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

(DS599)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE QUESTIONS TO THE THIRD PARTIES

February 15, 2023

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Argentina – Import Measures (AB)	Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R, adopted 26 January 2015
EC – Approval and Marketing of Biotech Products (Panel)	Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293R, adopted 21 November 2006
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products,* WT/DS76/AB/R, adopted 19 March 1999
US – Animals (Panel)	Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina,* WT/DS447/R, adopted on 31 August 2015

QUESTION 1: Panama asserts that Costa Rica's claims under Annex B(5)(b) and B(6)(a) to the SPS Agreement -relating to the procedures for notifying sanitary and phytosanitary (SPS) regulations to WTO Members- are outside the Panel's terms of reference because Costa Rica failed to include them in its request for the establishment of a panel.[1] Please comment on Panama's claim.

U.S. Response to Question 1:

1. Article 6.2 of the DSU provides in relevant part:

> 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. 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.[2] 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.[3]

3. Panama argues that Costa Rica's panel request identified a claim in relation to SPS Agreement Annex B(1), but that in its first submission, Costa Rica has instead advanced claims under Annex B(5)(b) and Annex B(6)(a). 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.

4. That is, that 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.

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[1] Panama's first written submission, paras. 49-58.

[2] *See Argentina – Import Measures (AB)*, para. 5.39 (noting that a panel request meets the element of DSU Art. 6.2 to "present the problem clearly" by connecting the challenged measure with the provisions claimed to have been infringed).

[3] *See, e.g.*, DSU Appendix 3, para. 4: "Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments."

QUESTION 2: Article 7 of the SPS Agreement states that "Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B."

(a) Does Article 7 of the SPS Agreement contain normative content that allows it to be applied independently of Annex B to the SPS Agreement, or should it be read in conjunction with that Annex?

(b) Is the relationship between Article 7 of the SPS Agreement and Annex B thereto of a similar nature as that between Article 8 of the SPS Agreement and Annex C thereto, with respect to the joint or independent application of said Articles with the respective Annexes?

U.S. Response to Question 2(a), (b):

5. As an initial matter, Article 1 of the SPS Agreement provides that "The annexes are an integral part of this Agreement."

6. Article 7 of the SPS Agreement provides as follows:

> "Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B."

7. According to its terms, Article 7 expresses a commitment to "notify changes" and to "provide information" on SPS measures "in accordance with the provisions of Annex B". "In accordance with" means, in relevant part, "in conformity to; according to."[4] That is, the commitment in Article 7 is to carry out (in conformity to; according to) those commitments expressed with precision in Annex B.

8. Similarly, the text of Article 8 provides that "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures…". That is, Members have an obligation ("shall") to observe the provisions of Annex C. Annex C, in turn, provides further precision regarding how that obligation is satisfied.

9. The relationship between Article 7 and Annex B, on the one hand, and Article 8 and Annex C, on the other, is therefore similar as Annexes B and C express precise commitments to be carried out under Articles 7 and 8.

[4] Oxford Dictionary online (oed.com), "accordance", definition 2.b "in accordance with": "in agreement or harmony with; in conformity to; according to."

QUESTION 3: Please comment on the possibility of the Panel exercising judicial economy over Costa Rica's claims under Article 3.1 of the SPS Agreement in the event that it finds that the measures at issue are inconsistent with any of the other provisions of that Agreement.

U.S. Response to Question 3:

10. It is difficult to state in the abstract the circumstances in which exercising judicial economy on a claim under SPS Agreement Article 3.1 would be appropriate. This judgment may relate to the claims and defences advanced by the parties, and the Panel's assessment of their arguments. For example, a dispute which involves an appraisal of a Member's assessment of risk and scientific evidence may implicate the "examination and evaluation of scientific information in accordance with the provisions of this Agreement" referred to in footnote 2 of Article 3.3, which provision is referred to in Article 3.1.

QUESTION 4: What are the implications for the applicability of the provisions of the SPS Agreement invoked by Costa Rica other than Articles 2.2, 5.1 and 5.2, including Articles 2.3, 5.5 and 5.6, of a determination that a measure at issue is a provisional measure under Article 5.7 of the SPS Agreement? In your response, please comment on Costa Rica's assertion that "Article 5.7 is an exemption from the obligation under Articles 2.2 and 5.1, but not from the obligations stipulated under other provisions of the SPS Agreement."[5]

U.S. Response to Question 4:

11. If an importing Member has met the terms of Article 5.7 and has taken a provisional measure while reviewing an exporting Member's claim in a "reasonable period of time", then that analysis could support a finding that no breach of Article 2.3, Article 5.5, or Article 5.6 has occurred.

12. In a situation in which Article 5.7 is successfully applied, then the ongoing review is "reasonable" and should not be considered to be "discriminatory" under Article 2.3 or Article 5.5. It would be contradictory to find that ongoing review was reasonable, and yet discriminatory at the same time. Likewise, if a provisional measure is justifiably taken while review is ongoing, then necessarily the outcome of that review has not been reached. If that is the case, it would be contradictory to conclude at the same time that a less-restrictive measure is available under Article 5.6.

13. However, if a panel were to find that the importing Member's review did not occur within a reasonable period of time, then the panel should conclude that the importing Member failed to satisfy the time requirements under Article 5.7. A panel could then address the claim under Article 2.2 and then Article 5.1.[6] Article 5.1 sets forth a requirement for "an assessment,

[5] Costa Rica's opening statement at the first meeting of the Panel, para. 19.

[6] *EC – Biotech (Panel)*, para. 7.2980 and para. 7.2996. In its report, the panel stated that "Article 2.2 was not intended to apply in the situations covered by Article 5.7." In finding that Article 5.1 was "properly viewed as a

as appropriate to the circumstances, of the risks to human, animal or plant life or health," and Articles 5.2 and 5.3 set forth requirements applicable when conducting such an assessment of risks. Article 5.7, however, addresses the situation where relevant scientific evidence is insufficient to permit such an assessment, and accordingly provides an exception to Articles 5.1-5.3.

14. Furthermore, Article 5.7 does not provide an exception from the discipline of Article 5.8. Article 5.8 sets forth a procedural obligation that is not contingent on the existence of any particular quantum of scientific evidence and that is therefore unrelated to the applicability of Article 5.7 to any situation.

> **QUESTION 5: Please comment on the following assertion by Panama: Costa Rica's claims [with respect to the measure relating to the importation of dairy and meat products] refer exclusively to Panama's "control, inspection and approval procedures" within the meaning of Article 8 of the SPS Agreement and Annex C thereto. As such, these procedures do not fall within the scope of Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6 and 5.7 of the SPS Agreement.**[7]

U.S. Response to Question 5:

15. Each part of the SPS Agreement potentially could serve as interpretative context for any other part, depending on the particular interpretive issue under examination. With that general observation in mind, the United States has the following comments.

16. Annex C is entitled "control, inspection, and approval procedures," and Article 8 provides that:

> Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.[8]

17. Three aspects of the language of Article 8 are important for evaluating the above assertion by Panama and the applicability of certain provisions of Article 2 and Article 5.

18. First, Article 8 makes clear that Annex C does not apply to every SPS measure; rather, it only applies to a subset SPS measures – namely, "control, inspection, and approval procedures." Second, Article 8 provides context for what is meant in Article 8 and Annex C by providing examples, including systems for approving the use of additives, and systems for establishing tolerances for contaminants – both relating to approving or controlling particular products or

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specific application of the obligations provided for in Article 2.2," the panel concluded "Article 5.1 cannot be applicable in situations where Article 2.2 is not applicable."

[7] Panama's first written submission, para. 65.

[8] *SPS Agreement,* Article 8.

substances. Third, the final clause of Article 8 establishes that a Member shall "otherwise ensure that their procedures are not inconsistent" with the SPS Agreement. This clause clarifies that a Member's "procedures", which includes "control, inspection and approval procedures" shall be consistent not only with Annex C, but also "otherwise … with the provisions of this Agreement".

19. Because "control, inspection and approval procedures" shall be "otherwise … not inconsistent with the provisions of this Agreement", they are subject to those provisions where relevant.

> **QUESTION 6: Article 5.7 of the SPS Agreement refers to "insufficient" relevant scientific evidence. What parameters should the Panel take into consideration in order to determine whether scientific evidence submitted by the parties is "relevant" and "sufficient" within the meaning of Article 5.7 of the SPS Agreement?**

U.S. Response to Question 6:

20. 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."

21. 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."[9] Further, the term "science" is expansive; dictionary definitions of "science" include "knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method."[10]

22. 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.[11] Accordingly, "relevant scientific evidence" is scientific evidence that is used for purposes of a risk assessment consistent with Article 5.1.

23. 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." These categories are overlapping: for example, "scientific evidence" is the foundation for sampling and testing (data collection and statistical analysis); identification of prevalence of specific diseases or pests

[9] "Scientific," *Merriam-Webster Dictionary,* https://www.merriam-webster.com/dictionary/scientific.

[10] "Science," *Merriam-Webster Dictionary,* https://www.merriam-webster.com/dictionary/science.

[11] "Relevance," *Merriam-Webster Dictionary,* https://www.merriam-webster.com/dictionary/relevance.

and existence of pest-or disease-free areas (epidemiology); relevant ecological and environmental conditions (ecology, geography, environmental science).

24. Article 5.3 refers to the obligation that a Member has to "take into account" economic factors relevant to the assessment of risk. These factors also rely upon scientific evidence: for example, the "potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease" likely requires a combination of information derived, at a minimum, from epidemiology (including effectiveness of quarantine) as well as geography.

25. 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).[12] 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)."[13]

26. 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.[14] 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).

[12] *Japan – Agricultural Products II (AB)*, para. 92; *EC – Biotech (Panel)*, para. 7.2989.

[13] *EC – Biotech (Panel),* para. 7.2989.

[14] *EC – Biotech (Panel)*, para. 7.2992.

QUESTION 7: Article 3.1 of the SPS Agreement provides that "Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist". In this regard, Costa Rica asserts that there exist relevant international guidelines and standards that determine (i) the types of measures that an importing country may take in the event of non-compliance with an MRL, including the exchange of information in such instances[15]; and (ii) the situations in which SPS measures banning imports can be adopted.[16] Costa Rica also asserts that "[r]elevant international standards may include not only those provisions that address specific diseases or pests, but also horizontal provisions or those that establish a basic framework of general application."[17]

Please comment on these assertions by Costa Rica.

U.S. Response to Question 7:

27. In its first written submission, Costa Rica points to three documents issued by the Codex Alimentarius Commission (Codex) to illustrate their claim that relevant guidelines and standards exist for the types of measures than an importing country may take in the event of non-compliance with an MRL, including the exchange of information in such instances.[18] These include i) *Guidelines for the Design, operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems* (CAC/GL 26-1997), ii) *Guidelines for Food Import Control Systems* (CAC/GL 47-2003), and iii) *Guidelines for the Exchange of Information Between Countries on Rejections of Imported Food* (CAC/GL 25-1997).

28. In its first written submission, Costa Rica also points to two regulations promulgated by the International Plant Protection Convention (IPPC) to demonstrate the situations in which SPS measures banning imports can be adopted.[19] These include the *Framework for Pest Risk Analysis* (ISPM 2) and the *Guidelines for a Phytosanitary Import Regulatory System* (ISPM 20).

29. In its first written submission, Costa Rica also asserts that "[r]elevant international standards may include not only those provisions that address specific diseases or pests, but also horizontal provisions or those that establish a basic framework of general application.[20] The three relevant international organizations outlined in the SPS Agreement – Codex, OIE, and IPPC –promulgate both general principles and more granular guidance for specific diseases, pests or food safety concerns. The Unites States agrees with Costa Rica's statement that "[r]elevant international standards may include not only those provisions that address specific

[15] Costa Rica's first written submission, para. 403.

[16] Costa Rica's first written submission, paras. 831 and 1111.

[17] Costa Rica's first written submission, para. 218.

[18] Costa Rica's first written submission, para. 403.

[19] Costa Rica's first written submission, paras. 1111-1119.

[20] Costa Rica's first written submission, para. 218.

diseases or pests, but also horizontal provisions or those that establish a basic framework of general application."

> **QUESTION 8: Article 5.7 of the SPS Agreement requires that Members who provisionally adopt SPS measures "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". What is the relevance to these requirements under Article 5.7 of the SPS Agreement of the responses provided by Costa Rica to Panama's requests for information in the context of the measures at issue?**

U.S. Response to Question 8:

30. 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.

> **QUESTION 9: Costa Rica asserts that "no importing country [of fresh Costa Rican pineapple] has ever expressed any concerns regarding the pink hibiscus mealybug".[21] Could the third parties importing fresh pineapple from Costa Rica corroborate this assertion and identify the phytosanitary measures taken to allow fresh Costa Rican pineapple access to your markets?**

U.S. Response to Question 9:

31. The United States has not previously expressed any concerns regarding the pink hibiscus mealybug on pineapple exported by Costa Rica to the United States.

> **QUESTION 10: In its third-party statement at the third-party session of the Panel's first meeting with the parties, Australia states the following:**
>
> > **[T]he 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 adverse effects on human health *from the presence of a particular Oxamil residue level***

[21] Costa Rica's first written submission, para. 108.

> ***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.[22]**
>
> **Under what circumstances would the detection of a pesticide in quantities greater than the relevant MRL cause relevant scientific evidence that was deemed sufficient prior to detection to be deemed "insufficient", within the meaning of Article 5.7 of the SPS Agreement, after the detection? Does the level of non-compliance detected have a bearing thereon?**

U.S. Response to Question 10:

32. 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.

> **QUESTION 11: Who bears the burden of proof under Article 5.7 of the SPS Agreement?**

U.S. Response to Question 11:

33. 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.

> **QUESTION 12: Article 5.7 of the SPS Agreement requires Members to adopt an SPS measure provisionally and to review it "within a reasonable period of time". Annex C(1)(a) to the SPS Agreement provides that Members shall ensure that any procedure to check and ensure the fulfilment of SPS measures are undertaken and completed "without undue delay". A panel's**

[22] Australia's third-party statement, para. 11.

review of claims under these two provisions therefore presupposes consideration of facts that occurred over a period of time.

In this regard, what should be the end-date of the period that the Panel should take into consideration to assess whether:

(a) the SPS measures at issue were revised "within a reasonable period of time" within the meaning of Article 5.7 of the SPS Agreement?;

(b) the procedures at issue were undertaken and completed "without undue delay" within the meaning of Annex C(1)(a) to the SPS Agreement?[23]

U.S. Response to Question 12:

34. As reflected in the text, these provisions do not contemplate a specific end date. However, these two provisions do reflect independent obligations. First, with respect to Article 5.7, the importing Member implements a provisional measure during which it reviews an exporting Member's claim within a reasonable period of time. In that circumstance, the time taken by the importing Member must be "reasonable," which also implies that the lack of a final measure is "[p]roportionate" or "[w]ithin the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate[.]"[24]

35. With respect to Annex (C)(1)(a), if the procedures at issue were undertaken and completed within that same reasonable period of time, it may be that they were completed "without undue delay." However, while the analysis of any "undue delay" may be informed by the existence and duration of provisional measures (and review thereof), consistency of the measure with Annex (C)(1)(a) must nevertheless be examined on its own merits.

36. With respect to the prompt that "A panel's review of claims under these two provisions therefore presupposes consideration of facts that occurred over a period of time", the United States recalls that a panel's terms of reference are set out in Articles 7.1 and 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Specifically, when the Dispute Settlement Body ("DSB") establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint." A measure (including inaction) or a claim pertaining to a time or situation after the establishment of the panel would not, therefore, form part of the matter presented to the DSB that establishes the panel's terms of reference. As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[25]

[23] *See US – Animals (Panel)*, para. 7.118.

[24] "Reasonable", Oxford English Dictionary (1993) at pp. 2496.

37. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the precise question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body reports both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "at the time of establishment of the Panel."[26] It is thus the challenged measures, as they existed at the time of the Panel's establishment, when the "matter" was referred to the Panel, that are properly within the Panel's terms of reference and on which the Panel should make findings.

[26] *See, e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id*., para. 259 (finding that the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *EC – Biotech (Panel)*, para. 7.456 (finding that the "essential elements" characterizing the moratorium at issue were in effect as of the time of the establishment of the panel.").