

Before the World Trade Organization

*Panama – Measures concerning the importation of certain products
from Costa Rica (Costa Rica) (WT/DS599)*

Responses of Australia to the Panel's Questions

15 February 2023

Q5 To all third parties [Advance 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.

1. Article 8 of the SPS Agreement requires Members to observe the provisions of Annex C in the operation of control, inspection and approval procedures and *to ensure those procedures are not inconsistent with the provisions of the SPS Agreement*. Panama's argument is not supported by the text of Article 8. In particular, it would be internally inconsistent to require Members to "ensure that their [control, inspection and approval procedures] are not inconsistent with the provisions of the Agreement" if those provisions did not apply to the procedures.
2. Article 8 does not limit the scope of provisions that might be applicable to "control, inspection and approval procedures". Instead in Australia's view it specifies that in respect of a sub-set of measures (control, inspection and approval procedures) the provisions of Annex C must be observed, which may be additional to the application of other provisions of the SPS Agreement to such measures.

Q6 To all third parties [Advance 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?

3. Article 5.7 is internally balanced by its four cumulative requirements, namely:
 - (i) relevant scientific evidence is insufficient;
 - (ii) provisional SPS measures are adopted on the basis of available pertinent information;
 - (iii) the adopting member seeks the additional information necessary for a more objective assessment of risk; and
 - (iv) the adopting member reviews the SPS measures within a reasonable period of time.
4. The first two requirements recognise WTO Members need the latitude to take action where there is some risk even if it cannot be fully assessed at that time. The second two requirements discipline the maintenance of those measures. Too narrow an interpretation of the first two requirements risks disturbing this existing balance.
5. The first requirement places a limitation on the scope of Article 5.7. It only applies in situations where 'relevant scientific evidence is insufficient'. In previous disputes this has been interpreted as meaning '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.’ Australia agrees with this approach and considers it provides the parameters for WTO members to argue whether the requirement has been met.

6. In that context, ‘relevant’ means any scientific evidence that is pertinent to performing a risk assessment and ‘insufficient’ means less than ‘sufficient’ evidence to perform a adequate risk assessment under Article 5.1. In Australia’s view, the question is less about the parameters of the terms ‘relevant’ and ‘insufficient’ and more about whether the WTO Member has enough evidence *overall* to perform an adequate risk assessment. If there is some evidence of risk but an adequate assessment cannot be performed on its basis, it follows that ‘relevant scientific evidence is insufficient’.

Q7 To all third parties [Advance 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 ; and (ii) the situations in which SPS measures banning imports can be adopted. 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." Please comment on these assertions by Costa Rica.

7. A panel’s role is to determine whether international standards, guidelines and recommendations exist based on the definition in paragraph 3 of Annex A. A panel need not determine the level of the standards, the consensus behind them or their adoption process.¹ If relevant standards exist, a panel must then consider whether the SPS measures at issue are ‘based on’ those standards. That will be the case where the measure has some foundation in or is supported by those standards,² and does not contradict those standards.³
8. However, Australia recalls the exception to Article 3.1 in Article 3.3 which allows a WTO Member to adopt a level of protection different from that implicit in the international standard, and, subject to certain conditions, to implement or embody that level of protection in a measure not 'based on' the international standard.

¹ Panel Reports, EC – Hormones (Canada), para. 8.72; and EC – Hormones (US), para. 8.69.

² Panel Report, US – Animals, para. 7.233.

³ Panel Report, India – Agricultural Products, para. 7.269.

Q10 [Advance 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 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.⁴

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?

9. It is difficult to foresee circumstances in which the detection of a higher level of pesticide residue than that permitted under an established MRL would cause the relevant evidence (that was deemed sufficient to establish the MRL) to be deemed insufficient within the meaning of Article 5.7 of the SPS Agreement.
10. The level of non-compliance detected, on its own, does not have a bearing on whether the scientific evidence that was deemed sufficient prior to detection can be subsequently deemed insufficient. Absent some link to the effect on human health of a particular residue level, the detection of any residue level (whether higher or lower than the established MRL) would not be relevant to the risk assessment required under Article 5.7 of the SPS Agreement.
11. In our view, Panama's submission incorrectly identified the relevant risk assessment within the meaning of Article 5.7. It focused on the risk of *Costa Rican* strawberries specifically and argued that residue levels above the MRL called into question Panama's assessment of the risk posed by Costa Rica in respect of Oxamyl residue levels in strawberries. Australia's view is that the correct assessment in this context is an assessment of the risk posed to human health by the contaminant or toxin (i.e. Oxamyl) in strawberries (regardless of the origin of the strawberries). In our view,

⁴ Australia's third-party statement, para. 11. (italics original)

Panama's arguments go more to compliance with a measure established under Article 2.2 than to the relevant test for adopting a measure under Article 5.7.

Q9 To all third parties: Costa Rica asserts that "no importing country [of fresh Costa Rican pineapple] has ever expressed any concerns regarding the pink hibiscus mealybug".

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?

12. Australia does not import fresh pineapple from Costa Rica.