

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

(DS599)

**THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA**

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TABLE OF CONTENTS

TABLE OF REPORTS	ii
I. INTRODUCTION	1
II. PANAMA’S REQUEST FOR A PRELIMINARY FINDING REGARDING THE SUFFICIENCY OF COSTA RICA’S PANEL REQUEST	1
III. CLAIMS RELATING TO UNDUE DELAY UNDER ARTICLE 8 AND ANNEX C OF THE SPS AGREEMENT	4
IV. CONCLUSION	5

TABLE OF REPORTS

Short Form	Full Citation
<i>EC – Biotech (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, adopted 21 November 2006
<i>Korea – Pneumatic Valves (AB)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R, adopted on 30 September 2019

I. INTRODUCTION

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.

II. PANAMA’S REQUEST FOR A PRELIMINARY FINDING REGARDING THE SUFFICIENCY OF COSTA RICA’S PANEL REQUEST

2. The United States will briefly comment on Panama’s request for a preliminary finding on the sufficiency of Costa Rica’s panel request.¹

3. As an initial matter, the United States understands that, as set out in Costa Rica’s first written submission, the claims in this dispute relate to four measures adopted by Panama between 2019 and 2020, which Costa Rica alleges prevented it from exporting agricultural products to Panama without sufficient technical justification.² Costa Rica describes the measures and alleged actions taken by Panama as:

- An import ban on strawberries, resulting from the alleged detection of a pesticide in two shipments of strawberries from Costa Rica; Costa Rica alleges that Panama failed to provide Costa Rica with the details of the analysis that detected the pesticide and that Costa Rica’s own authorities did not detect the pesticide during their own analysis; Costa Rica notes the pesticide (Oxamyl) is not authorized in Costa Rica and was not used by the relevant producer.³
- An import ban on dairy and meat products, resulting from Panama’s refusal to renew the sanitary authorizations of 18 Costa Rican establishments, following a decision to revoke Costa Rica’s sanitary eligibility, which is a precondition for obtaining renewals.⁴
- A ban on fresh pineapple imports, based on the alleged presence of the pink cochineal pest in Costa Rica, while allowing fresh pineapple imports from other countries that reported the presence of the same pest, such as the United States and Colombia.⁵

¹ See Panama’s Request for a Preliminary Ruling (“PRR”), Section A, page 11; Section B, page 15; and Section C, page 17.

² Costa Rica FWS, para. 5.

³ Costa Rica FWS, para. 5(a).

⁴ Costa Rica FWS, para. 5(b).

⁵ Costa Rica FWS, para. 5(c).

- A ban on plantain and banana imports, following a technical review process of the phytosanitary requirements already in effect, but which Panama arbitrarily decided to reconsider without justification; Costa Rica alleges Panama later gave new reasons to justify the ban, citing reports of tropical disease or pesticide use.⁶

4. Costa Rica argues that, with respect to these measures, Panama acted inconsistently with its obligations under Articles 5.1, 5.2, 5.5, and 5.6 of the SPS Agreement (and, consequently, also with Article 2.2); Article 2.3 of the SPS Agreement; Article 3.1 of the SPS Agreement; Article 8 and Annex C.1.a of the SPS Agreement; Article 7 and Annex B.5 or B.6.a; and consequently Articles 1.1 and 2.1 of the SPS Agreement.⁷

5. In its request for a preliminary finding, Panama argues that Costa Rica's panel request fails to “clearly link” the challenged measures to the provisions of the covered agreements alleged to have been infringed; does not succinctly explain “how or why” the measures violate the numerous provisions identified in the panel request; and argues that Costa Rica provided only brief generic descriptions of the legal provisions of its claims without connecting them to the four sets of distinct measures at issue.⁸

6. 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.

7. 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.

8. 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.

⁶ Costa Rica FWS, para. 5(d).

⁷ Costa Rica FWS, paras. 1248-1251.

⁸ See Panama’s PRR, Section A, page 11; Section B, page 15; and Section C, page 17.

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.

9. 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.

10. 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.”

11. 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.

12. 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.”⁹ 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.

13. To the extent Panama's request concerning Article 6.2 depends on legal requirements that are not in the text, they do not provide a basis for the Panel to reject Costa Rica's claims.

⁹ *Korea – Pneumatic Valves (AB)*, para. 5.12.

III. CLAIMS RELATING TO UNDUE DELAY UNDER ARTICLE 8 AND ANNEX C OF THE SPS AGREEMENT

14. In this section, the United States will address the proper interpretation of Article 8 and Annex C of the SPS Agreement. As noted, however, the United States may address other matters in its subsequent oral or written submissions.

15. In its first written submission, Costa Rica argues that it incurred undue delays in relation to the procedure to verify compliance with sanitary requirements relating to strawberries;¹⁰ undue delays in the approval process to renew the sanitary authorizations of Costa Rican establishments with respect to meat and dairy products;¹¹ undue delays in the review process of the phytosanitary requirements for the importation of pineapple, which includes a risk assessment process;¹² and undue delays of over one year in its technical review process or approval procedures for bananas and plantains.¹³

16. With respect to the operation of control, inspection, and approval procedures, Article 8 of the SPS Agreement 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.

17. Further, 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.”

18. 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.”¹⁴ “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.”¹⁵ Thus, the plain meaning of the phrase “without undue delay” suggests that any control,

¹⁰ Costa Rica’s FWS, paras. 475-497 (relating to strawberries).

¹¹ Costa Rica’s FWS, paras. 680-704 (relating to meat and dairy products).

¹² Costa Rica’s FWS, paras. 944-965 (relating to fresh pineapple).

¹³ Costa Rica’s FWS, paras. 1166-1203 (relating to bananas and plantains).

¹⁴ “Undue,” *Oxford English Dictionary*, <https://www.oed.com/view/Entry/212679?redirectedFrom=undue#eid>.

¹⁵ “Delay,” *Oxford English Dictionary*, <https://www.oed.com/view/Entry/49277?rskey=9GDt0x&result=1#eid>.

inspection, or approval procedure be undertaken and completed without any unjustifiable deferment or postponement.

19. 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;”¹⁶ 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.”¹⁷ Furthermore, the panel interpreted “Annex C(1)(a), first clause, essentially as a good faith obligation requiring Members to proceed with their approval procedures as promptly as possible, taking into account of the need to check and ensure the fulfillment of their relevant SPS measures.”¹⁸ This interpretation is consistent with the plain meaning of the words “undue delay” in the view of the United States.

IV. CONCLUSION

20. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the DSU and of Article 8 and Annex C of the SPS Agreement.

¹⁶ *EC – Biotech (Panel)*, para. 7.1494.

¹⁷ *EC – Biotech (Panel)*, para. 7.1495.

¹⁸ *EC – Biotech (Panel)*, para. 7.1498.