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

**(DS599)**

**THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA**

**March 1, 2023**

## EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

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 that 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.