BEFORE THE WORLD TRADE ORGANIZATION

Panama – Measures Concerning the Importation of Certain Products from Costa Rica
(WT/DS599)

Third Party Oral Statement of Australia

13 December 2022
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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.1

“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.2

5. However, both Panama and Costa Rica have referred to the “how or why” standard in their submissions on this issue.3 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

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1 Agreement on the Application of Sanitary and Phytosanitary Measures.
2 Costa Rica’s response to Panama’s preliminary ruling request, para. 50; Panama’s preliminary ruling request, para. 11.
3 Costa Rica’s response to Panama’s preliminary ruling request, paras. 11, 42-44; Panama’s preliminary ruling request, para. 11.
measure infringed WTO obligations. 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 agreement, in a manner sufficient to present the problem clearly. In this 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.

**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. Article 5.7 has four requirements. First, a member may provisionally adopt an SPS measure only if it is imposed where relevant scientific evidence is insufficient. 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” – including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members. 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.”

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4 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. 5.9; see Costa Rica’s response to Panama’s preliminary ruling request, para. 9; Panama’s preliminary ruling request, paras. 15, 29.

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

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

9 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”.

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

11 SPS Agreement Article 5.7
within a reasonable period of time”12. 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.13 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”.14

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.15 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”.16

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 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.17 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.

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12 Set out as the second group of requirements (1) and (2) in Appellate Body Report, *Japan – Agricultural Products II*, para. 89.
13 SPS Agreement, Article 5.7; Appellate Body Report, *Japan – Agricultural Products II*, para 89.
15 Brazil’s third party written submission, para 6.
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.\(^\text{18}\)

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.\(^\text{19}\) 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".\(^\text{20}\) 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.\(^\text{21}\)

**Conclusion**

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

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\(^{19}\) Discussed in, for example, *US – Wheat Gluten; US – Upland Cotton*; and *EC – Bananas III*.


\(^{21}\) Appellate Body Report, *Japan – Agricultural Products II*, para. 93.