rica's panel request, pp. 1-6.

⁸⁷ Costa Rica's panel request, p. 6.

⁸⁸ Panama's preliminary ruling request, para. 20.

⁸⁹ Costa Rica's response to Panama's preliminary ruling request, paras. 18-19.

3.22. Since Costa Rica's panel request includes four different measures and claims under multiple provisions, the Panel will carefully analyse "whether it is sufficiently clear which 'problem' is caused by which measure".⁹⁰ To this end, the Panel will begin its analysis by examining the ordinary meaning of the terms that make up the phrase "[t]odas y cada una". As noted by Costa Rica, according to the *Diccionario de la Real Academia Española*, the term "cada uno/a" "[d]enotes a set the members of which are considered individually" ("*[d]enota un conjunto cuyos miembros se consideran uno a uno*"), while the adjective "todo/a" "[i]ndicates all the members of the set denoted by the noun phrase that it modifies" ("*[i]ndica la totalidad de los miembros del conjunto denotado por el sintagma nominal al que modifica*").⁹¹ It is the Panel's understanding that the terms "todo/a" and "cada uno/a", used together, allude to all the elements of a set considered individually.⁹² The Panel therefore considers that the phrase "[t]odas y cada una de las medidas descritas en la Sección I ... son incompatibles con todas y cada una de las siguientes obligaciones" ("*[e]ach and every one of the measures described in Section I ... are inconsistent with each and every one of the following obligations*"), used by Costa Rica in its panel request, should be interpreted to mean that all of the measures described in Section I, considered individually, are inconsistent with all of the obligations listed in Section II, considered individually. It is the Panel's understanding that, in its panel request, Costa Rica connects in this manner each of the four measures at issue with each of the provisions listed therein.

3.23. In the Panel's view, this reading is confirmed by the way in which Costa Rica introduces its claims of inconsistency in the list of legal provisions following the phrase "todas y cada una de las siguientes obligaciones de Panamá conforme a los acuerdos abarcados de la OMC" ("each and every one of the following obligations for Panama under the WTO covered agreements").⁹³ Each bullet point on the list refers to the alleged breach of one or more obligations under the SPS Agreement, the GATT 1994 or the Agreement on Agriculture. Under each of these bullet points, except for one⁹⁴, Costa Rica uses the phrases "cada una de las medidas en cuestión" ("each of the measures at issue"/"none of the measures at issue")⁹⁵ or "ninguna de las medidas en cuestión" ("none of the measures at issue"/"any of the measures at issue").⁹⁶ In this way, Costa Rica emphasizes that the listed provisions, which contain the "obligations ... under the ... covered agreements", are connected with each of the measures at issue.

3.24. It follows from the above that the phrase "todas y cada una" ("each and every one"), read in its context, including the descriptions of the measures in Section I, the terms in the introductory paragraph of Section II and the list of provisions following that paragraph, plainly connects the four measures at issue with the 23 legal provisions allegedly violated. The Panel therefore considers that,

⁹⁰ See Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220).

⁹¹ *Diccionario de la Real Academia Española*, definition of "cada uno, na" <https://dle.rae.es/cada?m=form2#BWjUFxS> (accessed 29 March 2023); definition of "todo, da" <https://dle.rae.es/todo> (accessed 29 March 2023). See also Costa Rica's response to Panama's preliminary ruling request, para. 18.

⁹² Costa Rica's response to Panama's preliminary ruling request, para. 18. As indicated by the *Real Academia Española*, "la expresión 'todos y cada uno de + grupo nominal' aunque aparentemente es redundante, tiene valor enfático" ("the phrase 'each and every one of + nominal group' while apparently redundant, has emphatic value"). See <https://twitter.com/raeinforma/status/300908345076899840?lang=en> (accessed 29 March 2023).

⁹³ Costa Rica's panel request, p. 6. (emphasis added)

⁹⁴ Regarding the claim under Article 5.4 of the SPS Agreement, Costa Rica states that Panama has violated that Article, "because, when determining the appropriate level of sanitary or phytosanitary protection, Panama failed to take into account the objective of minimizing negative trade effects". (Costa Rica's panel request, p. 6). Article 5.4. provides that, "Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects". The Panel understands that the fact that the text of the provision does not explicitly mention the phrase "sanitary or phytosanitary measures" (SPS measures) would explain the formulation of Costa Rica's corresponding claim without explicit reference to "each of", "none of" or "any of" of the measures.

⁹⁵ For example, the panel request states that Panama has violated Article 5.1 of the SPS Agreement, "dado que cada una de las medidas en cuestión no se basa en una evaluación, adecuada a las circunstancias, de los riesgos existentes para la vida y la salud de las personas y de los animales o para la preservación de los vegetales, ..." ("because none of the measures at issue are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, ..."). (Costa Rica's panel request, p. 6).

⁹⁶ In its panel request, Costa Rica claims that Panama has violated Article 3.1 of the SPS Agreement, "dado que ninguna de las medidas en cuestión se basa en normas, directrices o recomendaciones internacionales existentes" ("because none of the measures at issue are based on existing international standards, guidelines or recommendations"). (Costa Rica's panel request, p. 7).

through the use of the phrase "*todas y cada una*", Costa Rica is informing Panama in a sufficiently clear manner of its claim that each of the four measures at issue is inconsistent with each of the obligations referred to in Section II of its panel request.

3.25. The Panel observes that Panama, in support of its arguments that the phrase "*todas y cada una*" does not establish a clear connection between the measures at issue and the provisions allegedly violated, notes that the Appellate Body has cautioned against the use of "convenient" phrases in panel requests, in light of the high level of precision required under Article 6.2 of the DSU.⁹⁷ Panama refers specifically to phrases used in the panel requests in the disputes *India – Patents (US)* and *EC – Tube or Pipe Fittings*.⁹⁸

3.26. The Panel notes that the phrases discussed in *India – Patents (US)* ("including but not necessarily limited to") and *EC – Tube or Pipe Fittings* ("especially (but not exclusively)") were used in the respective panel requests to present a list of allegedly infringed provisions, in such a way as to highlight certain articles forming part of an open-ended set of provisions.⁹⁹ In both disputes, the complainants submitted claims under a provision not explicitly identified in the panel requests at a later stage in the proceedings.¹⁰⁰ The phrases "including but not necessarily limited to" and "especially (but not exclusively)" were considered inadequate to comply with the requirements of Article 6.2 of the DSU because the panel requests failed to identify the specific provision that had allegedly been violated.¹⁰¹ In this regard, the Appellate Body has cautioned against the use of this type of phrase, since non-exhaustive listing could lead to the inclusion of any and all other claims not specifically included in the panel request.¹⁰²

3.27. The Panel does not consider Costa Rica's panel request to present an open-ended set of provisions. On the contrary, in the Panel's view, the sentence "[e]ach and every one of the measures described in Section I of this request ... are inconsistent with each and every one of the following obligations for Panama" instead suggests a closed set in which both the measures and the claims are clearly identified in the panel request.

3.28. Panama further submits that in the panel request there is nothing in the description of the measures (Section I) or the legal basis (Section II) to indicate that Costa Rica is claiming that *every one* of the measures at issue violates *every one* of the provisions mentioned.¹⁰³ Regarding the description of the measures, Panama considers that the narrative part fails to provide a level of detail that explains the claim. With regard to the legal basis, Panama states that Costa Rica has presented a brief and generic narrative that paraphrases the language of the relevant provision, without identifying which of the various measures described in Section I relates to the narrative description for each provision in Section II.¹⁰⁴

⁹⁷ Panama's preliminary ruling request, para. 21 (quoting Appellate Body Report, *US – Carbon Steel*, para. 126).

⁹⁸ Panama's preliminary ruling request, para. 21.

⁹⁹ In *India – Patents (US)*, the panel request stated that: "India's legal regime appears to be inconsistent with the obligations of the [Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)], *including but not necessarily limited to* Articles 27, 65 and 70". (United States' panel request, WT/DS50/4. (emphasis added). In *EC – Tube or Pipe Fittings*, the panel request contained, *inter alia*, a claim of violation under "Article 6 [of the Anti-Dumping Agreement], *especially (but not exclusively)* Articles 6.1, 6.2, 6.4, 6.6, 6.10 and 6.12". (Brazil's panel request, WT/DS219/2, p. 2). (emphasis added)

¹⁰⁰ In *India – Patents (US)*, the complainant submitted an alternative claim under Article 63 of the TRIPS Agreement, which was not mentioned in the panel request. (Appellate Body Report, *India – Patents (US)*, paras. 89-91). In *EC – Tube or Pipe Fittings*, some of the provisions cited in the complainant's first written submission did not appear in the list of provisions in its panel request. (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14).

¹⁰¹ In *India – Patents (US)*, the Appellate Body noted that there was a failure to comply with even the minimum standard of listing the provisions allegedly violated. (Appellate Body Report, *India – Patents (US)*, para. 91). Similarly, the panel in *EC – Tube or Pipe Fittings* noted that the phrase "especially, but not exclusively" may be convenient, but was inadequate to comply with the requirements of Article 6.2 of the DSU, since the general reference to the Articles was not sufficiently clear to identify the specific provisions at issue, such as Articles 6.9 and 6.13 of the Anti-Dumping Agreement. (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14).

¹⁰² Appellate Body Report, *EC – Fasteners (China)*, para. 597.

¹⁰³ Panama's preliminary ruling request, para. 19. (emphasis original)

¹⁰⁴ Panama's preliminary ruling request, paras. 15, 25 and 27-28.

3.29. In this regard, Panama refers to an example regarding the measure concerning the importation of strawberries. Panama notes that, in the section on the measures at issue, Costa Rica contends that this measure "is baseless and lacks scientific evidence, a risk analysis or any other valid justification under WTO rules". For Panama, however, the phrase "each and every one" in the section on the legal basis indicates that Costa Rica considers this measure to be in violation of provisions that, according to Panama, have no connection with the scientific underpinnings of an SPS measure, such as Articles 2.3, 5.5, 5.6, 6.1 and Annex C of the SPS Agreement. According to Panama, the description of the legal basis of the complaint does not allow it to discern the provision that has been violated by the measure at issue.¹⁰⁵

3.30. The Panel understands that, through this example, Panama is raising the question of whether Costa Rica should have provided a greater level of detail in its description of the measures at issue (Section I) and the legal basis (Section II) to plainly connect the measures at issue with the provisions allegedly violated. Panama also mentions the examples of the claims under Articles 5.5 and 2.3 of the SPS Agreement and Article I:1 of the GATT 1994 and under Annex C(1)(a)-(c) of the SPS Agreement.¹⁰⁶ The Panel will now address the example of the claims under Articles 5.5 and 2.3 of the SPS Agreement, which Panama refers to in more detail, to determine whether the panel request provides a brief summary of the claims sufficient to present the problem clearly.¹⁰⁷

3.31. In relation to Articles 5.5 and 2.3 of the SPS Agreement, the panel request states as follows in the list of allegedly violated provisions in Section II:

Each 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:

...

Article 5.5 of the SPS Agreement, because each of the measures at issue reflects arbitrary or unjustifiable distinctions in the levels that Panama considers to be appropriate in different situations, resulting in discrimination or a disguised restriction on international trade. Consequently, Article 2.3 of the SPS Agreement, because each of the measures at issue arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail and constitutes a disguised restriction on international trade.¹⁰⁸

3.32. The Panel recalls that the introductory paragraph in Section II of the panel request connects each of the measures at issue with each of the provisions allegedly violated¹⁰⁹; in this case, with Articles 5.5 and 2.3 of the SPS Agreement. The Panel notes that, in a bullet point following the introductory paragraph, Costa Rica provides a narrative description of its claim under these Articles, in which it introduces the reasons for the violation claimed. To do this, it uses the term "because" and then paraphrases the provision in question. Panama submits that "[t]he mere recitation of the obligations" under these Articles is not sufficient.¹¹⁰

3.33. The Panel previously explained that to determine whether "a brief summary of the legal basis of the complaint" is "sufficient to present the problem clearly", both the language contained in the panel request and the nature of the obligations contained in the provisions at issue should be examined.¹¹¹ In this regard, the Panel notes that both Article 5.5 and Article 2.3 cover two obligations – not to discriminate and not to impose disguised restrictions on international trade.¹¹² The Panel

¹⁰⁵ Panama's preliminary ruling request, para. 20.

¹⁰⁶ See e.g. Panama's preliminary ruling request, paras. 27-28; first written submission, para. 44.

¹⁰⁷ Panama's preliminary ruling request, paras. 26-27; first written submission, para. 44.

¹⁰⁸ Costa Rica's panel request, pp. 6-7.

¹⁰⁹ See para. 3.22 above.

¹¹⁰ Panama's preliminary ruling request, para. 27.

¹¹¹ Appellate Body Reports, *China – HP SSST (Japan)/China – HP SSST (EU)*, para. 5.32. See also Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9).

¹¹² Article 5.5 of the SPS Agreement contains two obligations with respect to appropriate levels of protection (ALOP), namely: to avoid arbitrary or unjustifiable distinctions in the levels a Member considers appropriate in different situations, if such distinctions result in (i) discrimination or (ii) a disguised restriction on international trade. Similarly, Article 2.3 of the SPS Agreement requires: (i) Members to ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar

recalls that where provisions contain not one single, distinct obligation, but rather multiple obligations, the panel request might need to specify which of the obligations contained in the provision is being challenged.¹¹³

3.34. In its panel request, Costa Rica paraphrases the language of Articles 5.5 and 2.3 of the SPS Agreement regarding each of the two obligations. This presentation of the claims does not constitute a mere listing of provisions that contain various obligations, as paraphrasing the specific language of the relevant obligation provides a greater level of detail than simple listing.¹¹⁴ Furthermore, the obligations contained in Articles 5.5 and 2.3 are clearly delineated, so the paraphrasing of the relevant language of these Articles specifies in a sufficiently clear manner the obligations invoked by Costa Rica (namely the obligations not to discriminate and not to impose disguised restrictions on international trade) in relation to each of the measures at issue.

3.35. Panama states that, in the narrative part of Section I of the panel request, Costa Rica should have provided additional details regarding its claims, such as, for example, (i) the distinctions in the levels of protection that Panama considers appropriate in different situations, (ii) the reason why Costa Rica considers such distinctions to constitute arbitrary or unjustifiable discrimination between Costa Rica and other Members, and (iii) the reason why the conditions in Costa Rica would be identical or similar to those in other Members.¹¹⁵

3.36. The Panel recalls that Article 6.2 of the DSU requires only that the panel request be sufficiently detailed to present the claims on which the complaint is based, and not the *arguments* supporting them.¹¹⁶ The term "arguments" is understood to mean those statements adduced by the complainant to demonstrate that the measure at issue does indeed infringe upon the identified treaty provision.¹¹⁷ The details that Panama considers should appear in the panel request are indeed elements that Costa Rica would have to demonstrate to support its claim of violation of Articles 5.5 and 2.3 of the SPS Agreement. These additional details or narratives therefore constitute "arguments" and, as such, do not fall within the Article 6.2 requirement to provide a brief summary of the claims on which Costa Rica bases its complaint. Costa Rica can submit them when developing its claims in subsequent communications.¹¹⁸

3.37. The Panel therefore considers that Costa Rica presented its claim under Articles 5.5 and 2.3 of the SPS Agreement in a sufficiently clear manner, connecting each of the measures at issue with the specific obligations contained in these Articles, and thus complying 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.

3.38. Panama also argues that Costa Rica should have included more details regarding its claims under Annex C(1)(a)-(c) to the SPS Agreement, particularly as to how each and every one of the measures involve or relate to control, inspection and approval procedures, and how or why those

conditions prevail, including between their own territory and that of other Members, and (ii) that SPS measures not be applied in a manner which would constitute a disguised restriction on international trade.

¹¹³ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9, in turn quoting Appellate Body Reports, *China – Raw Materials*, para. 220).

¹¹⁴ See Appellate Body Report, *Thailand – H-Beams*, para. 90. Narratives that align the claim with the relevant language of the provision provide clarity to the presentation of claims under provisions containing different obligations. (See e.g. Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.32-7.33).

¹¹⁵ Panama's preliminary ruling request, para. 27.

¹¹⁶ Appellate Body Reports, *Korea – Dairy*, para. 123; *Korea – Pneumatic Valves (Japan)*, paras. 5.6, 5.31, and 5.33 (quoting Appellate Body Reports, *China – HP SSST (Japan)/China – HP SSST (EU)*, para. 5.14; *US – Countervailing Measures (China)*, para. 4.9). (emphasis original). See also Appellate Body Report, *EC – Bananas III*, para. 141.

¹¹⁷ Appellate Body Report, *Korea – Dairy*, para. 139.

¹¹⁸ The Panel also notes that it is Costa Rica's prerogative not to develop some of the claims included in its panel request. However, this prerogative is an issue different from the assessment of the consistency of the panel request with Article 6.2 of the DSU. (Panel Report, *US – Countervailing Measures (China)*, para. 4.19). Furthermore, Panama's argument that Costa Rica sought to connect measures and claims that cannot be connected (in Panama's view, the measure concerning the importation of strawberries and Article 5.3 of the SPS Agreement) is an issue that concerns the applicability of a provision to a measure, and not whether there is a clear connection between the measures and claims in the panel request under Article 6.2 of the DSU. (Panama's first written submission, paras. 39-40).

measures violate Annex C(1)(a)-(c).¹¹⁹ The reasoning developed by the Panel under Articles 5.5 and 2.3 of the SPS Agreement is equally applicable in this case. The Panel considers that the details that Panama believes Costa Rica should have included in relation to Annex C(1)(a)-(c) to the SPS Agreement constitute arguments and, as such, Article 6.2 does not require Costa Rica to include them in its panel request.

3.39. The Panel understands that its reasoning above regarding the claims under Articles 5.5 and 2.3 and Annex C(1)(a)-(c) of the SPS Agreement is equally applicable to the rest of the claims in Costa Rica's panel request. In this regard, the Panel considers that Costa Rica has presented its claims in a sufficiently clear manner, including in the case of provisions establishing multiple obligations, since it has used the relevant language of the provision and the narrative description in the panel request in a manner sufficient to present the problem clearly.

3.40. Lastly, the Panel will address Panama's argument that Costa Rica's panel request suffers from the same fundamental flaws identified by the Appellate Body in *China – Raw Materials*.¹²⁰ The relevant preliminary ruling in that dispute covered Section III of the panel requests at issue, which addressed "Additional Restraints Imposed on Exportation" for certain raw materials. The section contained a narrative description of the measure, an open-ended list of legal instruments in which the complainants understood the measures to be reflected¹²¹ and a paragraph indicating the provisions of the covered agreements that had allegedly been violated.

3.41. The Appellate Body noted that the section in question referred generically to "Additional Restraints Imposed on Exportation" and raised multiple problems stemming from several different obligations arising under various provisions of the GATT 1994, China's Accession Protocol, and China's Accession Working Party Report.¹²² The Appellate Body, like the panel, did not read the section in question as advancing all claims, under all provisions, with respect to all measures.¹²³ The Appellate Body considered that the complainants were challenging "some (groups of) measures as inconsistent with some (groups) of the listed ... obligations"¹²⁴, and that the combination of wide-ranging obligations and 37 different legal instruments did not allow it to discern the problem. The Appellate Body thus concluded that the complainants had failed to present the legal basis for their complaints so that the panel and China could determine with sufficient clarity what "problem" or "problems" were alleged to have been caused by which measures, contrary to the requirements of Article 6.2 of the DSU.¹²⁵

3.42. The Panel does not consider the panel request in the present dispute to suffer from the same flaws as the panel requests in *China – Raw Materials*. Costa Rica's panel request does not contain a general description of a type of measure and an open-ended list of instruments reflecting the measures; rather, it describes four specific measures, the nature and content of which are defined in four specific sections in Section I thereof. "Each and every one" of these measures are connected to "each and every one" of the obligations listed in Section II of the panel request, where Costa Rica briefly summarizes the legal basis of its complaint. Unlike the panel requests in *China – Raw Materials*, the text and structure of Costa Rica's panel request do not give rise to different interpretations as to how the various instruments and legal obligations identified therein are connected.

3.43. For the foregoing reasons, the Panel concludes that Costa Rica's panel request plainly connects the challenged measures with the provisions of the covered agreements claimed to have been infringed. Consequently, the Panel finds that Costa Rica's panel request is not inconsistent with the

¹¹⁹ Panama's preliminary ruling request, para. 28.

¹²⁰ Panama's preliminary ruling request, paras. 16-17 (quoting Appellate Body Reports, *China – Raw Materials*, paras. 226-229). See para. 3.4 above.

¹²¹ The list began with the phrase "among others" and ended with the phrase "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures". See e.g. United States' panel request, WT/DS394/7, pp. 6-9.

¹²² Appellate Body Reports, *China – Raw Materials*, para. 230.

¹²³ Appellate Body Reports, *China – Raw Materials*, para. 231. The panel rejected this interpretation because, in the panel's view, it seemed to contradict the substance of the narrative paragraphs, according to which some (groups of) measures were inconsistent with some of the listed obligations. (Panel Reports, *China – Raw Materials*, Annex F-1, p. F-11, para. 36).

¹²⁴ Appellate Body Reports, *China – Raw Materials*, para. 231.

¹²⁵ Appellate Body Reports, *China – Raw Materials*, para. 231. See also *Ibid.* paras. 226-229.

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".

3.44. This conclusion leads the Panel to address as the final issue in this section Panama's argument concerning the alleged violation of its due process rights. According to Panama, this violation stems from the failure of Costa Rica's panel request to meet 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".¹²⁶ Costa Rica asserts that since its panel request is clear as to the connection between the measures at issue and the legal basis, the premise of the "alleged impact on due process" claimed by Panama is not valid.¹²⁷

3.45. A determination as to whether due process has been respected does not necessitate a separate examination of whether the parties suffered prejudice, considering that "[t]his due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".¹²⁸ Therefore, if the complainant meets the requirement of plainly connecting the challenged measures with the provisions claimed to have been infringed, the respondent can know what case it has to answer and can begin preparing its defence.¹²⁹

3.46. The Panel notes that the finding that Costa Rica's panel request does not fail to meet the requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" invalidates the premise underpinning the alleged violation of Panama's due process rights. Accordingly, the Panel finds that, contrary to Panama's claims, Panama's due process rights have not been violated as a result of failure to comply with the aforementioned requirement in Article 6.2 of the DSU.

4 WHETHER 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

4.1. The Panel will now assess the second issue raised by Panama, namely whether the claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement, as developed in Costa Rica's first written submission, fall outside the Panel's terms of reference. The arguments of the parties and the third parties are set out below, followed by the Panel's analysis.

4.1 Arguments of the parties and third parties

4.2. **Panama** submits that the claims developed by Costa Rica in its first written submission under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement are not within the Panel's terms of reference because they were not included in the panel request.¹³⁰

4.3. Panama notes that in its first written submission, Costa Rica abandoned the claims relating to Annex B(1) to the SPS Agreement, which were included in the panel request, and replaced them with new claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement, which were not included in the panel request. According to Panama, these are separate transparency obligations under Annex B to the SPS Agreement.¹³¹ Panama submits that, while Annex B(1) requires the publication of *adopted* sanitary and phytosanitary regulations, Annex B(5)(b) imposes a notification requirement for *proposed* sanitary and phytosanitary regulations, and Annex B(6)(a) refers to urgent problems of health protection where Members are not required to notify proposed regulations as long as they notify adopted regulations immediately.¹³²

¹²⁶ Panama's preliminary ruling request, para. 12.

¹²⁷ Costa Rica's response to Panama's preliminary ruling request, para. 54.

¹²⁸ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640).

¹²⁹ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8. The requirements of precision in the panel request flow from the two essential purposes of the panel's terms of reference: (i) to define the scope of the dispute; and (ii) to serve the due process objective. (Appellate Body Report, *US – Carbon Steel*, para. 130).

¹³⁰ Panama's first written submission, para. 49.

¹³¹ Panama's first written submission, para. 50.

¹³² Panama's first written submission, paras. 51-52. (emphasis original)

4.4. Panama considers that the circumstances of this case are similar to those in *Costa Rica – Avocados (Mexico)*.¹³³ According to Panama, the panel in that dispute correctly found that the aspect of Mexico's claim under Article 6.1 of the SPS Agreement concerning the adaptation of the challenged measures to the phytosanitary characteristics of the area of origin of the product in question was outside the Panel's terms of reference. The panel's conclusion was based on the fact that, in its panel request, Mexico had limited its claim under Article 6.1 to the alleged failure to adapt the measures to the sanitary or phytosanitary characteristics of the area to which the product in question was *destined*, with no reference to the area of *origin* of the product.¹³⁴ Panama asserts that, likewise, the panel request in the present case limits Costa Rica's transparency-related claims to a specific obligation under Annex B(1) to the SPS Agreement. Therefore, Panama is of the view 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.¹³⁵

4.5. **Costa Rica** submits that the claims under Article 7 and Annex B(5)(b) and Annex B(6)(a), as developed in its first written submission, fall within the Panel's terms of reference because Costa Rica included them in its panel request.¹³⁶ Costa Rica argues that it is clear from its panel request that it challenged both the *transparency* obligations in Article 7 and the *publication* obligation in Annex B(1).¹³⁷

4.6. Costa Rica notes that it maintains its claim relating to *transparency*, i.e. the notification obligation provided for in Article 7 and, by extension, Annex B(5)(b) and Annex B(6)(a) regarding the notification obligation. According to Costa Rica, Article 7 in itself has operational content with respect to the SPS notification obligation that Costa Rica developed in its first written submission. Costa Rica submits that Annex B(5)(b) and Annex B(6)(a) fall within the Panel's terms of reference because Article 7, which is expressly included in the panel request, makes an explicit reference to Annex B.¹³⁸

4.7. Costa Rica considers that, in any event, Article 7, which is within the Panel's terms of reference, provides the basis for its SPS notification claim.¹³⁹ Costa Rica argues that this provision "can be applied independently of Annex B"¹⁴⁰ because it establishes that "Members shall notify changes in their [SPS] measures". In this connection, Costa Rica compares the relationship between Article 7 and Annex B to the relationship between Article 8 and Annex C. Costa Rica notes that in its panel request it refers to "Article 7 *and* Annex B, paragraph 1, of the SPS Agreement", and that "[t]he conjunction 'and' indicates union, sum or addition".¹⁴¹ In contrast, Costa Rica did not use the conjunction "and" in relation to Article 8, but referred to "Annex C, paragraph 1(a) ... *read in conjunction with* Article 8". In Costa Rica's view, Article 8 does not in itself have operational content, but refers to the specific obligations contained in Annex C and to the other obligations of the SPS Agreement.¹⁴²

4.8. **Canada** asserts as a third party that Costa Rica has not stated the claims under Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement with sufficient clarity to meet the standard in Article 6.2 of the DSU.¹⁴³ Canada notes that, in its panel request, Costa Rica refers only to Annex B(1) to the SPS Agreement, that Annex B contains several obligations in its other paragraphs, and that Annex B(5)(b) and Annex B(6)(a) contain transparency obligations that are separate and different from those in Annex B(1) and should be specifically listed.¹⁴⁴ Canada is of the view that the relationship between Article 7 and Annex B of the SPS Agreement, on the one hand, and between Article 8 and Annex C of the Agreement, on the other, is similar, in that each Article contains both an obligation the fulfilment of which is linked to compliance with the provisions of the relevant Annex, and a separate obligation that is independent of those provisions (namely, the obligation under Article 7 to notify changes to SPS measures and the obligation under Article 8 to ensure that

¹³³ Panama's first written submission, para. 53.

¹³⁴ Panama's first written submission, paras. 54-55. (emphasis original)

¹³⁵ Panama's first written submission, para. 55.

¹³⁶ Costa Rica's response to Panel question No. 66, para. 3.22.

¹³⁷ Costa Rica's response to Panel question No. 66, para. 3.23. (emphasis original)

¹³⁸ Costa Rica's response to Panel question No. 66, paras. 3.24-3.25.

¹³⁹ Costa Rica's response to Panel question No. 66, para. 3.29.

¹⁴⁰ Costa Rica's response to Panel question No. 66, para. 3.28.

¹⁴¹ Costa Rica's response to Panel question No. 66, para. 3.26. (emphasis original)

¹⁴² Costa Rica's response to Panel question No. 66, para. 3.27. (emphasis original)

¹⁴³ Canada's third-party response to Panel question No. 1, para. 9.

¹⁴⁴ Canada's third-party response to Panel question No. 1, paras. 5-8.

procedures are not inconsistent with the provisions of the SPS Agreement).¹⁴⁵ According to Canada, the reference to Article 7 also does not provide sufficient clarity for the purposes of Article 6.2 of the DSU.¹⁴⁶

4.9. **The United States** asserts as a third party that if a provision is not mentioned in the panel request, this provision and the commitment therein would not form part of the matter referred to the DSB, and would fall outside the Panel's terms of reference. The United States adds that there would not be a basis for a panel to make findings or recommendations with respect to a provision not cited in the panel request.¹⁴⁷ In the United States' view, the relationship between Article 7 and Annex B, on the one hand, and Article 8 and Annex C, on the other, is similar as Annexes B and C express precise commitments to be carried out under Articles 7 and 8, respectively.¹⁴⁸

4.10. **The European Union** asserts as a third party that the claims under Annex B(5)(b) and Annex B(6)(a) are not mentioned in the panel request and consequently fall outside the Panel's terms of reference. The European Union considers that the transparency claims included in the panel request refer to Article 7 and Annex B(1) and to Article X:1 of the GATT 1994.¹⁴⁹ The European Union notes that Annex B provides details with regard to the notification and provision of information requirements, and that, similarly, Annex C provides details with regard to the operation of control, inspection and approval procedures.¹⁵⁰

4.2 Analysis by the Panel

4.11. The Panel will now consider whether Costa Rica's claims under Annex B(5)(b) and Annex B(6)(a) fall outside its terms of reference, as alleged by Panama. In so doing, the Panel will examine whether Costa Rica properly identified these claims in its panel request. The Panel recalls that the panel request governs a panel's terms of reference¹⁵¹, so measures or claims not identified in the panel request fall, as a general rule, outside its terms of reference.¹⁵² At the same time, it should also be recalled that errors in a panel request cannot be "cured" subsequently and, therefore, the claims not included or included deficiently in a panel request cannot be the subject of consideration by a panel.¹⁵³

4.12. The Panel notes that the only reference to Annex B of the SPS Agreement in Costa Rica's panel request is in the thirteenth bullet point in Section II on the legal basis of the complaint. The bullet point introduces the alleged inconsistency of the measures at issue with:

Article 7 and Annex B, paragraph 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 nonconformities in imports from Costa Rica.¹⁵⁴

4.13. This bullet point explicitly mentions Annex B(1) to the SPS Agreement. The fact that Costa Rica refers to "transparency and *publication* obligations in relation to each of the measures at issue, including by failing to *publish* the MRLs for substances" confirms that Costa Rica's Annex B claim is made under Annex B(1), which provides that "Members shall ensure that all sanitary and phytosanitary regulations which have been adopted *are published* promptly". It therefore follows from the language in the panel request that Costa Rica's claim in its panel request covers the transparency aspect relating to publication, and specifically the obligation contained in Annex B(1).

¹⁴⁵ Canada's third-party response to Panel question No. 2(b), para. 11. See also Ibid. paras. 12-18.

¹⁴⁶ Canada's third-party response to Panel question No. 1, para. 9.

¹⁴⁷ United States' third-party response to Panel question No. 1, paras. 3-4.

¹⁴⁸ United States' third-party response to Panel question No. 2, para. 9. See also Ibid. para. 7-8.

¹⁴⁹ European Union's third-party response to Panel question No. 1, paras. 2-3.

¹⁵⁰ European Union's third-party response to Panel question No. 2, paras. 4-5.

¹⁵¹ Appellate Body Reports, *China – HP SSST (Japan)/China – HP SSST (EU)*, para. 5.12.

¹⁵² See Panel Reports, *EU – Energy Package*, circulated to WTO Members 10 August 2018, appealed 21 September 2018, para. 7.103; and *India – Agricultural Products*, para. 7.103.

¹⁵³ Panel Report, *Colombia – Textiles (Article 21.5 – Panama)*, para. 7.368. To permit otherwise would undermine the due process rights enshrined in Articles 6.2 and 7.1 of the DSU. (Panel Report, *EU – Energy Package*, circulated to WTO Members 10 August 2018, appealed 21 September 2018, para. 7.98).

¹⁵⁴ Costa Rica's panel request, p. 7.

4.14. In the panel request, the Panel finds no explicit mention of Annex B(5) on the *notification* of proposed sanitary and phytosanitary regulations, nor of Annex B(6), which exempts Members from the obligation of Annex B(5) in the event of urgent problems of health protection. Moreover, the panel request contains no reference to the language of these provisions that could lead to the conclusion that Costa Rica has raised claims under these provisions. The panel request therefore fails to minimally identify the claims under Annex B(5)(b) and Annex B(6)(a).¹⁵⁵

4.15. Costa Rica argues that Annex B(5)(b) and Annex B(6)(a) fall within the Panel's terms of reference because Article 7, which is within the Panel's terms of reference, contains an explicit reference to Annex B.¹⁵⁶ In addition, Costa Rica asserts that its claim under Article 7 can be applied independently of Annex B with respect to the notification obligation.¹⁵⁷

4.16. The Panel notes that Article 7 provides that "Members shall notify changes in their [SPS] measures and shall provide information on their [SPS] measures in accordance with the provisions of Annex B". As is clear from the language of this provision, Article 7 and Annex B are intertwined and must be read together.¹⁵⁸ Both Article 7 and Annex B set out transparency obligations.¹⁵⁹ Article 7 contains two transparency obligations: to notify changes in SPS measures and to provide information on SPS measures. Annex B, for its part, sets out specific obligations on the publication of SPS regulations (paragraphs 1 and 2), enquiry points (paragraphs 3 and 4), and notification procedures (paragraphs 5-10).

4.17. In the Panel's view, the relationship between Article 7 and Annex B is similar to the relationship between Article 8 and Annex C, which pertain to control, inspection and approval procedures.¹⁶⁰ Article 7 requires Members to notify changes in SPS measures and to provide information *in accordance with* the provisions of Annex B, while Article 8 requires Members to *observe* the provisions of Annex C in the operation of control, inspection and approval procedures.¹⁶¹ In both cases, the respective annexes elaborate upon the obligations to be met under the provisions in question, as suggested by the ordinary meaning of the Spanish terms "*de conformidad con*" ("in accordance with") ("*conforme a*"¹⁶² ("in conformity with")) and "*observar*" ("to observe") ("*guardar y cumplir*"¹⁶³ ("keep and comply with")), which are used in reference to the provisions of the annexes.¹⁶⁴ In the case of Article 7, the phrase "in accordance with the provisions of Annex B" qualifies both of the preceding obligations, namely, to notify changes in SPS measures and to provide information on SPS measures. Costa Rica's reading of this provision as containing an obligation independent of Annex B is therefore not supported by the language of Article 7.

4.18. In its first written submission, Costa Rica acknowledges that Article 7 and Annex B should be read together¹⁶⁵, and claims that Panama acted inconsistently with Article 7 as a consequence of

¹⁵⁵ The Panel recalls that the requirement to provide a brief summary of the legal basis of the complaint under Article 6.2 of the DSU requires, at the very least, that the provisions of the covered agreements claimed to have been violated be listed (i.e. identified). (Appellate Body Reports, *Korea – Dairy*, paras. 123-124; *US – Carbon Steel*, para. 130; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17).

¹⁵⁶ Costa Rica's response to Panel question No. 66, paras. 3.24-3.25.

¹⁵⁷ Costa Rica's response to Panel question No. 66, paras. 3.28-3.29.

¹⁵⁸ Panel Report, *India – Agricultural Products*, para. 7.741. See also Panel Report, *Russia – Pigs (EU)*, para. 7.1416.

¹⁵⁹ Article 7 is entitled "Transparency" and Annex B is entitled "Transparency of Sanitary and Phytosanitary Regulations".

¹⁶⁰ Both Article 8 and Annex C are entitled "Control, Inspection and Approval Procedures".

¹⁶¹ The Panel notes that Article 8 also includes the obligation to otherwise ensure that procedures are not inconsistent with the provisions of the SPS Agreement.

¹⁶² *Diccionario de la Real Academia Española*, definition of "*conformidad*", available at: <https://dle.rae.es/conformidad> (accessed 29 March 2023).

¹⁶³ *Diccionario de la Real Academia Española*, definition of "*observar*", available at: <https://dle.rae.es/observar?m=form> (accessed 29 March 2023).

¹⁶⁴ The French version of the SPS Agreement is particularly instructive in this respect, as it uses the phrases "*conformément aux*" for "*de conformidad con*" in Article 7, and "*se conformeront aux*" for "*observar*" in Article 8. Both sentences in the French version derive from the same verb "*se conformer*" ("to conform"), which is defined as "*devenir conforme (à); se comporter de manière à être en accord (avec)*" ("to come into conformity (with); to behave in such a way as to be in accordance (with)") and which is a synonym of "*observer*" ("to observe"). (*Le Petit Robert Dictionnaire de la Langue Française*, definition of "*conformer*", available at: <https://dictionnaire.lerobert.com/definition/conformer> (accessed 29 March 2023)).

¹⁶⁵ Costa Rica's first written submission, para. 1205 (referring to Panel Report, *India – Agricultural Products*, para. 7.741).

acting inconsistently with Annex B(5)(b) and Annex B(6)(a).¹⁶⁶ In line with this understanding of the relationship between Article 7 and Annex B, in its responses to the Panel's questions, Costa Rica refers to Article 7 to assert that, because of "the explicit reference" made by that Article to Annex B, the claims under Annex B(5)(b) and Annex B(6)(a) fall within the Panel's terms of reference. The Panel has the following observations to make in this regard.

4.19. First, as mentioned above, Article 7 contains two transparency obligations. In its panel request, Costa Rica does not specify the Article 7 obligation allegedly breached by the measures at issue, but refers generally to Panama's "transparency and publication obligations".¹⁶⁷ Second, Annex B sets out a number of obligations pertaining to the transparency of sanitary and phytosanitary regulations, covering three distinct areas: the publication of regulations, enquiry points, and notification procedures. Third, in the relevant bullet point of Section II of Costa Rica's panel request, Article 7 is accompanied only by a reference to Annex B(1). Consequently, the panel request does not duly inform Panama of the claims under Annex B(5)(b) and Annex B(6)(a) regarding the notification of proposed sanitary or phytosanitary regulations, which Costa Rica developed in its first written submission.¹⁶⁸

4.20. The Panel therefore does not consider that, in this case, the reference to Article 7 of the SPS Agreement in Costa Rica's panel request is sufficient to include claims under Annex B(5)(b) and Annex B(6)(a) to the Agreement in the Panel's terms of reference.

4.21. In the light of all the above considerations, the Panel concludes that Costa Rica has not included the claims under Annex B(5)(b) and Annex B(6)(a) in its panel request, and these claims therefore fall outside the Panel's terms of reference.

5 CONCLUSION

5.1. In the light of the above considerations, the Panel finds that:

- a. 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"; and
- b. 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.

5.2. This preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties in the course of the proceedings.

¹⁶⁶ See e.g. Costa Rica's first written submission, para. 1220.

¹⁶⁷ Where a provision contains multiple and distinct obligations, the panel request should specify which of the obligations contained in the provision is being challenged. (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6).

¹⁶⁸ The Panel recalls that the purpose of the requirement in Article 6.2 of the DSU to specify the claims sufficiently is to allow the defending party and the third parties to know the legal basis of the complaint. (Appellate Body Report, *EC – Bananas III*, para. 143).