

**AS DELIVERED**

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**

## TABLE OF CASES

Short Title	Full Case Title and Citation
<i>China – HP-SSST (Japan)/ China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , <a href="#">WT/DS394/AB/R</a> / <a href="#">WT/DS395/AB/R</a> / <a href="#">WT/DS398/AB/R</a> , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , <a href="#">WT/DS291/R</a> , Add.1 to Add.9 and Corr.1 / <a href="#">WT/DS292/R</a> , Add.1 to Add.9 and Corr.1 / <a href="#">WT/DS293/R</a> , Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/AB/R</a> , adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , <a href="#">WT/DS315/AB/R</a> , adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , <a href="#">WT/DS76/AB/R</a> , adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , <a href="#">WT/DS245/AB/R</a> , adopted 10 December 2003
<i>Korea – Pneumatic Valves</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , <a href="#">WT/DS504/AB/R</a> , adopted 30 September 2019

<i>Russia – Railway Equipment</i>	Appellate Body Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , <a href="#">WT/DS499/AB/R</a> and Add.1, adopted 5 March 2020
<i>US/Canada – Continued Suspension, para. 701</i>	Appellate Body Report, <i>US – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS320/AB/R</a> , adopted 14 November 2008 Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS321/AB/R</a> , adopted 14 November 2008
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , <a href="#">WT/DS437/AB/R</a> , adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – Hot Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <a href="#">WT/DS166/AB/R</a> , adopted 19 January 2001, DSR 2001:II, p. 717

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.<sup>1</sup>

**“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.<sup>2</sup>
5. However, both Panama and Costa Rica have referred to the “how or why” standard in their submissions on this issue.<sup>3</sup> 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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<sup>1</sup> Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>2</sup> Costa Rica's response to Panama's preliminary ruling request, para. 50; Panama's preliminary ruling request, para. 11.

<sup>3</sup> 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.<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup>

### 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.<sup>7</sup>
8. Article 5.7 has four requirements.<sup>8</sup> First, a member may provisionally adopt an SPS measure only if it is imposed where relevant scientific evidence is insufficient.<sup>9</sup> 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”<sup>10</sup> – “including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members”.<sup>11</sup> 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

<sup>4</sup> 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.

<sup>5</sup> 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 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162). See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

<sup>6</sup> 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.

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

<sup>8</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

<sup>9</sup> 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”.

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

<sup>11</sup> SPS Agreement Article 5.7

within a reasonable period of time”<sup>12</sup>. 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.<sup>13</sup> 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”.<sup>14</sup>
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.<sup>15</sup> 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”.<sup>16</sup>
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.<sup>17</sup> 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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<sup>12</sup> Set out as the second group of requirements (1) and (2) in Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

<sup>13</sup> SPS Agreement, Article 5.7; Appellate Body Report, *Japan – Agricultural Products II*, para 89.

<sup>14</sup> Appellate Body Report, *Japan – Apples*, para. 179.

<sup>15</sup> Brazil’s third party written submission, para 6.

<sup>16</sup> Appellate Body Report, *Japan – Apples*, para. 189.

<sup>17</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2971.

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.<sup>18</sup>
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.<sup>19</sup> 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”.<sup>20</sup> 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.<sup>21</sup>

### **Conclusion**

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

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<sup>18</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

<sup>19</sup> Discussed in, for example, *US – Wheat Gluten*; *US – Upland Cotton*; and *EC – Bananas III*.

<sup>20</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 85.

<sup>21</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93.