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KOREA – IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES

AB-2018-1

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ALARA	as low as reasonably achievable
ALOP	appropriate level of protection
Bq	becquerel
Codex	Codex Alimentarius Commission
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FDNPP	Fukushima Dai-ichi Nuclear Power Plant
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
ICRP	International Commission on Radiological Protection
KFDA	Korea Food and Drug Administration
Kg	kilogram
LNT	linear-no-threshold
MFDS	Ministry of Food and Drug Safety
MIFAFF	Ministry for Food, Agriculture, Forestry and Fisheries of Korea (original name); Ministry of Agriculture, Food and Rural Affairs of Korea (since 2013)
mSv	millisievert
OIE	Office International des Epizooties (original name); World Organisation for Animal Health (since 2003)
Panel Report	*Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Short Title	Description
Panel Exhibit JPN-3.b	PMO blanket import ban and additional testing requirements press release	Korea Prime Minister's Office, Press Release, "Government Bans Import of All Fishery Products from 8 *ken* near Fukushima" (6 September 2013)
Panel Exhibit JPN-4.b		Korea Office for Government Policy Coordination, Ministry of Food and Drug Safety, Ministry of Oceans and Fisheries, and Nuclear Safety and Security Commission, "Q&A on Radioactivity Safety Management of Fishery Products Imported from Japan" (September 2013)
Panel Exhibits JPN-55.b (revised) and KOR-72 (revised)	KFDA 14 April 2011 press release	Korea Food and Drug Administration, Press Release, "Status of KFDA's Response and Management Measures Regarding the Japanese Nuclear Crisis (5)" / "KFDA's Response to the Fukushima Nuclear Power Plant Accident and Management Status" (14 April 2011)
Panel Exhibit JPN-75.b	MFDS 2013 blanket import ban and additional testing requirements notice	Korea Ministry of Food and Drug Safety, "Notice of Temporary Special Measure for Safety for Food Imported from Japan" (6 September 2013)
Panel Exhibit JPN-76.b		Korea Ministry of Food, Agriculture, Forestry and Fisheries, Press Release, "Temporary Import Suspension on Cod from Miyagi-*ken* and Iwate-*ken*, Japan" (3 May 2012)
Panel Exhibit JPN-77.b		Korea Ministry of Food, Agriculture, Forestry and Fisheries, Press Release, "Temporary Import Suspension on 35 Fishery Products, including Yellowfish from Fukushima-*ken*, Japan" (26 June 2012)
Panel Exhibit JPN-78.b		Korea Ministry of Food, Agriculture, Forestry and Fisheries, Press Release, "Temporary Import Suspension on Cod from Aomori-*ken*, Japan" (29 August 2012)
Panel Exhibit KOR-140		European ALARA Network, Newsletter 31: "Development and dissemination of ALARA culture" (11 July 2016)

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7

Short Title	Full Case Title and Citation
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Agricultural Products	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, DSR 2015:V, p. 2459
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Import Licensing Regimes	Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Radionuclides	Panel Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/R and Add.1, circulated to WTO Members 22 February 2018
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
US – Animals	Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015, DSR 2015:VIII, p. 4085
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291

Short Title	Full Case Title and Citation
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:1, p. 7
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809

WORLD TRADE ORGANIZATION
APPELLATE BODY

Korea – Import Bans, and Testing and Certification Requirements for Radionuclides

AB-2018-1

Appellate Body Division:

Servansing, Presiding Member
Bhatia, Member
Graham, Member

Korea, *Appellant/Appellee*
Japan, *Other Appellant/Appellee*

Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
European Union, *Third Participant*
Guatemala, *Third Participant*
India, *Third Participant*
New Zealand, *Third Participant*
Norway, *Third Participant*
Russia, *Third Participant*
Chinese Taipei, *Third Participant*
United States, *Third Participant*

1 INTRODUCTION

1.1. The Republic of Korea (Korea) and Japan each appeal certain issues of law and legal interpretations developed in the Panel Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*[1] (Panel Report). The Panel was established on 28 September 2015[2] to consider a complaint by Japan[3] with respect to the consistency of certain measures adopted by Korea on Japanese food products with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

1.2. The challenged measures were imposed by Korea in response to the Fukushima Dai-ichi Nuclear Power Plant (FDNPP) accident in Japan on 11 March 2011 and its aftermath. Specifically, Japan challenged four sets of Korean measures: (i) the additional testing requirements adopted in 2011 for non-fishery products (except livestock); (ii) the product-specific import bans adopted in 2012 on Alaska pollock from one prefecture and on Pacific cod from five prefectures; (iii) the additional testing requirements adopted in 2013 for fishery and livestock products; and (iv) the "blanket import ban" adopted in 2013 on all fishery products from eight prefectures in relation to 28 fishery products.[4] The factual aspects of this dispute are set forth in greater detail in the Panel Report.

1.3. Japan claimed before the Panel that all of Korea's challenged measures are inconsistent with: (i) Article 5.6 of the SPS Agreement for being more trade-restrictive than required; (ii) Article 2.3 of the SPS Agreement for arbitrarily or unjustifiably discriminating against Japanese food products and constituting a disguised restriction on international trade; and (iii) Article 7 and paragraphs 1 and 3 of Annex B to the SPS Agreement, as Korea failed to comply with certain transparency requirements. Moreover, Japan claimed before the Panel that the 2011 additional testing requirements and the 2013 additional testing requirements are inconsistent with Article 8 and paragraphs 1(a), 1(c), 1(e),

[1] WT/DS495/R, 22 February 2018.
[2] WT/DSB/M/368, para. 6.4.
[3] Panel Report, para. 1.4; Request for the Establishment of a Panel by Japan, WT/DS495/3 (Japan's panel request).
[4] Panel Report, paras. 2.98, 2.100-2.102, 2.105-2.107, and 2.113-2.115. In this Report, we refer to these measures as the 2011 additional testing requirements, the product-specific import bans, the 2013 additional testing requirements, and the blanket import ban.

and 1(g) of Annex C to the SPS Agreement.[5] Korea requested the Panel to reject Japan's claims in their entirety.[6]

1.4. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 22 February 2018, the Panel found that:

a. Korea's measures do not fulfil the four requirements in Article 5.7 of the SPS Agreement[7];

b. with respect to whether Korea's measures are more trade-restrictive than required under Article 5.6 of the SPS Agreement:

   i. the 2011 additional testing requirements and product-specific import bans were not more trade-restrictive than required when adopted[8];

   ii. the 2011 additional testing requirements and product-specific import bans are maintained in a manner inconsistent with Article 5.6 because they are more trade-restrictive than required[9];

   iii. the 2013 additional testing requirements were adopted and maintained in a manner inconsistent with Article 5.6 because they were and are more trade-restrictive than required[10];

   iv. the blanket import ban (with the exception of the ban on Pacific cod originating from Fukushima and Ibaraki) was adopted in a manner inconsistent with Article 5.6 because it was more trade-restrictive than required[11]; and

   v. the blanket import ban with respect to all 28 fishery products from all eight prefectures is maintained in a manner inconsistent with Article 5.6 because it is more trade-restrictive than required[12];

c. with respect to whether Korea's measures arbitrarily or unjustifiably discriminate against Japanese products under the first sentence of Article 2.3 of the SPS Agreement and whether they are applied in a manner which would constitute a disguised restriction on international trade under the second sentence of Article 2.3:

   i. the 2013 additional testing requirements and the blanket import ban with respect to the 27 fishery products subject to Japan's claim from the eight prefectures and Pacific cod from six prefectures, i.e. excluding Pacific cod from Fukushima and Ibaraki, were inconsistent with the first sentence of Article 2.3 and, as a consequence, the second sentence of Article 2.3, when Korea adopted them[13];

   ii. by maintaining the product-specific import bans, the blanket import ban on the 28 fishery products from the eight prefectures, the 2011 additional testing requirements, and the 2013 additional testing requirements on Japanese products, Korea acted inconsistently with the first sentence of Article 2.3 and, as a consequence, the second sentence of Article 2.3[14]; and

[5] Panel Report, paras. 3.1, 7.113, 7.258, 7.363, and 7.448; Japan's first written submission to the Panel, paras. 141-142, 155-157, 195-196, 333-335, 402, 450, and 464-465.
[6] Panel Report, para. 3.3.
[7] Panel Report, paras. 7.111 and 8.1.
[8] Panel Report, paras. 7.253-7.254 and 8.2.a.
[9] Panel Report, paras. 7.253-7.254 and 8.2.b.
[10] Panel Report, paras. 7.253, 7.255, and 8.2.c.
[11] Panel Report, paras. 7.253, 7.256, and 8.2.d.
[12] Panel Report, paras. 7.253, 7.256, and 8.2.e.
[13] Panel Report, paras. 7.360 and 8.3.a.
[14] Panel Report, paras. 7.360 and 8.3.b.

iii. the Panel exercised judicial economy with regard to the other grounds raised by Japan for inconsistency of Korea's measures with the second sentence of Article 2.3[15];

d. with respect to the obligations concerning control, inspection, and approval procedures in Article 8 and Annex C to the SPS Agreement, Japan failed to establish that Korea acted inconsistently with the provisions of Annex C(1), subparagraphs (a), (c), (e), and (g), and, as a consequence, Article 8 with respect to the adoption and maintenance of the 2011 additional testing requirements and the 2013 additional testing requirements[16]; and

e. with respect to the transparency obligations under Article 7 and Annex B to the SPS Agreement:

i. Korea acted inconsistently with Annex B(1) and, as a consequence, Article 7, in relation to the publication of all of the challenged measures[17]; and

ii. Korea's SPS enquiry point's incomplete response to Japan's first request and its failure to respond to Japan's second request are sufficient to establish that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7.[18]

1.5. In accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and having found that Korea acted inconsistently with certain provisions of the SPS Agreement, the Panel recommended that Korea bring its measures into conformity with its obligations under the SPS Agreement.[19]

1.6. On 9 April 2018, Korea notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[20] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[21] (Working Procedures). On 16 April 2018, Japan notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal[22] and another appellant's submission pursuant to Rule 23 of the Working Procedures. On 27 April 2018, Japan and Korea each filed an appellee's submission.[23] On 30 April 2018, Brazil, the European Union, and the United States each filed a third participant's submission.[24] On the same day, Canada, China, Guatemala, India, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) each notified its intention to appear at the hearing as a third participant.[25] Subsequently, the Russian Federation (Russia) notified its intention to appear at the hearing as a third participant.[26]

1.7. On 8 June 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.[27] On

[15] Panel Report, paras. 7.360 and 8.3.c.
[16] Panel Report, paras. 7.447 and 8.4.
[17] Panel Report, paras. 7.476, 7.487, 7.501-7.503, and 8.5.a.
[18] Panel Report, paras. 7.519-7.520 and 8.5.b.
[19] Panel Report, para. 8.7.
[20] WT/DS495/8.
[21] WT/AB/WP/6, 16 August 2010.
[22] WT/DS495/9.
[23] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[24] Pursuant to Rule 24(1) of the Working Procedures.
[25] Pursuant to Rule 24(2) of the Working Procedures.
[26] On 28 November 2018, Russia submitted its delegation list for the hearing to the Appellate Body Secretariat. We have interpreted this action as a notification to attend the hearing pursuant to Rule 24(4) of the Working Procedures.
[27] The Chair of the Appellate Body explained that this was due to a number of factors, including the substantially enhanced workload of the Appellate Body in 2018, scheduling issues arising from overlap in the composition of the Divisions hearing different appeals owing to the current vacancies on the Appellate Body, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat. Although the appeals in this dispute were initiated on 9 April 2018 and

1 March 2019, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 11 April 2019.[28]

1.8. On 28 September 2018, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Shree Baboo Chekitan Servansing to complete the disposition of this appeal, even though his term of office was due to expire before the completion of the appellate proceedings.

1.9. The hearing in this appeal was held on 3-4 December 2018. The participants and six of the third participants (Brazil, Canada, the European Union, New Zealand, Norway, and the United States) made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[29] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS495/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Brazil, the European Union, and the United States) are reflected in the executive summaries of their written submissions provided to the Appellate Body[30], and are contained in Annex C of the Addendum to this Report, WT/DS495/AB/R/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

a. whether the Panel erred in its application of Article 5.6 of the SPS Agreement in finding that Japan's proposed alternative measure achieves Korea's appropriate level of protection (ALOP);

b. whether the Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement in finding that: (i) similar conditions exist in Japan and in other Members regarding the adoption of certain measures and the maintenance of all challenged measures; (ii) the import bans and the additional testing requirements arbitrarily or unjustifiably discriminate between these Members; and (iii) Korea's measures are applied in a manner which would constitute a disguised restriction on international trade;

c. in relation to the Panel's findings under Article 5.7 of the SPS Agreement:

    i. whether the Panel erred under Articles 6.2, 7, and 11 of the DSU in making findings under Article 5.7 of the SPS Agreement;

16 April 2018, due to the multiple appeals pending before the Appellate Body, the reduced number of Appellate Body Members, and the shortage of staff in the Appellate Body Secretariat, work on these appeals could only begin in September 2018. (WT/DS495/10)

[28] WT/DS495/11.

[29] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[30] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

ii. whether the Panel erred in its interpretation and application of Article 5.7 of the SPS Agreement in allocating the burden of proof under that provision to Korea;

iii. whether the Panel erred in its interpretation and application of Article 5.7 of the SPS Agreement in finding that Korea did not establish that: (i) the relevant scientific evidence had been insufficient with respect to the product-specific import bans, the blanket import ban, and the 2013 additional testing requirements; (ii) the blanket import ban and the 2013 additional testing requirements had been adopted on the basis of available pertinent information; and (iii) Korea had reviewed any of its measures within a reasonable period of time; and

iv. whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU by engaging in internally inconsistent reasoning;

d. in relation to the Panel's treatment of evidence, whether the Panel acted inconsistently with Articles 3.3-3.4, 3.7, and 11 of the DSU and erred in the application of Articles 2.3 and 5.6 of the SPS Agreement;

e. in relation to the Panel's expert selection, whether the Panel acted inconsistently with Article 11 of the DSU by appointing two experts who allegedly were not independent or impartial;

f. in relation to the Panel's findings under Article 7 and Annex B(1) to the SPS Agreement:

i. whether the Panel erred in its interpretation of Annex B(1) to the SPS Agreement in finding that this provision requires that the publication of an SPS regulation contain sufficient content that interested Members will know the conditions (including specific principles and methods) that apply to their goods;

ii. whether the Panel erred in its application of Annex B(1) to the SPS Agreement in finding that Korea acted inconsistently with this provision by: (i) not publishing the full product scope of the blanket import ban, and the full content of the 2011 additional testing requirements and the 2013 additional testing requirements; and (ii) not demonstrating that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue; and

iii. whether the Panel acted inconsistently with Article 11 of the DSU in finding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day;

g. in relation to the Panel's findings under Article 7 and Annex B(3) to the SPS Agreement, whether the Panel erred in its interpretation and application of Annex B(3) to the SPS Agreement in finding that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement, because of Korea's SPS enquiry point's incomplete response to Japan's first request and its failure to respond to Japan's second request; and

h. whether the Panel erred in its interpretation and application of Annex C(1)(a) to the SPS Agreement in declining to presume that Japanese imported products and Korean domestic products are "like" and therefore in finding that Japan failed to establish that Korea acted inconsistently with Annex C(1)(a) and, as a consequence, Article 8 of the SPS Agreement.

5 ANALYSIS OF THE APPELLATE BODY

5.1. In this Report, we address the participants' claims of error on appeal in the following order: (i) Korea's claim under Article 5.6 of the SPS Agreement; (ii) Korea's claims under Article 2.3 of the SPS Agreement; (iii) Korea's claims regarding the Panel's findings under Article 5.7 of the SPS Agreement; (iv) Korea's and Japan's claims regarding the Panel's treatment of evidence; (v) Korea's claim regarding the selection of certain experts by the Panel; (vi) Korea's claims regarding

the Panel's findings under Article 7 and Annexes B(1) and B(3) to the SPS Agreement; and (vii) Japan's claim under Article 8 and Annex C(1)(a) to the SPS Agreement.

5.1 Article 5.6 of the SPS Agreement

5.1.1 Introduction

5.2. Korea appeals the Panel's finding that Korea acted inconsistently with Article 5.6 of the SPS Agreement with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures. In particular, Korea contests the Panel's findings relating to the achievement of Korea's ALOP by an alternative measure proposed by Japan. Korea argues that "the Panel effectively applied an incorrect ALOP, and as a result erred in finding that Japan's proposed alternative measure would meet Korea's ALOP."[31] Based on this alleged error, Korea requests that we reverse the Panel's finding that the challenged import bans and the additional testing requirements are inconsistent with Article 5.6 of the SPS Agreement.[32] Japan responds that the Panel did not err in applying Korea's ALOP to Japan's proposed alternative measure.[33]

5.3. We begin by summarizing the Panel's findings under Article 5.6 of the SPS Agreement. We then address Korea's claim of error on appeal.

5.1.2 The Panel's findings

5.4. Before the Panel, Japan claimed that Korea's measures are inconsistent with Article 5.6 of the SPS Agreement because they are more trade-restrictive than required. In support of this claim, Japan proposed a single alternative measure to all challenged Korean measures consisting of "testing for caesium, to verify that the products' caesium content does not exceed Korea's level of 100 Bq/kg, as a means to control both caesium contamination and contamination from additional radionuclides".[34] Japan submitted that testing for caesium alone would be sufficient to ensure that Korean consumers' exposure to radionuclides through the consumption of food would be below 1 millisievert per year (mSv/yr) as long as caesium levels in Japanese imports were below 100 becquerel per kilogram (Bq/kg).[35] Before the Panel, Korea contested the level of protection that would be achieved by Japan's alternative measure in relation to its own ALOP.

5.5. In addressing whether the alternative measure proposed by Japan would achieve Korea's ALOP[36], the Panel noted Korea's acknowledgement that "it has adopted the Codex benchmark of 1 mSv/year radiation exposure limit, in order to quantify the highest radiation exposure it is willing to accept, keeping in mind the two objectives of not exceeding the levels in the ordinary environment and abiding by the … principle" of exposure "as low as reasonably achievable" (ALARA).[37] The Panel then reviewed evidence concerning the ALARA principle and its application to food safety standards, including the views of the experts consulted by the Panel.[38] With regard to radioactivity levels that exist in the ordinary environment, the Panel stated that "[t]he experts were not familiar with Korea's definition of the 'ordinary environment' being the levels of radiation absent a major nuclear accident."[39] The Panel

[31] Korea's appellant's submission, para. 170.
[32] Korea's appellant's submission, paras. 170 and 197 (referring to Panel Report, paras. 7.253-7.256 and 8.2.b-e).
[33] Japan's appellee's submission, para. 140.
[34] Panel Report, para. 7.120. (fn omitted)
[35] Panel Report, para. 7.120. (fn omitted)
[36] With respect to other issues under Article 5.6 of the SPS Agreement, the Panel found as a preliminary matter that Japan's proposed alternative of testing for caesium with a 100 Bq/kg limit is "another measure" within the meaning of footnote 3 to Article 5.6. (Panel Report, paras. 7.122-7.127) The Panel also concluded that the proposed alternative measure is technically and economically feasible, noting that Korea already undertakes caesium and iodine testing on randomly selected samples from every consignment of Japanese products at the border. (Panel Report, para. 7.149) As to whether Japan's proposed alternative measure is significantly less trade-restrictive than Korea's measures, the Panel noted that Korea did not contest that the alternative measure would be less trade-restrictive than the import bans. Further, based on evidence concerning "the additional cost and time required for the additional testing", the Panel found that the proposed alternative measure is significantly less trade-restrictive than the additional testing requirements. (Panel Report, paras. 7.150 and 7.156)
[37] Panel Report, para. 7.165 (referring to Korea's first written submission to the Panel, para. 234).
[38] Panel Report, paras. 7.166-7.168.
[39] Panel Report, para. 7.170.

noted, however, the experts' recognition that "radiological protection in food is based on the principle that the additional dose from contaminating radionuclides in foods should not add significantly to the dose already received in the ordinary environment or as they referred to it the 'background dose'."[40]

5.6. The Panel stated that it "appreciate[d] Korea's adherence to the ALARA principle" and that Korea "maintains that its ALOP is not a fixed quantitative threshold".[41] At the same time, the Panel considered that, "if a Member is applying a particular measure with an express quantitative limit for contaminants, that is an indicator that products containing levels of contaminants below that limit will satisfy its ALOP."[42] The Panel observed in this connection that "not only for the challenged measures, but for food products in general, Korea has established maximum levels for radionuclides with a maximum upper limit of 1 mSv/year for total consumption of man-made radionuclides from all sources."[43] On this basis, the Panel stated that "it must determine whether Japan's alternative measure achieves the level of protection"[44] formulated in the following terms submitted by Korea:

> [T]o maintain radioactivity levels in food consumed by Korean consumers at levels that exist in the ordinary environment – in the absence of radiation from a major nuclear accident – and thus maintain levels of radioactive contamination in food that are "as low as reasonably achievable" (ALARA), below the 1 mSv/year radiation dose limit.[45]

5.7. In light of this articulation of Korea's ALOP, the Panel reasoned that "if Japan can demonstrate that its proposed alternative measure can achieve an ALOP that is below 1 mSv/year it will have met its burden under the second element of Article 5.6."[46]

5.8. In order to assess whether Japan's alternative measure would achieve Korea's ALOP, the Panel explained that it would examine: (i) the identification and characterization of the contaminants at issue; (ii) the levels of contaminants in Japanese food products; (iii) the extent to which Korean consumers will be exposed to radionuclides through their diet if Japan's alternative measure is adopted; and (iv) risk characterization.[47] The Panel stated that, based on this analysis, it would determine the level of protection achieved by Japan's alternative measure and whether "Japan has established that testing for caesium alone at a level of 100 Bq/kg would be sufficient to ensure that Korean consumers will be exposed to less than 1 mSv/year of radionuclides in food products from all sources."[48]

5.9. Regarding the relevant contaminants and their adverse effects, the Panel concluded that the main radionuclides released during the accident were caesium (Cs-134 and Cs-137) and iodine (I-131), while strontium and plutonium were also released. The Panel noted that Korea's measures at issue only "definitively regulate" these same four radionuclides.[49] Regarding leaks since the accident and the potential for future leaks, the Panel addressed the relevance of the amount of radionuclides *released* (referred to as the "source term") to the risk of contamination in food products, stating that:

> The experts concurred that[,] after the initial release, the source term becomes less important as you have the ability to produce actual measurements in food. All the experts agreed that knowing the remaining radionuclides contained in the reactor or the specific

[40] Panel Report, para. 7.170 (referring to Dr Skuterud's response to Panel question No. 11 to the experts). In this regard, the Panel recorded an expert's view that an effective dose of 1 mSv/year is "considered to be a minor addition to already experienced doses – or at the same level as that existing in the ordinary environment". (Panel Report, para. 7.170 (quoting Dr Skuterud's response to Panel question No. 11 to the experts))

[41] Panel Report, para. 7.171.

[42] Panel Report, para. 7.172.

[43] Panel Report, para. 7.172.

[44] Panel Report, para. 7.172.

[45] Panel Report, para. 7.172 (quoting Korea's opening statement at the second Panel meeting, para. 66). (emphasis added by the Panel)

[46] Panel Report, para. 7.173.

[47] Panel Report, para. 7.178.

[48] Panel Report, para. 7.178.

[49] Panel Report, para. 7.183. The Panel described estimates of the radionuclides released after the accident, and stated that "[c]aesium was the radionuclide released in the greatest absolute numbers as well as in the largest proportion to other radionuclides." The Panel also recorded various factual details and uncertainty regarding the release of caesium into the ocean, and noted evidence of the relatively limited release of strontium and plutonium. (Panel Report, paras. 7.184-7.190 (fn omitted))

amount of leaks was not relevant to assessing the potential for specific products to be contaminated with radionuclides.[50]

5.10. The Panel noted the development of "dose coefficients" to determine guideline levels for human consumption, based on the properties of radionuclides and "the rate at which the contamination moves up the food chain to higher order animals and eventually to humans, the so-called transfer factor".[51] The Panel stated that these dose coefficients were developed by the International Commission on Radiological Protection (ICRP), which "was guided by the principle that human exposure through ingestion of man-made radionuclides should not add significantly to doses from background exposure and other sources – such as medical treatments and air travel".[52] The Panel also discussed the Codex Alimentarius Commission (Codex) guideline levels for radionuclides in food and the review conducted by the Codex Committee on Contaminants in Food following the FDNPP accident.[53]

5.11. With respect to the levels of contaminants in Japanese food products, the Panel examined data provided by Japan from its food-monitoring programmes and other data sets. The Panel noted "a consensus among the experts that the various test results produced by Japan provide a statistically valid support for the conclusion that agricultural and fishery products containing less than 100 Bq/kg of caesium would contain the additional Codex radionuclides below or far below their tolerance levels".[54] Accordingly, the Panel concluded based on "the totality of the evidence, including the knowledge about releases of radionuclides from the FDNPP, as well as the uptake of radionuclides by the relevant species" that "Japan has established that if a food product contains less than 100 Bq/kg of caesium (both Cs-134 and Cs-137) it will necessarily contain amounts of strontium, plutonium and other radionuclides in amounts lower than the Codex guideline levels."[55]

5.12. The Panel then assessed the potential dietary exposure of Korean consumers to radionuclides in food products and the contribution of Japanese products to Korean consumers' overall exposure on an annual basis. The Panel reviewed evidence and calculations presented by Japan that contamination levels would remain below 1 mSv/year in a diet exclusively based on meals typically eaten in Fukushima or a diet completely consisting of Japanese marine products.[56] The Panel found that "the evidence supports a conclusion that testing for food with less than 100 Bq/kg of caesium would result in an effective dose below 1 mSv/year, and likely significantly lower, even if 100% of food consumed was of Japanese origin."[57]

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[50] Panel Report, para. 7.192. (fn omitted) The Panel additionally noted the "[r]igorous environmental and seawater monitoring" in place and the "relatively quick" detection in food products of evidence of a major new release. (Panel Report, para. 7.193 (fn omitted)) The Panel also addressed other factors that Korea considered to affect the assessment of the potential contamination of food products with radionuclides, including various "issues" concerning the ongoing release and contamination from the FDNPP. The Panel stated with respect to the issues raised by Korea that "the consensus of the experts was that they were not relevant to an analysis of the potential for contamination in Japanese food products." The Panel also observed that "[t]he experts universally stated that actual measurements in food were what are required." In response to specific issues raised by Korea, the experts clarified that many were of little relevance from the perspective of protection against radiation exposure arising from contaminated food products. (Panel Report, paras. 7.194-7.195)

[51] Panel Report, paras. 7.196-7.197.

[52] Panel Report, para. 7.197. (fn omitted) The Panel further stated its understanding that "the development of the dose coefficient takes into account the ALARA principle as well as the LNT [linear-no-threshold] approach." (Ibid.) The Panel explained elsewhere in its Report that "[t]he linear-no-threshold (LNT) model currently represents the most widely accepted dose-response model relating exposure to radiation and increase in cancer incidence" and that "[t]he LNT model assumes that there is no threshold below which adverse effects can be guaranteed not to occur." (Panel Report, para. 2.17 (fn omitted))

[53] Panel Report, para. 7.198. The Panel noted that this review has not resulted in any modifications to the standards, and that "[t]he experts all agreed that the review of the guideline levels did not impact the sufficiency of the evidence on overall dose limit, individual dose limits, or how to test for radionuclide contamination in food products." (Ibid. (fn omitted)) According to the Panel, Codex uses the ALARA principle when adopting its guidelines for substances in foods, and both Japan and Korea use Codex guideline levels for all radionuclides except caesium, for which they have adopted a level (100 Bq/kg) that is ten times lower than the Codex standard. (Ibid.)

[54] Panel Report, para. 7.225. (fn omitted) In doing so, the Panel addressed various arguments concerning the adequacy of the test results and methodologies used to analyse the data.

[55] Panel Report, para. 7.226.

[56] Panel Report, para. 7.228.

[57] Panel Report, para. 7.236. In this connection, recalling that the 1 mSv/year level is based on annual averages, the Panel noted expert explanations that consumption of one outlier fish (a so-called "Frankenfish") with high levels of strontium exceeding its caesium levels would not affect the overall conclusion about consumer

5.13. Regarding "risk characterization", the Panel turned to assess the link between the onset of adverse effects (e.g. cancers) and radiation exposure. Noting the difficulty of tracing such effects to one particular source of radiation, the Panel stated that "[t]he ICRP recommended dose limit is the basis for food safety standards adopted by many national authorities."[58] The Panel stated that "the upper boundary of Korea's tolerance is 1 mSv/year" and that "Korea seems to adopt as its own the risk characterization carried out by the ICRP and utilized by the Codex in developing its maximum guideline levels."[59] According to the Panel, "Korea's adoption of the 1 mSv/year dose limit and the Codex guideline levels for the 20 radionuclides (except caesium) when developing its own limits[] reflects an understanding that below these levels food should be considered as safe for human consumption."[60]

5.14. Finally, the Panel assessed the level of protection achieved by Japan's proposed alternative measure in comparison to Korea's ALOP. The Panel was unable to conclude that Japan's alternative measure would achieve human exposure at 1 mSv/year at the time of adoption of the 2011 additional testing requirements[61] and the product-specific import bans.[62] At the same time, the Panel also found that, at least since 2013, the data were sufficient to confirm that caesium levels were consistently below 100 Bq/kg and that strontium and plutonium had not been detected in levels even nearing their respective Codex guidelines.[63] Assessing Japan's alternative measure in light of the volumes of initial releases, their dispersion, and their effect on plants and animals in the food chain, combined with the expected dietary exposure of Korean consumers to contamination in Japanese products, the Panel stated that:

> [T]he evidence supports a conclusion that utilizing Japan's alternative measure would result in a dose below 1 mSv/year even if 100% of food consumed was of Japanese origin. Given that Japanese food products represent a small share of the Korean market, their expected contribution to Korean consumers' dose would be significantly lower.
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> Therefore, the Panel finds that Japan's alternative measure ensures that the total dose is below 1 mSv/year and likely significantly lower.[64]

5.15. In comparing this level of protection with Korea's ALOP, the Panel noted that Korea's tolerance level for caesium is 100 Bq/kg and "not 'trace amounts' or 0.5 Bq/kg".[65] Therefore, according to the Panel, "testing for 100 Bq/kg of caesium is an appropriate measure for ensuring that Korea's tolerance level for that radionuclide is not exceeded"[66], and products from Japan containing less than 100 Bq/kg

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exposure. (Ibid.) The Panel further noted the views of the experts that, even if the market share of Japanese products were to return to pre-accident levels (0.37% of the Korean food market), "the data supports a conclusion that this would still result in a dietary exposure of less than 1 mSv/year." (Panel Report, para. 7.237 (fn omitted))

[58] Panel Report, para. 7.238. The Panel cited explanations by the experts that the model employed by ICRP to calculate the 1 mSv/year dose limit "assumes that there is no threshold below which adverse effects can be guaranteed not to occur". (Ibid., para. 7.239)

[59] Panel Report, para. 7.240.

[60] Panel Report, para. 7.240. (fn omitted)

[61] Panel Report, para. 7.242. Regarding the 2011 additional testing requirements, the Panel referred to its earlier finding that these requirements "were adopted in a situation where there was insufficient scientific evidence". (Ibid., para. 7.84) The Panel specifically found for the 2011 additional testing requirements that "the data were not sufficient to support the conclusion that levels of strontium and plutonium would normally have been lower than levels of caesium in products and that testing for 100 Bq/kg of caesium would have ensured that the levels of the other radionuclides were below their Codex guideline levels." (Ibid., para. 7.242)

[62] Panel Report, para. 7.242. Regarding the product-specific import bans, the Panel recalled that Japan itself had "conducted its own risk assessment and determined that the products were not safe for distribution", and concluded for this reason that "the evidence does not support a conclusion that Japan's alternative measure would achieve 1 mSv/year in 2012 for Alaska pollock and Pacific cod from the five relevant prefectures." (Ibid.)

[63] Panel Report, para. 7.243. The Panel "recognize[d] that testing for 100 Bq/kg of caesium should be sufficient to identify and prevent the entry onto market of any goods that exceed the maximum levels established". (Ibid.)

[64] Panel Report, paras. 7.244-7.245. (fn omitted) In this regard, the Panel noted that "Japan presents a 'worst case scenario' where the maximum level of exposure that could be reached using its alternative measure would be 0.94 mSv/year." (Panel Report, fn 897 to para. 7.244)

[65] Panel Report, para. 7.249.

[66] Panel Report, para. 7.249.

of caesium "would also contain less than Korea's specific maximum levels for strontium, plutonium, and the other Codex radionuclides".[67]

5.16. The Panel thus found that Japan failed to establish that its proposed alternative measure would have achieved Korea's ALOP at the time the 2011 additional testing requirements[68] and the product-specific import bans were adopted.[69] The Panel, however, found that Japan's alternative measure would achieve Korea's ALOP with regard to the *adoption* of the 2013 additional testing requirements and blanket import ban[70], and that Japan had established that its alternative measure would achieve Korea's ALOP with respect to the *maintenance* of all the challenged measures.[71]

5.17. The Panel therefore found that the 2011 additional testing requirements and product-specific import bans were not more trade-restrictive than required when adopted, but were maintained inconsistently with Article 5.6 because they were more trade-restrictive than required at the time of the establishment of the Panel.[72] The Panel further found that the 2013 additional testing requirements and the blanket import ban[73] were adopted and maintained inconsistently with Article 5.6 because they were more trade-restrictive than required.[74]

5.1.3 Whether the Panel erred under Article 5.6 of the SPS Agreement in finding that the alternative measure proposed by Japan would achieve Korea's appropriate level of protection

5.18. Korea claims that the Panel committed legal error under Article 5.6 because it "effectively substituted" an incorrect quantitative standard as Korea's ALOP[75] and thus compared Japan's proposed alternative against an incorrect ALOP.[76] In particular, Korea contends that, after initially accepting Korea's ALOP, the Panel then proceeded to apply a quantitative standard of 1 mSv/year as Korea's ALOP and that the Panel disregarded Korea's actual ALOP by relying on this standard.[77] Korea emphasizes that its ALOP consists of "several elements", including maintenance of levels of radioactive contamination in food as low as reasonably achievable (ALARA), below the 1 mSv/year radiation dose limit, at a level that exists in the ordinary environment.[78] Korea argues that the Panel's analysis and conclusions focus solely on a quantitative threshold, ignoring the ALARA element, and the maintenance of radioactivity levels at levels that exist in the ordinary environment, both of which are part of Korea's ALOP.[79] In this regard, Korea submits that the 1 mSv/year dose limit is an "upper bound" of tolerable risk[80], and that a measure meeting this threshold would not necessarily meet an ALOP of radiation exposure as low as reasonably achievable below 1 mSv/year at a level that exists in the ordinary environment, as these are two different standards.[81]

5.19. Japan submits that the Panel correctly determined and applied Korea's ALOP as part of its finding that Japan's proposed alternative measure would meet Korea's ALOP. Japan notes that the Panel accepted Korea's own formulation of its ALOP as comprising three elements: (i) the levels that exist in the ordinary environment; (ii) ALARA; and (iii) the quantitative dose exposure threshold of

[67] Panel Report, para. 7.249.
[68] Panel Report, para. 7.250. The Panel recalled in this connection that it had found that "there is insufficient data to demonstrate that testing for caesium alone would have been sufficient to achieve a dose below 1 mSv/year in 2011 when the first additional testing requirements were adopted." (Ibid.)
[69] Panel Report, para. 7.250. The Panel recalled that it had found that "the evidence also did not support a conclusion as regards the adoption of the 2012 product-specific import bans that testing only for caesium would achieve a 1 mSv/year level of protection with respect to Alaska pollock and Pacific cod from the five relevant prefectures." (Ibid.)
[70] Panel Report, para. 7.251. The Panel noted the "exception" of Pacific cod from Fukushima and Ibaraki for which Japan maintained distribution restrictions throughout 2013 because Japan considered it to be unsafe for distribution. (Ibid.)
[71] Panel Report, para. 7.252. The Panel also cited the "even smaller concentration levels measured in all Japanese food products in 2015" in support of this conclusion. (Ibid.)
[72] Panel Report, para. 7.254.
[73] With the exception of the adoption of the import ban on Pacific cod from Fukushima and Ibaraki.
[74] Panel Report, paras. 7.255-7.256.
[75] Korea's appellant's submission, para. 184.
[76] Korea's appellant's submission, para. 196.
[77] Korea's appellant's submission, para. 188.
[78] Korea's appellant's submission, para. 187.
[79] Korea's appellant's submission, para. 191.
[80] Korea's appellant's submission, para. 194.
[81] Korea's appellant's submission, para. 192.

1 mSv/year.[82] Japan asserts that one aspect of the Panel's task in this dispute was to clarify the relationship between the three elements of Korea's ALOP.[83] According to Japan, the Panel found that the role of the first two elements (ordinary environment and ALARA) was to inform Korea's determination of the third element (dose exposure limit of 1 mSv/year).[84] Japan argues that the ALARA element was not apt to serve as an ALOP because it did not constitute or define a particular "*level* of protection".[85] Japan further submits that the Panel properly assessed the ALOP actually being applied in Korea's SPS regime based on the quantitative limit used by Korea for contaminants in food.[86]

5.20. Article 5.6 of the SPS Agreement provides that:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.**[*]**
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> **[*fn original]** [3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

5.21. We recall that, under Article 5.6, a complainant must establish that an alternative measure: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's ALOP; and (iii) is significantly less restrictive to trade than the contested SPS measure.[87] These cumulative elements entail an assessment of a proposed alternative measure that serves as a conceptual tool to be used for the analysis under Article 5.6.[88]

5.22. This appeal concerns the requirement that an alternative measure achieve a Member's ALOP. Annex A(5) to the SPS Agreement defines the "appropriate level of sanitary or phytosanitary protection" as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory". The note to Annex A(5) explains that the concept of the appropriate level of protection is also referred to as the "acceptable level of risk".

5.23. The Appellate Body has said that a Member's ALOP is an "objective" and that an SPS measure is the instrument chosen to attain or implement that objective.[89] It is the "prerogative" of a Member to set the level of protection that it deems appropriate.[90] At the same time, Members adopting SPS measures must determine their appropriate level of protection with sufficient precision to enable the application of the relevant provisions of the SPS Agreement.[91] While a Member is not required to set the appropriate level of protection in quantitative terms, a Member may not establish its level of protection with such vagueness or equivocation as to render impossible the application of the relevant disciplines of the SPS Agreement, including the obligation set out in Article 5.6.[92]

5.24. In examining a claim under Article 5.6 of the SPS Agreement, a panel is charged with, *inter alia*, identifying the level of protection of the Member whose SPS measure is challenged and the level of

[82] Japan's appellee's submission, para. 126.
[83] Japan's appellee's submission, para. 128.
[84] Japan's appellee's submission, para. 129.
[85] Japan's appellee's submission, paras. 131-132. (emphasis original)
[86] Japan's appellee's submission, para. 134.
[87] Appellate Body Reports, *India – Agricultural Products*, para. 5.203; *Australia – Salmon*, para. 194.
[88] Appellate Body Report, *Australia – Apples*, para. 363. Consequently, a demonstration that an alternative measure meets the relevant Member's ALOP does not imply that the Member whose SPS measure is found to be inconsistent with Article 5.6 of the SPS Agreement must adopt that alternative measure or that the alternative measure is the only option that would achieve the desired level of protection. (Ibid.)
[89] Appellate Body Reports, *Australia – Salmon*, para. 200; *India – Agricultural Products*, para. 5.204.
[90] Appellate Body Reports, *India – Agricultural Products*, para. 5.205; *Australia – Apples*, para. 342; *Australia – Salmon*, para. 199. (emphasis omitted)
[91] Appellate Body Report, *India – Agricultural Products*, para. 5.205 (referring to Appellate Body Reports, *Australia – Apples*, para. 343; *Australia – Salmon*, paras. 205-206).
[92] Appellate Body Report, *Australia – Apples*, para. 343 (referring to Appellate Body Report, *Australia – Salmon*, para. 206).

protection of the proposed alternative measure.[93] A panel would typically be expected to accord weight to the respondent's articulation of its ALOP, particularly where that appropriate level of protection was specified in advance of the adoption of the SPS measure, where the ALOP is specified with sufficient precision, and where it has been consistently expressed by the responding Member.[94] A panel, however, is not required to defer completely to a respondent's characterization of its own ALOP, particularly where the respondent has not expressed its ALOP with sufficient precision. Rather, a panel must ascertain the respondent's ALOP on the basis of the totality of the arguments and evidence on the record, which may include the level of protection reflected in the SPS measure actually applied.[95]

5.25. The main issue raised by Korea in its appeal is whether the Panel "effectively substituted"[96] a quantitative standard of 1 mSv/year as Korea's ALOP and thus applied an incorrect ALOP[97] in its assessment of the alternative measure proposed by Japan. In setting out the relevant ALOP for its analysis under Article 5.6 of the SPS Agreement, the Panel stated that it must determine whether Japan's alternative measure achieves the following level of protection:

> [T]o maintain radioactivity levels in food consumed by Korean consumers at levels that exist in the ordinary environment – in the absence of radiation from a major nuclear accident – and thus maintain levels of radioactive contamination in food that are "as low as reasonably achievable" (ALARA), below the 1 mSv/year radiation dose limit.[98]

5.26. We note that this formulation of the relevant ALOP, as articulated by Korea and accepted by the Panel[99], consists of both qualitative and quantitative aspects concerning radioactivity levels in food consumed by Korean consumers, namely: (i) the levels that exist in the ordinary environment; (ii) ALARA; and (iii) the quantitative dose exposure of 1 mSv/year.

5.27. The Panel acknowledged the multi-faceted character of Korea's formulation of its ALOP, and accordingly "concluded that Korea's ALOP is not quantified at 1 mSv per year, but is rather a qualitative ALOP that reflects Korea's adherence to the ALARA principle and its desire not to increase radiation exposure beyond what is in the ordinary environment".[100] The Panel made several observations concerning the various elements of this ALOP before ultimately accepting the formulation advanced by Korea.[101]

5.28. We observe, however, that, despite recognizing that Korea's ALOP comprises several elements, various statements throughout the Panel's analysis reflect a predominant focus on exposure below 1 mSv/year as a decisive indicator of whether Japan's proposed alternative measure would meet Korea's ALOP. Notably, having accepted the relevant ALOP as formulated by Korea, the Panel immediately stated in light of that formulation that, "if Japan can demonstrate that its proposed alternative measure can achieve an ALOP that is below 1 mSv/year[,] it will have met its burden under the second element of Article 5.6."[102] The Panel reiterated this emphasis on the quantitative threshold

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[93] Appellate Body Reports, *Australia – Apples*, para. 344; *India – Agricultural Products*, para. 5.220.

[94] Appellate Body Report, *India – Agricultural Products*, para. 5.221.

[95] Appellate Body Reports, *India – Agricultural Products*, para. 5.221; *Australia – Salmon*, para. 207.

[96] Korea's appellant's submission, para. 184.

[97] Korea's appellant's submission, para. 170.

[98] Panel Report, para. 7.172 (referring to Korea's opening statement at the second Panel meeting, para. 66). (emphasis added by the Panel)

[99] We note that Korea submits that its ALOP was correctly defined by the Panel at the outset of its analysis. (Korea's appellant's submission, para. 185) Japan observes on appeal that the Panel accepted Korea's own formulation of its ALOP. (Japan's appellee's submission, para. 126)

[100] Panel Report, para. 7.247.

[101] The Panel noted that "the overall limit for all radionuclides set by CODEX STAN 193-1995 is 1 mSv/year." (Panel Report, para. 7.165) With respect to ALARA, the Panel took note of evidence cited by Korea that "ALARA is an obligation of means, and not an obligations of results", and further noted an expert's view that "ALARA is a process with no easily discernible end point and … it cannot itself be used as an international standard for food acceptance." (Panel Report, paras. 7.166 (referring to Korea's response to Panel question No. 57(b), in turn referring to European ALARA Network, Newsletter 31: "Development and dissemination of ALARA culture" (11 July 2016) (Panel Exhibit KOR-140)) and 7.167 (referring to Expert Meeting Transcript, para. 1.7)) With respect to radiation levels that exist in the ordinary environment, the Panel noted the experts' recognition that "radiological protection in food is based on the principle that the additional dose from contaminating radionuclides in foods should not add significantly to the dose already received in the ordinary environment or as they referred to it the 'background dose'." (Panel Report, para. 7.170 (quoting Dr Skuterud's response to Panel question No. 11 to the experts))

[102] Panel Report, para. 7.173.

at the outset of its assessment of whether Japan's proposed alternative measure would achieve Korea's ALOP, stating that it would determine whether Japan has established that "testing for caesium alone at a level of 100 Bq/kg would be sufficient to ensure that Korean consumers will be exposed to less than 1 mSv/year of radionuclides in food products from all sources."[103] With respect to the level of protection achieved by Japan's proposed alternative measure, the Panel then found that "Japan's alternative measure ensures that the total dose is below 1 mSv/year and likely significantly lower."[104] The Panel emphasized the same view when comparing this level of protection to Korea's ALOP. Specifically, the Panel found that "the evidence supports a conclusion that since 2013 Japan's alternative measure would achieve a maximum level of exposure below 1 mSv/year and likely significantly lower"[105] for all but one of the products subject to the challenged measures. The Panel thus found that Japan had established that its suggested alternative measure would achieve Korea's ALOP.[106]

5.29. While neither Article 5.6 nor Annex A(5) to the SPS Agreement precludes a Member's ALOP from containing multiple elements, Korea's appeal regarding the Panel's emphasis on one element of the ALOP as accepted by the Panel in this dispute raises the question of the precise relationship that exists between the various elements, both quantitative and qualitative, of that ALOP.[107] We note that the Panel did not clearly resolve whether each of these elements represented a distinct component of Korea's ALOP, and how they interact as parts of Korea's overall ALOP. In this respect, the Panel examined the development of the 1 mSv/year limit used by Codex in its guideline levels for radionuclides.[108] The Panel stated that both the ICRP and Codex applied the ALARA principle when arriving at the dose limit for all radionuclides (1 mSv/year) and the guideline levels for the individual radionuclides.[109] The Panel understood that the development of the dose coefficient by the ICRP and Codex takes into account the ALARA principle[110], and noted that the ICRP was guided by the principle that human exposure through ingestion of man-made radionuclides should not add significantly to doses from background exposure and other sources – such as medical treatments and air travel.[111] Despite these explanations, the Panel did not address whether the ALARA principle or background exposure, as considered by the ICRP and Codex to develop the 1 mSv/year limit, differs in any way from the elements of ALARA or radiation levels in the "ordinary environment" that form part of Korea's ALOP.

5.30. Further, the Panel did not resolve whether the qualitative aspects of Korea's ALOP were fully comprised by the 1 mSv/year dose limit, such that an alternative measure achieving exposure below that quantitative threshold would necessarily achieve the qualitative level of protection represented by the ALARA element and maintenance of radioactivity levels in food at levels that exist "in the ordinary environment". The Panel appeared to suggest that this is the case in referring to measures applied by Korea to food in general, stating that "the qualitative ALOP [i.e. the ALARA element and radioactivity levels in the ordinary environment] is reflected and inherent in the measures Korea applies to food products – which seek to limit overall consumption to below 1 mSv/year."[112] In characterizing the relevant risk, the Panel referred to the 1 mSv/year dose limit as the "upper boundary of Korea's tolerance" before concluding that "Korea's adoption of the 1 mSv/year dose limit and the Codex guideline levels for the 20 radionuclides (except caesium) when developing its own

[103] Panel Report, para. 7.178.

[104] Panel Report, para. 7.245. The Panel similarly stated that Japan's alternative measure "would achieve an exposure dose for Korean consumers below 1 mSv/year and likely significantly lower". (Ibid., para. 7.246)

[105] Panel Report, para. 7.251.

[106] Panel Report, para. 7.251. Similarly, the Panel found that "Japan has also established that its alternative measure would result in an exposure level below 1 mSv/year or significantly lower and achieve Korea's ALOP with regard to the maintenance of all the measures." (Panel Report, para. 7.252)

[107] This is particularly so given Japan's argument before the Panel that Korea's ALOP is in fact an exposure level of 1 mSv/year, and the nature of Japan's proposed alternative measure to verify that the caesium content of products does not exceed a specified quantitative level. (Panel Report, paras. 7.120 and 7.161; Japan's second written submission to the Panel, paras. 220-234) We also note, in this regard, the European Union's view that "the key issue … is the relationship between Korea's 1 mSv/year benchmark and the qualitative elements". (European Union's third participant's submission, para. 67)

[108] Panel Report, paras. 2.35-2.36.

[109] Panel Report, para. 7.171.

[110] Panel Report, para. 7.197. The Panel also understood that "the development of the dose coefficient takes into account … the LNT approach", which the Panel explained refers to the use of a "linear no threshold" model that "assumes that there is no threshold below which adverse effects can be guaranteed not to occur". (Ibid., paras. 7.197 and 7.239)

[111] Panel Report, para. 7.197; see also ibid., para. 7.170.

[112] Panel Report, para. 7.247.

limits[] reflects an understanding that below these levels food should be considered as safe for human consumption."[113] The Panel further considered that, "if a Member is applying a particular measure with an express quantitative limit for contaminants, that is an indicator that products containing levels of contaminants below that limit will satisfy its ALOP."[114] Although these statements would suggest that the Panel considered the quantitative threshold to be an expression of Korea's ALOP, they stand in tension with the Panel's stated appreciation of "Korea's adherence to the ALARA principle"[115], its recognition that Korea "maintains that its ALOP is not a fixed quantitative threshold"[116], and its ultimate acceptance of the ALOP expressed by Korea for purposes of Article 5.6.

5.31. The Panel's findings of an exposure limit that is "significantly lower"[117] than the purely quantitative standard of 1 mSv/year arguably reflect a qualitative dimension of reduction *below* that numeric exposure limit that, like the elements of ALARA and "levels that exist in the ordinary environment", forms part of Korea's ALOP. At the same time, we recall that the identification of a Member's ALOP is a critical element of the analysis under Article 5.6. This is because, pursuant to footnote 3 to Article 5.6, a measure cannot be considered "more trade-restrictive than required" unless, *inter alia*, there is "another measure" that is shown to achieve that ALOP. In this dispute, the Panel identified the relevant ALOP as maintaining radioactivity levels in food "at levels that exist in the ordinary environment" and thus maintaining those levels as low as reasonably achievable, below the 1 mSv/year radiation dose limit.[118] In identifying the ALOP in these terms, the Panel did not subordinate any of the various aspects of this ALOP or clearly find that certain aspects (namely, the elements of ALARA and "levels that exist in the ordinary environment") were necessarily comprised by the quantitative exposure limit of 1 mSv/year. Rather, the formulation advanced by Korea and accepted by the Panel reflected a multi-faceted level of protection that would need to be satisfied in its entirety in accordance with the requirements of Article 5.6 of the SPS Agreement. In our view, the Panel's findings as to achievement of exposure "below" or "significantly lower" than that upper boundary do not clearly correspond to the other integral elements of the ALOP that the Panel identified as being the basis for its analysis under Article 5.6.

5.32. Moreover, we do not consider achievement of the multi-faceted ALOP accepted by the Panel to follow automatically from the Panel's observations as to the "conservative" nature of the proposed alternative measure and Japan's supporting argumentation concerning, for example, the relationship between the 100 Bq/kg contamination level and Codex standards[119] or the overestimation of Korean dietary exposure to Japanese products.[120] While such considerations may have been potentially relevant to the Panel's application of Article 5.6, the Panel did not explicitly draw on these considerations in carrying out the required comparison under Article 5.6 between the level of protection achieved by the alternative measure proposed by Japan and Korea's ALOP as identified by the Panel.[121]

5.33. Having accepted Korea's formulation of its ALOP, it was incumbent on the Panel to assess whether the alternative measure proposed by Japan, namely, testing whether the caesium content of food products exceeds 100 Bq/kg, would achieve Korea's ALOP by maintaining levels of radioactivity that exist in the ordinary environment, and as low as reasonably achievable, below the 1 mSv/year radiation dose limit. The Panel, however, did not explicitly integrate the various elements of Korea's ALOP to account for all of these elements in assessing the level of protection that would be achieved by Japan's alternative measure. Rather, the Panel found that Japan's alternative measure would

[113] Panel Report, para. 7.240. The Panel distinguished caesium among the radionuclides regulated by Korea given that Korea applied lower limits than those provided for in the Codex guideline levels. (Ibid., para. 2.109 and Tables 2 and 5)

[114] Panel Report, para. 7.172.

[115] Panel Report, para. 7.171.

[116] Panel Report, para. 7.171.

[117] Before the Panel, Japan had "calculated that applying this limit [of 100 Bq/kg] to imports would result in an estimated maximum exposure dose of 0.8 mSv/year (0.94 mSv/year in the worst-case scenario)". (Panel Report, para. 7.120 (fn omitted) and fn 897 to para. 7.244)

[118] We note that Korea acknowledged before the Panel that "it has adopted the Codex benchmark of 1 mSv/year radiation exposure limit, in order to quantify *the highest radiation exposure it is willing to accept, keeping in mind the two objectives* of not exceeding the levels in the ordinary environment and abiding by the ALARA principle." (Panel Report, para. 7.165 (emphasis added; fn omitted))

[119] Panel Report, para. 7.168.

[120] Panel Report, paras. 7.233-7.234 and 7.236.

[121] Appellate Body Reports, *India – Agricultural Products*, para. 5.206; *Australia – Apples*, para. 344.

achieve exposure "below 1 mSv/year" or "significantly lower"[122] than 1 mSv/year, which the Panel recognized as "the *upper boundary* of Korea's tolerance".[123]

5.34. The specification of an ALOP is both a prerogative and an obligation of the responding Member under Article 5.6.[124] Members adopting SPS measures must determine their appropriate level of protection with sufficient precision as to enable the application of the relevant provisions of the SPS Agreement.[125] A panel must ascertain the respondent's ALOP on the basis of the totality of the arguments and evidence on the record[126], which may include evidence of the level of protection reflected in the SPS measure actually applied.[127] Where a panel considers that a respondent's ALOP differs from that articulated by the respondent, the panel must clearly explain what it has determined the respondent's ALOP to be, along with the reasons and evidentiary basis for the panel's determination. Reasons for such a determination may include whether the respondent has expressed its ALOP in a manner that it is insufficiently precise or that would otherwise render impossible the application of the disciplines of Article 5.6.[128]

5.35. In this dispute, the Panel made certain statements concerning the qualitative aspects of Korea's ALOP that may have been relevant to their significance under Article 5.6.[129] In particular, the Panel cited evidence concerning the objective of implementing ALARA, which stated that "ALARA is an obligation of means, and not an obligation of results, in the sense that the result of ALARA depends on processes, procedures, and judgments and is not a given value of exposure."[130] While such statements could have called into question whether the ALARA principle or radioactivity levels that exist in the ordinary environment can serve as a meaningful ALOP, or as parts thereof, the Panel did not resolve the issue and did not make any finding to this effect. The Panel also did not determine that the ALARA principle, as applied by the ICRP and Codex[131], and the principle that food contamination should not add significantly to the doses received in the ordinary environment[132] are equivalent to the qualitative elements of the ALOP as expressed by Korea. Ultimately, the Panel accepted Korea's own formulation of the relevant ALOP as the level of protection that would need to be achieved by Japan's alternative measure.[133] Thus, the Panel did not explicitly examine whether the ALARA element and the maintenance of radioactivity levels in food "at levels that exist in the ordinary environment" were insufficiently precise or otherwise incapable of serving as elements of Korea's ALOP for the purposes of assessing alternative measures under Article 5.6.

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[122] Panel Report, paras. 7.245-7.246 and 7.251-7-252.

[123] Panel Report, para. 7.240. (emphasis added)

[124] Appellate Body Reports, *India – Agricultural Products*, para. 5.221; *Australia – Salmon*, paras. 199 and 205-206.

[125] Appellate Body Report, *India – Agricultural Products*, para. 5.205 (referring to Appellate Body Reports, *Australia – Salmon*, paras. 205-206; *Australia – Apples*, para. 343).

[126] The Appellate Body has said that "[t]his duty applies equally when a claimant further contends that the appropriate level of protection expressed or identified by the respondent for purposes of WTO dispute settlement proceedings does not genuinely reflect that Member's appropriate level of protection." (Appellate Body Report, *India – Agricultural Products*, para. 5.221)

[127] Appellate Body Reports, *India – Agricultural Products*, paras. 5.221-5.222; *Australia – Salmon*, para. 207.

[128] Appellate Body Reports, *India – Agricultural Products*, para. 5.205; *Australia – Apples*, para. 343; *Australia – Salmon*, paras. 206-207.

[129] For example, regarding the ALARA element of Korea's ALOP, the Panel noted the absence of evidence on how adherence to this element "pre-existed the onset of this proceeding" or "how Korea developed its ALOP [including the ALARA element] or where this ALOP is set forth in its internal legislation or regulations". (Panel Report, fn 716 to para. 7.171) Regarding radiation levels in the ordinary environment, the Panel noted that "[t]he experts [appointed by the Panel] were not familiar with Korea's definition of the 'ordinary environment' being the levels of radiation absent a major nuclear accident." (Panel Report, para. 7.170) The Panel further observed that Korea's tolerance level for caesium is 100 Bq/kg and that the measures Korea applies to food products seek to limit overall consumption to below 1 mSv/year. (Panel Report, paras. 7.172, 7.247, and 7.249)

[130] Panel Report, para. 7.166 (referring to Korea's response to Panel question No. 57(b), in turn quoting European ALARA Network, Newsletter 31: "Development and dissemination of ALARA culture" (11 July 2016) (Panel Exhibit KOR-140)). Relatedly, the Panel noted a clarification from the ICRP that "the optimisation principle (of which ALARA is a part) applies in all circumstances and that it is a process rather than an endpoint." (Panel Report, para. 6.35 (referring to ICRP's response to Panel question No. 1))

[131] Panel Report, paras. 7.166-7.168.

[132] Panel Report, paras. 7.170 and 7.197.

[133] Panel Report, para. 7.172 (referring to Korea's opening statement at the second Panel meeting, para. 66).

5.36. Overall, the Panel framed its analysis under Article 5.6 of the SPS Agreement according to an ALOP containing multiple elements, while reaching conclusions with respect to Japan's alternative measure, that leave unclear whether it considered the alternative measure to satisfy *all* of the elements of the ALOP it had identified. The Panel's ultimate findings reflect an effective subordination of the elements of ALARA and radioactivity levels "in the ordinary environment" to the quantitative element of Korea's ALOP, in a manner that is at odds with the formulation of the ALOP explicitly accepted by the Panel at the outset of its analysis. Based on the requirements of Article 5.6, the Panel was required to have either clearly accounted for all elements of Korea's ALOP in comparing the level of protection that would be achieved by Japan's proposed alternative measure, or to have explicitly determined, based on the totality of the evidence, that certain elements were not part of the relevant ALOP under Article 5.6. We consider that the Panel, having ultimately failed to account clearly for all elements of the ALOP attributed to Korea in relation to the level of protection achieved by Japan's proposed alternative measure, erred in its application of Article 5.6 and assessment of whether Korea's measures are more trade-restrictive than required.

5.37. Our finding of error concerns the Panel's acceptance of an ALOP consisting of quantitative and qualitative aspects, and its comparison to an alternative measure in a manner that effectively focuses on achievement of protection to some degree "below" the quantitative threshold that forms only one part of that ALOP. We are not called upon to consider whether Korea's ALOP could be equated or reduced to exposure "below" or even "significantly lower" than 1 mSv/year. We do not express a view on the Panel's assessment of factual matters that are not challenged on appeal, including the levels of contaminants in Japanese food products, the relationship and ratios of different radionuclides based on releases from the FDNPP, and the potential dietary exposure of Korean consumers to radionuclides in food products.

5.1.4 Conclusion

5.38. A panel examining a claim under Article 5.6 of the SPS Agreement is charged with, *inter alia*, ascertaining the respondent's ALOP on the basis of the totality of the arguments and evidence on the Panel record. A panel is also required to identify the level of protection that would be achieved by the alternative measure proposed by the complainant. The Panel in this dispute accepted Korea's own articulation of the relevant ALOP as one containing the following elements concerning radioactivity levels in food consumed by Korean consumers: (i) the levels that exist in the ordinary environment; (ii) exposure "as low as reasonably achievable"; and (iii) the quantitative dose exposure of 1 mSv/year. While the Panel accepted Korea's articulation of this multi-faceted ALOP, its analysis focuses on the quantitative element of 1 mSv/year. The Panel reached conclusions with respect to Japan's alternative measure that leave unclear whether it considered the alternative measure to satisfy *all* of the elements of Korea's ALOP it had identified. The Panel's findings effectively subordinated the elements of ALARA and radioactivity levels "in the ordinary environment" to the quantitative element of exposure below 1 mSv/year. This is at odds with the articulation of the ALOP explicitly accepted by the Panel at the outset of its analysis.

5.39. We therefore find that the Panel erred in its application of Article 5.6 of the SPS Agreement in finding that Japan's proposed alternative measure achieves Korea's ALOP. Consequently, we reverse the Panel's findings of inconsistency with Article 5.6 with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures.

5.2 Article 2.3 of the SPS Agreement

5.2.1 Introduction

5.40. Korea appeals the Panel's findings that Korea acted inconsistently with Article 2.3 of the SPS Agreement with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures. In particular, Korea challenges the Panel's interpretation and application of Article 2.3, first sentence, concerning whether "similar conditions prevail" between the territories of Japan and other Members, and whether Korea's measures result in arbitrary or unjustifiable discrimination. Korea further challenges the Panel's finding that its measures constitute disguised restrictions on international trade in violation of Article 2.3, second sentence. Korea requests

us to reverse the Panel's findings that Korea acted inconsistently with Article 2.3.[134] Japan contends that the Panel correctly found that similar conditions prevail between Japanese food products and products from other sources, and that Korea has not established any legal error with respect to the Panel's findings on arbitrary or unjustifiable discrimination or disguised restrictions on international trade.[135] We begin by summarizing the Panel's findings under Article 2.3 before addressing Korea's claims on appeal.

5.2.2 The Panel's findings

5.41. Before the Panel, Japan claimed that Korea's measures are inconsistent with the first sentence of Article 2.3 of the SPS Agreement because they arbitrarily or unjustifiably discriminate against Japanese products. In this connection, Japan claimed that the conditions of food products from Japan and from other origins are similar because they pose similar SPS risks regulated by Korea's measures. Japan additionally claimed that Korea's measures constitute a disguised restriction on international trade within the meaning of the second sentence of Article 2.3. Korea contended before the Panel that the relevant conditions are not similar between Japan and other Members, and that any distinction drawn by the challenged measures is rationally connected to the differences in the conditions prevailing in the territories of the Members concerned.[136]

5.42. Under the first sentence of Article 2.3, the Panel assessed whether identical or similar conditions prevail between Japan and other Members, and then examined whether Korea's measures arbitrarily or unjustifiably discriminate between Japanese products and those of other Members.[137]

5.43. Regarding "the type of conditions that can be [the] subject of a comparison under Article 2.3"[138], the Panel considered that "the regulatory objective of a measure should inform the Panel's determination of the relevant conditions" to be compared under Article 2.3.[139] The Panel further considered that the phrase "including between their own territory and that of other Members", which appears at the end of the first sentence of Article 2.3, "identifies 'territory' as an example of conditions that could be compared, but it does not preclude that other conditions could be compared as well".[140] Based on these considerations, the Panel declined to limit the conditions to be compared under Article 2.3 only to territorial conditions in different Members, and thus exclude the conditions of products.[141]

5.44. In this connection, the Panel set out its views on the relationship between Article 2.3 and other provisions of the SPS Agreement and the General Agreement on Tariffs and Trade 1994 (GATT 1994), including Articles 5.2 and 5.5 of the SPS Agreement and Articles I:1, III:4, and X:1 of the GATT 1994.[142] The Panel further reasoned that "SPS measures regulate products and the risks that they can transfer from one territory to another."[143] The Panel contrasted cases involving "measures adopted to prevent the spread of pests or diseases" in which "territorial aspects are likely to be more prominent compared to disputes over measures targeting 'risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs', covered by Annex A(1)(b)."[144] The Panel considered that, "even when examining territorial conditions – such as the presence of pests or environmental contamination – it is done in light of the ultimate purpose of addressing risks of products in international trade."[145] The Panel concluded that its determination of the relevant "conditions" under Article 2.3 "should be informed by the regulatory objective of the challenged measures and the justification relied upon by the Member in light of the character of the measures

[134] Korea's appellant's submission, paras. 291, 322, and 333 (referring to Panel Report, paras. 7.276, 7.283, 7.321-7.322, 7.349-7.350, 7.355, 7.359-7.360, and 8.3.a-b).
[135] Japan's appellee's submission, paras. 145, 349, and 372.
[136] Panel Report, paras. 7.258 and 7.357-7.358.
[137] Panel Report, para. 7.259.
[138] Panel Report, para. 7.261.
[139] Panel Report, para. 7.266.
[140] Panel Report, para. 7.267. (fn omitted)
[141] Panel Report, paras. 7.268-7.275.
[142] Panel Report, paras. 7.268-7.269 and 7.272-7.275.
[143] Panel Report, para. 7.270.
[144] Panel Report, para. 7.270.
[145] Panel Report, para. 7.270. (fn omitted)

and specific circumstances of the case".[146] In this regard, the Panel found that it was not precluded "from considering the risk present in products in international trade as the relevant condition".[147]

5.45. Turning to the relevant "conditions" in this dispute, the Panel reviewed evidence concerning Korea's regulatory objective and the risks being addressed by its measures.[148] The Panel noted "the close link between Korea's measures, their complementarity and their single regulatory objective", and, based on these factors, it "view[ed] Korea's import bans and the additional testing requirements as part of an overall regime pursuing a single objective of protecting Korea's population from potential adverse effects from consumption of food contaminated with radionuclides".[149] The Panel therefore considered the relevant conditions to be compared under Article 2.3 to be "whether products from Japan and the rest of the world have a similar potential to be contaminated … and whether the levels of contamination would be below Korea's tolerance levels".[150]

5.46. In assessing the potential for contamination with caesium and the additional radionuclides in food products from Japan and other origins, the Panel first addressed the source of radioactive contamination and, in light of the nature and volumes of the radionuclides released from the FDNPP, focused on the potential contamination by caesium, strontium, and plutonium isotopes.[151] While recognizing the "unprecedented nature" of the FDNPP accident as "the largest release of radionuclides from a nuclear accident into the marine environment", the Panel also noted major releases of radionuclides and contamination of the marine environment prior to that accident.[152] The Panel reviewed evidence concerning the release of radionuclides in general and the process of contamination of plants, animals, and fungi ("radionuclide uptake")[153] to conclude that "past releases of radionuclides to the environment continue to affect food products and mean that food from anywhere in the world has the potential to be contaminated with radionuclides."[154]

5.47. The Panel next turned to the levels of radionuclides in food based on data provided by Japan. Recalling the progressive imposition of the measures over time, their different product coverage, and Japan's challenge against the adoption and maintenance of the measures, the Panel stated that it would first determine "whether the conditions were similar in 2011, 2012, and 2013 with respect to the groups of products covered by each measure", and then determine "whether the conditions were similar when the Panel was established on 28 September 2015 and whether they continued to be so".[155]

5.48. The Panel found that Japan did not establish the existence of similar conditions in Japanese and non-Japanese products at the time of adoption of the 2011 additional testing requirements[156] and the product-specific bans.[157] Regarding the adoption of the blanket import ban, the Panel found the data to "support[] a conclusion that the potential caesium contamination in these products was below the 100 Bq/kg tolerance level" for all but one of the products covered by Japan's challenge.[158] The Panel

[146] Panel Report, para. 7.276.
[147] Panel Report, para. 7.276.
[148] Panel Report, paras. 7.280-7.282. In addition to Korea's additional testing requirements and import bans, the Panel also examined measures that were not challenged by Japan, including the testing of randomly selected samples from every consignment for caesium and iodine, the requirement of origin certificates and pre-export caesium and iodine testing certificates, as well as internal measures for additional testing. (Ibid., para. 7.282)
[149] Panel Report, para. 7.283.
[150] Panel Report, para. 7.283. The Panel specifically referred to the potential to be contaminated with "the 20 Codex radionuclides, in particular with caesium, iodine, strontium and plutonium". (Ibid.)
[151] Panel Report, para. 7.290.
[152] Panel Report, para. 7.292. (fn omitted)
[153] Panel Report, paras. 7.293-7.297.
[154] Panel Report, para. 7.298.
[155] Panel Report, para. 7.300.
[156] Panel Report, para. 7.301. This was due to "the absence of sufficient data directly addressing the conditions of the Japanese products subject to the challenged measure". (Ibid.)
[157] Panel Report, para. 7.302. Specifically, the Panel found that Japan did not "establish its factual assertion that the potential for radionuclide contamination in Pacific cod and Alaska pollock from the relevant prefectures in 2012 [was] below Korea's tolerance levels", based on evidence of Japan's own imposition of internal restrictions on these products. The Panel considered that "[t]hese restrictions are an indication that Japan itself concluded that there was a high potential for contamination in these fishery products in these areas in 2012." (Ibid.)
[158] Panel Report, para. 7.303. Specifically, the Panel found that "the data supports a conclusion that the potential caesium contamination … was below the 100 Bq/kg tolerance level" in relation to 27 of the fishery

found with respect to the adoption of the 2013 additional testing requirements that "Japan has established its factual assertion that, in general, the levels of caesium contamination in all Japanese food products were below 100 Bq/kg."[159] For the maintenance of the import bans and the additional testing requirements, the Panel found that Japan established "that the potential for contamination with caesium in excess of 100 Bq/kg is low".[160]

5.49. The Panel then stated that it would compare "the potential for contamination with caesium in Japanese products … with those of other origins".[161] For this purpose, the Panel compared test results of Japanese and non-Japanese food products "taking into account the Panel's findings about past releases of caesium, their global reach and potential to transfer to food products".[162] The Panel concluded on this basis that "the majority of both Japanese and non-Japanese products have potential to contain caesium in amounts below the 100 Bq/kg tolerance level."[163] With respect to strontium and plutonium, the Panel again compared test results of Japanese and non-Japanese food products[164] "taking into account generally low levels of strontium and plutonium released globally and from the FDNPP".[165] On this basis, the Panel found that "food products from Japan and from other origins have similar potential for containing strontium and plutonium below their respective tolerance levels."[166] The Panel rejected the relevance of potential future releases from the FDNPP to whether the conditions in food products were similar when Korea adopted the measures and as of the establishment of the Panel.[167]

5.50. The Panel therefore concluded that similar conditions existed in Japan and in other Members with regard to the adoption of the 2013 additional testing requirements and the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki), and that similar conditions existed with regard to the maintenance of Korea's import bans and additional testing requirements at the time of the establishment of the Panel.[168]

5.51. The Panel proceeded to analyse whether the measures for which similar conditions existed arbitrarily or unjustifiably discriminated against Japanese products.[169] With respect to the import bans, the Panel concluded based on a variety of factors that "Korea's import bans are not rationally connected to the objective of protecting Korea's population against the risk arising from consumption of contaminated food products."[170] As a result, the Panel found that Korea's maintenance of the product-specific bans and the blanket import ban amounts to arbitrary or unjustifiable discrimination, and that "the discrimination resulting from the adoption of the blanket import ban … constitute[s] arbitrary or unjustifiable discrimination."[171] With respect to the additional testing requirements, the Panel found that "there is no rational connection between the discrimination resulting from applying the additional testing requirements to Japanese food products and the stated regulatory objective of

products from all eight prefectures and Pacific cod from Aomori, Chiba, Gunma, Iwate, Miyagi, and Tochigi, but not for Pacific cod from Fukushima and Ibaraki. (Ibid.)

[159] Panel Report, para. 7.306.

[160] Panel Report, para. 7.311. In support of this finding, the Panel noted data showing a continuous decline in levels of caesium in Japanese products, and the Panel addressed the significance of "outliers" in the data for some samples with caesium in excess of 100 Bq/kg. (Panel Report, paras. 7.308-7.311)

[161] Panel Report, para. 7.312.

[162] Panel Report, para. 7.314.

[163] Panel Report, para. 7.314.

[164] The Panel noted the relatively limited measurements of strontium and plutonium and used data on samples tested by Korea at the point-of-sale, while referring to its findings in response to Korea's objections on the sufficiency of the sample size to draw valid conclusions. (Panel Report, paras. 7.316-7.317)

[165] Panel Report, para. 7.319.

[166] Panel Report, para. 7.319.

[167] Panel Report, para. 7.320.

[168] Panel Report, paras. 7.321-7.322. The Panel stated that it would not continue the analysis with respect to the adoption of the 2011 additional testing requirements or the product-specific import bans, because Japan had failed to establish that similar conditions existed in that regard. (Ibid., para. 7.322)

[169] The Panel made separate findings that the import bans and additional testing requirements discriminate against Japanese products. (Panel Report, paras. 7.324-7.325 and 7.330-7.332)

[170] Panel Report, para. 7.349. The Panel's conclusion was based on "a cumulative assessment" of various factors, namely: (i) the high degree of trade-restrictiveness of the measures; (ii) the levels of caesium and additional Codex radionuclides measured in the relevant Japanese fishery species well below Korea's tolerance levels; (iii) the lack of review of the measures within a reasonable period of time with a view to conducting a risk assessment; (iv) the Panel's findings that the import bans are inconsistent with Article 5.6; and (v) the disregarding of the origin and contamination levels of a product harvested by a Japanese ship and packaged or processed in one of the eight prefectures. (Ibid.)

[171] Panel Report, para. 7.350. This finding excluded the ban on Pacific cod from Fukushima and Ibaraki.

the measure."[172] Therefore, the Panel considered "the discriminatory treatment afforded by the additional testing requirements when they were adopted in 2013 as well as the maintenance of both the 2011 and the 2013 additional testing requirements to constitute arbitrary or unjustifiable discrimination".[173]

5.52. Under the second sentence of Article 2.3, the Panel found that the import bans and additional testing requirements "constitute equally a disguised restriction on international trade" based on its finding of arbitrary or unjustifiable discrimination.[174]

5.2.3 Whether the Panel erred under Article 2.3 of the SPS Agreement in finding that "similar conditions prevail" in Japan and other Members

5.53. Korea challenges the Panel's findings with respect to the scope of the conditions that must be compared under Article 2.3 of the SPS Agreement. As an interpretive matter, Korea takes issue with the Panel's reliance on the principle of effective treaty interpretation, considerations of object and purpose, and contextual reference to other non-discrimination provisions of the SPS Agreement and GATT 1994.[175] Korea further argues that the Panel erred in conducting "an overly narrow application of Article 2.3 that did not take full account of the circumstances or factors that made up the relevant conditions".[176] In this regard, Korea considers that the Panel applied an incorrect standard that is focused exclusively on the risk present in products as "*the* relevant condition".[177] According to Korea, the Panel failed to explain why "the level of contamination of the products … should be the defining standard and all other circumstances or factors (e.g. environmental and ecological conditions) … are irrelevant to defining the relevant conditions in this dispute."[178]

5.54. Korea specifically criticizes the Panel for having "focused almost exclusively on the product test data" in its analysis as a "fail[ure] to properly assess whether the conditions in Japan and the conditions in the rest of the world were similar".[179] In Korea's view, the relevant conditions "had to include the environmental and ecological conditions in Japan and the status of the FDNPP" in addition to the "insufficiencies of the information about the ecological conditions in Japan, as well as about the status of the FDNPP".[180] In this respect, Korea argues that the Panel did not sufficiently assess radionuclide dispersion and contamination as they relate specifically to the FDNPP accident, despite the Panel's recognition of various factors that would be relevant to such radionuclide dispersion and contamination.[181] For example, Korea submits that the Panel recognized that radionuclide dispersion

[172] Panel Report, para. 7.355. In support of this finding, the Panel considered various factors, including: (i) the trade-restrictiveness of the additional testing requirements; (ii) the "low threshold" to trigger additional testing as compared with Korea's tolerance levels; (iii) the fact that Korea does not conduct at-the-border testing for additional radionuclides for countries and products "in which higher concentration of radionuclides have been detected than in Japanese products"; (iv) Korea's practice of administering import bans on Japanese products strictly on the basis of the nationality of the fishing vessel or location of the processing or packaging plant, regardless of the products' origin and contamination levels; and (v) its findings that there was sufficient knowledge about the levels of contamination in Japanese food products at the time the 2013 additional testing requirements were adopted, and that Korea had not completed a risk assessment of these requirements. (Ibid., paras. 7.351-7.354)

[173] Panel Report, para. 7.355.

[174] Panel Report, para. 7.359. The Panel found it unnecessary to consider other grounds put forward by Japan to support its claim under Article 2.3, second sentence – namely, statements by Korean officials indicating protectionist intent and the *de facto* restrictive effect of the additional testing requirements – and "exercise[d] judicial economy with respect to them". (Ibid.)

[175] Korea's appellant's submission, paras. 251-266. In particular, Korea contends that "the Panel disclosed its own preconceived view of the scope of Article 2.3" in its consideration that "remov[ing] whole categories of SPS measures" from the scope of Article 2.3 "would be contrary to the principles of effective treaty interpretation". (Ibid., paras. 252-253 (quoting Panel Report, para. 7.268)) Korea additionally contrasts the obligation under Article 2.3 of the SPS Agreement with those of Articles I:1 and III:4 of the GATT 1994 in that the latter explicitly call for a product-based comparison. (Ibid., paras. 261-264) Korea also contrasts the *chapeau* of Article XX of the GATT 1994, which "functions as an equilibrium device [that] should not cancel out the role of either substantive GATT obligations or each of the sub-paragraphs of Article XX", with Article 2.3, "which provides for an independent obligation without any exception clauses". (Ibid., para. 265)

[176] Korea's appellant's submission, para. 250.

[177] Korea's appellant's submission, para. 268 (referring to Panel Report, paras. 7.276 and 7.283). (emphasis added by Korea)

[178] Korea's appellant's submission, para. 269 (referring to Panel Report, paras. 7.276 and 7.283).

[179] Korea's appellant's submission, para. 274.

[180] Korea's appellant's submission, para. 276.

[181] Korea's appellant's submission, paras. 277-279.

may depend on "the atmospheric transport, precipitation, sea currents, as well as physical and chemical characteristics of specific isotopes"[182], but that "the Panel did not make any assessment of these factors or how they affected the dispersion of the radionuclides released before and after the accident from the FDNPP."[183] Korea further notes the Panel's observation that fish and marine species "can absorb radionuclides directly from water, from dietary sources, such as plankton, forage fish and, to a lesser extent, sediments in [the] case of demersal species"[184], but that the Panel "failed to assess these factors in connection with the FDNPP".[185] Korea also argues that the Panel failed to take account of "continuous releases of radionuclides"[186] after the accident, and that "the very fact that there is an active source of radionuclide contamination in Japan makes conditions there different."[187] Korea thus submits that "the Panel effectively adopted and applied an erroneous 'product-based' approach that improperly focused on the contamination levels of the products to the exclusion of the other relevant conditions."[188]

5.55. Japan submits that the Panel correctly found that similar conditions prevail between Japanese food products and products from other sources. Regarding the Panel's interpretation of the relevant "conditions" under Article 2.3, Japan contests Korea's claim that the Panel failed to cover all potentially relevant factors or prejudged the character of relevant "conditions". In Japan's view, the Panel left such conditions "to be identified on an open-ended basis in light of the particular circumstances surrounding the challenged measure"[189], especially the objectives pursued by the respondent's challenged measure and the SPS risks addressed.[190] Moreover, Japan submits that the Panel correctly identified the relevant conditions under Article 2.3 by reference to the objective of Korea's measures[191] and, based on the particular risk related to that objective, "explored the weight to be ascribed to the available evidence regarding a variety of matters, covering the conditions relating to the environment, ecology, and food".[192] In this regard, Japan refers to the elements of the Panel's assessment covering environmental contamination from the FDNPP and other major radionuclide releases worldwide[193], as well as the factors relied on by the Panel to assess the "risk of [food from Japan and from the rest of the world] containing levels of radionuclides above Korea's respective thresholds", including "scientific information concerning ecological and environmental issues; information concerning the specific properties of the radionuclides in question; and measurements of radiation levels in the food products".[194]

5.56. Responding to Korea's allegation that the Panel focused exclusively on the risk present in products as "the relevant condition" in its application of Article 2.3, Japan submits that the Panel considered all relevant factors and properly accounted for them.[195] In particular, Japan disagrees with Korea's contention that the Panel treated environmental and ecological conditions as "irrelevant", as the Panel expressly took relevant environmental and ecological considerations into account.[196] According to Japan, these factors include the environmental contamination near the FDNPP and in the wider global environment, as well as the pathways of contamination from the environment to agricultural, livestock, and marine products.[197] Japan further submits that the Panel explicitly addressed factors Korea claims to have been overlooked, such as the relevance of leak disclosures following the FDNPP accident and the possibility of future leaks.[198] In Japan's view, the fact that the Panel may have attached different weight to certain evidence is not itself an error in the legal application of Article 2.3.[199]

[182] Panel Report, para. 7.291.
[183] Korea's appellant's submission, para. 278.
[184] Panel Report, para. 7.294.
[185] Korea's appellant's submission, para. 279.
[186] Korea's appellant's submission, para. 281.
[187] Korea's appellant's submission, para. 285.
[188] Korea's appellant's submission, para. 291.
[189] Japan's appellee's submission, para. 175.
[190] Japan's appellee's submission, para. 179.
[191] Japan's appellee's submission, para. 200.
[192] Japan's appellee's submission, para. 204.
[193] Japan's appellee's submission, paras. 205-212.
[194] Japan's appellee's submission, para. 213. (fns omitted)
[195] Japan's appellee's submission, para. 223.
[196] Japan's appellee's submission, para. 228.
[197] Japan's appellee's submission, para. 231.
[198] Japan's appellee's submission, paras. 237-239.
[199] Japan's appellee's submission, para. 240.

5.57. Article 2.3 of the SPS Agreement provides:

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

5.58. Under the first sentence of Article 2.3, a complainant bears the burden of establishing that a measure arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, including between their own territory and that of other Members.[200] Article 2.3 therefore requires demonstrating as a threshold matter that "identical or similar conditions prevail" between Members. In this regard, the Appellate Body has said that, although the text of Article 2.3, first sentence, does not mandate a particular order of analysing the requirements thereunder, "identifying the *relevant* conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under Article 2.3, first sentence."[201]

5.59. The relevant conditions under Article 2.3 of the SPS Agreement must be identified subject to the particular nature of the measure and the specific circumstances of the case. By definition, SPS measures relate to a "protected interest"[202] as set out in Annex A(1) to the SPS Agreement, which corresponds to protection against a specific risk, or preventing or limiting damage from certain causes. The Appellate Body has previously recognized that "identifying the relevant conditions" and their similarity under Article 2.3 may require consideration of the specific SPS risks at issue.[203] The particular risk addressed by an SPS measure will necessarily relate to an objective pursued under the SPS Agreement[204] that may inform the "conditions" that must be "identical or similar" under the first sentence of Article 2.3.[205] Consequently, the disciplines of Article 2.3, and the particular "conditions" that must be shown to be "similar or identical" under that provision, should be informed by the nature of SPS measures in light of the particular circumstances of the case. Thus, "conditions" relating to the particular objective pursued and risks addressed by the SPS measure in question are relevant for the analysis under Article 2.3 of whether identical or similar conditions prevail between Members.[206]

5.60. The main issue raised in this appeal is whether the Panel properly considered the relevant "conditions" prevailing in Japan, including environmental and ecological conditions in Japan and the status of the FDNPP.[207] One aspect of Korea's appeal concerns the Panel's interpretation of Article 2.3 with respect to the relevance of risks arising in *products* to the prevailing "conditions" that must be shown to be "identical or similar" in different *territories*. Korea alleges that the Panel's "erroneous interpretive approach"[208] resulted in its articulation of "an incorrect standard that is focused

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[200] Appellate Body Report, *India – Agricultural Products*, para. 5.260.

[201] Appellate Body Report, *India – Agricultural Products*, para. 5.261. (emphasis added)

[202] Appellate Body Report, *Australia – Apples*, para. 172.

[203] In *India – Agricultural Products*, the Appellate Body stated that "identifying the relevant conditions, and assessing whether they are identical or similar", would logically serve as a good starting point for an analysis under Article 2.3, and found support for this in the Appellate Body's consideration in *Australia – Salmon* that, under the first sentence of Article 2.3, "it would first of all be necessary to determine the risk to Australia's salmonid population resulting from diseases." (Appellate Body Report, *India – Agricultural Products*, para. 5.261 and fn 703 thereto (quoting Appellate Body Report, *Australia – Salmon*, para. 255 (emphasis omitted)))

[204] We recall that the Appellate Body has previously referred to a Member's "appropriate level of protection" as an "objective" that is pursued by an SPS measure. (Appellate Body Reports, *Australia – Salmon*, para. 200; *Australia – Apples*, para. 172) (emphasis omitted)

[205] This understanding of Article 2.3 is in accord with the Appellate Body's guidance as to the *chapeau* of Article XX of the GATT 1994, which similarly refers to "arbitrary or unjustifiable discrimination between countries where the same conditions prevail". The Appellate Body has said in that context that "'conditions' relating to the particular policy objective under the applicable subparagraph [of Article XX of the GATT 1994] are relevant for the analysis under the chapeau." (Appellate Body Reports, *EC – Seal Products*, para. 5.300; see also Appellate Body Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.307-7.308; *Indonesia – Import Licensing Regimes*, para. 5.99)

[206] Appellate Body Reports, *EC – Seal Products*, paras. 5.300 and 5.317.

[207] Korea's appellant's submission, paras. 268-271, 276, and 291.

[208] Korea's appellant's submission, para. 266.

exclusively on 'the risk present in the products'"[209] as "the defining standard"[210] of the relevant conditions in this dispute.

5.61. We note that the Panel concluded its interpretation of the relevant "conditions" under Article 2.3 as follows:

> [T]he Panel concludes that its determination of the relevant conditions should be informed by the regulatory objective of the challenged measures and the justification relied upon by the Member in light of the character of the measures and specific circumstances of the case. In that regard, the Panel sees nothing in the language of Article 2.3, first sentence, read in its context and in the light of its object and purpose that would preclude it from considering the risk present in products in international trade as the relevant condition.[211]

5.62. In our view, the Panel correctly recognized that the regulatory objective of a measure should inform the determination of the relevant conditions under Article 2.3[212], which Korea does not dispute on appeal.[213] We note that Korea emphasizes the significance of territorial conditions based on the reference in Article 2.3 to discrimination "between Members", and the prevalence of "identical or similar conditions" as qualified by the phrase "including between their own territory and that of other Members". According to Korea, this language calls for a comparison "between the 'conditions' prevailing in the territory of one Member and the 'conditions' prevailing in the territory of another Member".[214]

5.63. It is noteworthy to us that the Panel considered that, under Article 2.3, "ecological or environmental conditions in an exporting Member can be relevant depending on the circumstances of the case and, in particular, the type of risk addressed by the challenged measures."[215] In our view, the relevant conditions under Article 2.3 include those of the territory of the Member taking the SPS measure and the territory of other Members. We note that Article 5.2 of the SPS Agreement requires Members to take into account "relevant ecological and environmental conditions" in their risk assessments. When ecological or environmental conditions in the territories of different Members are relevant to the risks addressed by an SPS measure, they inform the scope of conditions to be compared under Article 2.3. At the same time, we agree with the Panel's conclusion that the conditions referred to in Article 2.3 may be construed to "*include* those found in products and *not just* the territory of an exporting or importing Member".[216]

5.64. We disagree, however, with the Panel's conclusion that Article 2.3 permits consideration of the "risk present in products in international trade as *the* relevant condition"[217] because this would not give appropriate weight to all other relevant conditions under Article 2.3. While the analysis under Article 2.3 may include consideration of conditions that can be characterized as being present in the products from different Members, a proper interpretation of Article 2.3 includes consideration of other relevant conditions, such as territorial conditions, to the extent they have the potential to affect the products at issue.[218] The analysis under Article 2.3 thus entails consideration of all relevant conditions in different Members, including territorial conditions that may not yet have manifested in products but are relevant in light of the regulatory objective and specific SPS risks at issue. We note the Panel's

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[209] Korea's appellant's submission, para. 268, referring to Panel Report, para. 7.276.
[210] Korea's appellant's submission, para. 269.
[211] Panel Report, para. 7.276.
[212] Panel Report, para. 7.266.
[213] Korea's appellant's submission, para. 268 (referring to Panel Report, para. 7.276).
[214] Korea's appellant's submission, para. 235.
[215] Panel Report, para. 7.270.
[216] Panel Report, para. 7.274. (emphasis added)
[217] Panel Report, para. 7.276. (emphasis added)
[218] We further note that the Panel, in discussing the contextual relevance of the definition of "risk assessment" in Annex A(4) of the SPS Agreement, emphasized the words "*presence* of … contaminants, toxins … in food, beverages or feedstuffs" to conclude that "it is appropriate for a risk assessment analysis with regard to an Annex A(1)(b) measure to focus on the *presence* of a health hazard in certain products *and not on an analysis of territories*." (Panel Report, para. 7.274) (underlining removed; italics added) We disagree with the Panel to the extent that it understood the contextual guidance in Annex A(4) regarding risk assessments to exclude territorial conditions from the scope of relevant "conditions" under Article 2.3. More generally, we do not consider that the interpretation of Article 2.3 differs depending on the type of SPS measure at issue. Therefore, we disagree with the Panel's statement that territorial aspects are likely to be more prominent with respect to other risks covered by Annex A(1) than those falling under Annex A(1)(b); rather, the application of Article 2.3 may be informed by the type of SPS measure at issue and the arguments and evidence submitted in a particular dispute.

view that, "even when examining territorial conditions[,] … it is done in light of the ultimate purpose of addressing risks of products in international trade."[219] We do not consider that the "ultimate purpose of addressing risks of products in international trade"[220] permits, as an interpretive matter, conducting an analysis under Article 2.3 without fully considering relevant territorial conditions that have the potential to affect products for the reason that they have not yet materialized in products, despite their relevance to the regulatory objective and specific SPS risks at issue.

5.65. Therefore, we find that the Panel erred in its interpretation of Article 2.3 when it concluded that this provision permits consideration of the "risk present in products in international trade as *the* relevant condition" because we understand the Panel to have concluded that the scope of relevant "conditions" under Article 2.3 may be exclusively limited to "the risk present in products".[221]

5.66. Turning to the Panel's *application* of Article 2.3, Korea criticizes the Panel for having "focused almost exclusively on the product test data"[222] and argues that the Panel "did not properly assess other factors, particularly those relating to the ecological and environmental conditions in Japan".[223]

5.67. In identifying the relevant conditions under Article 2.3, "the Panel view[ed] Korea's import bans and the additional testing requirements as part of an overall regime pursuing a single objective of protecting Korea's population from potential adverse effects from consumption of food contaminated with radionuclides."[224] The Panel found that:

> Therefore, the relevant conditions to be compared between Members for the purpose of determining whether conditions are similar within the meaning of Article 2.3 is whether products from Japan and the rest of the world have a similar potential to be contaminated with the 20 Codex radionuclides, in particular with caesium, iodine, strontium and plutonium, *and* whether the levels of contamination would be below Korea's tolerance levels.[225]

5.68. The "relevant conditions" identified by the Panel for the purposes of Article 2.3 concern "whether products from Japan and the rest of the world have a similar potential to be contaminated" with certain radionuclides. In addition to the "potential to be contaminated", the Panel further identified as a relevant condition "whether the levels of contamination would be below Korea's tolerance levels". The Panel explained that "assessing whether the potential for contamination with caesium and the additional radionuclides is similar in food products from Japan and of other origins requires the Panel to take a holistic approach that would consider all the relevant factors affecting such a risk."[226]

5.69. The Panel began by assessing evidence relating to "the source of radioactive contamination", including "major releases of man-made radionuclides" and contamination of the global environment prior to the FDNPP accident.[227] In this regard, the Panel noted that "the fallout from nuclear weapons testing is responsible for the most radioactive material distributed globally."[228] The Panel also referred to the accident in the Chernobyl nuclear power plant as "another major source of global radioactive contamination, although it had a particularly strong impact on Europe", as well as "[r]eleases from other nuclear facilities [that] had more localized effects".[229] The Panel cited examples of "major releases of radionuclides [that] took place in marine areas, resulting in their contamination", including "discharges of radioactive waste into the Irish Sea and North Atlantic, as well as nuclear weapons tests conducted in the Pacific".[230]

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[219] Panel Report, para. 7.270. (fn omitted)
[220] Panel Report, para. 7.270. (fn omitted)
[221] Panel Report, para. 7.276. (emphasis added)
[222] Korea's appellant's submission, para. 274.
[223] Korea's appellant's submission, para. 280.
[224] Panel Report, para. 7.283.
[225] Panel Report, para. 7.283. (emphasis added)
[226] Panel Report, para. 7.289.
[227] Panel Report, paras. 7.290-7.291.
[228] Panel Report, para. 7.291.
[229] Panel Report, para. 7.291. (fns omitted)
[230] Panel Report, para. 7.292. (fns omitted)

5.70. At the same time, the Panel "recognise[d] the unprecedented nature of the FDNPP accident, as the largest release of radionuclides from a nuclear accident into the marine environment".[231] Further, the Panel stated that "radioactive material, mainly caesium, released [into] the atmosphere from the FDNPP also contributed to global contamination levels, although the fallout has affected the East and North of Japan the most."[232] The Panel noted that radionuclides released from the FDNPP "were largely dispersed by sea currents and added to existing concentration levels in the Northern Pacific", stating further that "some amounts of these radionuclides were bound to particles, sunk and settled in sediments off the Fukushima coast."[233]

5.71. In its discussion of global radionuclide contamination, the Panel appeared to indicate that there may be territorial differences in contamination depending on the source, specifically stating that "radionuclides can be more concentrated close to the source of contamination."[234] In addition, having noted that some of the radionuclides released from the FDNPP would be expected to have settled in sediments off the Fukushima coast, the Panel stated that "[t]his would also be true for areas close to the other primary sources of contamination."[235]

5.72. The Panel made these statements in the context of its findings of continuing global contamination resulting from various radionuclide releases, including those from the FDNPP. For example, while acknowledging the potential for concentration of radionuclides close to the source, the Panel further stated in reference to various radionuclide releases that "the radioactive material originating from all of these events has been dispersed across the world depending on the atmospheric transport, precipitation, sea currents, as well as physical and chemical characteristics of specific isotopes."[236] The Panel stated that "both the historical releases and the FDNPP accident continue to have global effects", and found that "the caesium, strontium and plutonium that were released to the environment in significant quantities prior to the FDNPP accident *still have the potential to be present in food* from across the world."[237]

5.73. We note that the Panel's findings concerning past releases of radionuclides refer generally to the potential for contamination, without accounting for any *degree* of contamination or differentiating the *relative potential* for contamination in different territories. Rather, the Panel ultimately concluded that "past releases of radionuclides to the environment continue to affect food products and mean that food from anywhere in the world has *the potential* to be contaminated with radionuclides."[238]

5.74. The Panel's conclusion as to "the potential to be contaminated with radionuclides", without regard to any specific source or relative degree, appears to conflict with some of the Panel's intermediate observations concerning the sources of worldwide contamination. For example, in addressing the example of contamination from nuclear weapons testing, the Panel states that "radioactive isotopes of caesium and strontium from nuclear weapons testing continue to this day to constitute *a potential* for contamination of food products across the world."[239] However, the Panel noted that the evidence relied on to reach this conclusion "does not take into account the additional releases from the Chernobyl accident or other release events from nuclear facilities", stating that such events "added to the global contamination levels and *thus increase the potential for contamination of food* above" that which is attributable to nuclear weapons testing.[240] Further, as noted above, the Panel observed that nuclear releases could have localized effects and that radionuclides can be more concentrated close to the source of contamination.[241] These statements indicate that particular release events may be capable of increasing the potential for contamination of food within a specified geographical location or territory.

5.75. We therefore read the Panel's assessment of the source of contamination as containing conflicting indications of relevant territorial differences concerning the potential for contamination of food. On the one hand, the Panel's analysis contains suggestions that specific release events or

[231] Panel Report, para. 7.292. (fn omitted)
[232] Panel Report, para. 7.291. (fn omitted)
[233] Panel Report, para. 7.291. (fn omitted)
[234] Panel Report, para. 7.291.
[235] Panel Report, para. 7.291. (fn omitted)
[236] Panel Report, para. 7.291. (fn omitted)
[237] Panel Report, para. 7.293. (fn omitted; emphasis added)
[238] Panel Report, para. 7.298. (emphasis added)
[239] Panel Report, para. 7.297. (emphasis added)
[240] Panel Report, para. 7.297. (emphasis added)
[241] Panel Report, para. 7.291.

radionuclide sources may result in an incremental and localized *increase* in contamination levels *and* the potential for food contamination, combined with the Panel's observation that radionuclides can be more concentrated close to the source of contamination. On the other hand, the Panel generally noted that radioactive material originating from the FDNPP and other events "has been dispersed across the world depending on the atmospheric transport, precipitation, sea currents, as well as physical and chemical characteristics of specific isotopes".[242] Although aspects of the Panel's reasoning appear to suggest that such dispersion is not globally uniform across different territories, its conclusion concerning environmental contamination makes no distinction between territories as it relates to the relative degree of potential for food contamination.[243]

5.76. We recognize that the Panel's assessment of the sources of contamination formed only part of what it framed at the outset as "a holistic approach that would consider all the relevant factors affecting such a risk".[244] Nevertheless, the Panel's conclusion regarding environmental contamination, as well as its general assessment of territorial conditions surrounding the FDNPP in relation to other territories, does not reflect a number of factors that the Panel itself had identified as affecting radionuclide contamination of different areas. The Panel observed that radionuclide dispersion from certain events would depend on "the atmospheric transport, precipitation, sea currents, as well as physical and chemical characteristics of specific isotopes".[245] Although the Panel did provide factual background on the radionuclides released from the FDNPP accident along with other major releases worldwide[246], it did not specifically account for such factors or territorial differences pertaining to the FDNPP, as opposed to other territories globally, and as they may relate to differences in the potential for food contamination. Indeed, the Panel's explanations of radionuclide release and dispersion following the FDNPP accident indicate localized and relatively recent territorial contamination[247], which the Panel does not reconcile with its conclusion suggesting undifferentiated global contamination stemming from various radionuclide releases worldwide and dispersion over a long period of time. Thus, at this stage of the Panel's assessment of the relevant conditions under Article 2.3, its comparison of territorial conditions near the FDNPP and the rest of the world does not reflect or differentiate between various factors that the Panel itself suggested could differently affect the potential for contamination.

5.77. Having assessed past releases of radionuclides, including from the FDNPP accident, to conclude that that "food from anywhere in the world has the potential to be contaminated with radionuclides", the Panel then "turn[ed] to the levels of radionuclides in food".[248] The Panel explained in this regard

[242] Panel Report, para. 7.291. (fn omitted)

[243] We further note that the Panel's discussion of the process of contamination of plants, animals, and fungi ("radionuclide uptake") does not reflect any difference across territories as it relates to the potential for food contamination. Rather, the Panel assessed in general terms the contamination of agricultural and livestock products from "[m]an-made radionuclides released [into] the environment … through direct deposition from the atmosphere", and made general observations on the exposure of livestock and marine species to environmental contamination and dietary consumption. Although the Panel noted "[v]arious pathways of radionuclide uptake" that "allow estimating transfer factors between plants, animals, and fungi up the food chain and ultimately to food products for humans", it made no indication of how such pathways and factors may specifically relate to the environmental contamination from the FDNPP accident, as compared to contamination from other major releases. Thus, despite the indication of various factors that may affect radionuclide dispersion and environmental contamination, the Panel did not address what impact such factors had on environmental and territorial conditions in Japan, or the relative potential for contamination of Japanese food products. (Panel Report, paras. 7.291 and 7.294-7.295 (fn omitted); see also ibid., paras. 2.4-2.7)

[244] Panel Report, para. 7.289.

[245] Panel Report, para. 7.291. (fn omitted)

[246] These include, for example, the accident at the Chernobyl nuclear power plant, discharges of radioactive waste into the Irish Sea and North Atlantic Ocean, as well as nuclear weapons tests conducted in the Pacific Ocean. (See e.g. Panel Report, paras. 2.44-2.62, 7.291-7.292, and Table 20)

[247] For example, the Panel noted that "[t]he effect of a release of radionuclides is not necessarily localized, but may be dispersed through the atmosphere and ocean currents." (Panel Report, para. 2.53) At the same time, the Panel noted of atmospheric dispersion that "the activity concentration in the atmosphere decreased noticeably with increase in distance from the FDNPP." (Ibid., para. 2.54 (fn omitted)) Regarding ocean dispersion, the Panel noted that the "high caesium-activity ratios" in samples from the North-Western Pacific taken two years after the accident suggest that these samples were contaminated by caesium released from the FDNPP. (Ibid., para. 2.56) Further, the Panel observed that "[t]he Fukushima prefecture and neighbouring prefectures have several river systems that flow from contaminated upland forests to coastal plains, and ultimately empty into the Pacific Ocean", and that "[g]roundwater has been continuously flowing from the hills into the FDNPP where it interacts with damaged fuel and becomes contaminated." (Ibid., paras. 2.57 and 2.60 (fn omitted))

[248] Panel Report, para. 7.298.

that "Japan has provided the Panel with data with respect to the levels of radionuclides in food products in Japan and from other origins."[249] Based on that data, the Panel reviewed the levels of radionuclides in food in order to make separate findings regarding the relevant "conditions" for both the adoption and maintenance of the challenged measures (the product-specific import bans, the blanket import ban, as well as the 2011 and 2013 additional testing requirements).[250] The Panel then compared "the potential for contamination in Japanese products … with those of other origins" based on import testing data from Korea and Japan, "as well as knowledge about contamination resulting from pre-2011 releases of radionuclides".[251]

5.78. In contrast to the Panel's finding of a general "potential for contamination" in relation to sources of contamination, the Panel's assessment of Japanese food focused on *actual* – not potential – levels of contamination for different products during different time periods, with emphasis on Korea's "tolerance level" for the relevant radionuclide.[252] As discussed in further detail below with regard to caesium, the Panel assessed levels of caesium contamination in Japanese food, focusing on actual caesium levels measured in Japanese food samples with repeated reference to the 100 Bq/kg "tolerance level".

5.79. We note that the Panel used varying formulations to express its findings in this step of its assessment, at times appearing to equate the potential for caesium contamination with the observation of actual measurements below a quantitative tolerance level. For example, regarding the adoption of the blanket import ban, the Panel cited measurements being "at that time consistently below the tolerance level of 100 Bq/kg" to find that "the data supports a conclusion that the potential caesium contamination in these products was below the 100 Bq/kg tolerance level."[253] The Panel similarly appeared to equate the notion of potential contamination with observed measurements below Korea's tolerance level in finding with respect to the maintenance of Korea's measures that "Japan has met its burden to establish that the potential for contamination with caesium in excess of 100 Bq/kg is low."[254] In relation to the adoption of the 2013 additional testing requirements, the Panel did not refer to the "potential" contamination as a legally relevant "condition" under Article 2.3, but rather concluded based on data on caesium contamination levels for all Japanese products[255] that "Japan has established its factual assertion that, in general, the levels of caesium contamination in all Japanese food products were below 100 Bq/kg."[256]

[249] Panel Report, para. 7.298.

[250] Panel Report, paras. 7.300-7.309.

[251] Panel Report, para. 7.312.

[252] In addition to the appealed findings discussed below, the Panel's unappealed findings regarding Japan's failure to show the existence of similar conditions (in relation to the adoption of measures in 2011 and 2012) similarly evince a focus on actual levels of food contamination in relation to Korea's tolerance levels. Regarding the adoption of the 2011 additional testing requirements, the Panel cited "the absence of sufficient data directly addressing the conditions of the Japanese products subject to the challenged measure" as the sole factor for finding that Japan had not demonstrated the existence of similar conditions. (Panel Report, para. 7.301) Regarding the adoption of the product-specific import bans, the Panel cited both Japan's own internal restrictions on the relevant products, as well as Japan's lack of argumentation with respect to the contamination levels of samples in 2012, to find that Japan had not established that "the potential for radionuclide contamination in Pacific cod and Alaska pollock from the relevant prefectures in 2012 [was] below Korea's tolerance levels." (Ibid., para. 7.302)

[253] Panel Report, para. 7.303. (fn omitted) The Panel made this finding in relation to products covered by the blanket import ban with the exception of Pacific cod for which Japan maintained its own restrictions in 2013.

[254] Panel Report, para. 7.311. We note that the Panel addressed various issues in support of this finding based on data on product samples, including the significance of outliers exceeding the 100 Bq/kg level. (Ibid., paras. 7.307-7.311)

[255] In this connection, the Panel explained that the 2013 additional testing requirements apply "to essentially all food – fishery, livestock, and agricultural products; processed food; and food additives". Further, because "Japan [was] seeking to invalidate Korea's additional testing requirements completely with respect to all the food products that they cover", the Panel stated that it would "not exclude any test results from specific fish species or food products from [its] analysis of the similarity of conditions with regard to the additional testing requirements". Thus, the Panel explained that, "[a]s the 2013 additional testing requirements address all products from anywhere in Japan in terms of their contribution towards an average annual exposure level, [its] analysis [would] examine all products from anywhere in Japan from the same perspective." (Panel Report, paras. 7.304-7.305)

[256] Panel Report, para. 7.306. The Panel noted in support of this finding that, "at the time the measure was adopted, in general, less than 1% of samples were found to exceed the caesium tolerance level of 100 Bq/kg for all product categories from all Japanese prefectures." (Ibid., para. 7.305 (fn omitted))

5.80. At this intermediate stage of its assessment, the varying formulations of the Panel's conclusions lend themselves to different possible readings in relation to the "conditions" to be compared under Article 2.3. Depending on the measure and claim being addressed, the Panel's findings may be read to mean that the "potential caesium contamination" was itself below the 100 Bq/kg level[257], there was a "low" potential for contamination in excess of 100 Bq/kg[258], or simply that caesium levels were below 100 Bq/kg.[259]

5.81. The Panel turned from its examination of caesium contamination levels in Japanese food "to compare the potential for contamination with caesium" in products of other origins.[260] The Panel noted the lack of "comprehensive testing data of non-Japanese products over all food categories".[261] Nevertheless, the Panel found that "the data provided can serve as a basis for a conclusion on general contamination in conjunction with the information available on contamination due to past releases throughout the world and general knowledge on the uptake of radionuclides in food products."[262]

5.82. We understand the Panel's reference to "the information available on contamination due to past releases throughout the world"[263] to correspond to its assessment of the sources of contamination undertaken before examining "the levels of radionuclides in food". As we observed above, the Panel's conclusion regarding past releases and global contamination was that "food from anywhere in the world has the potential to be contaminated with radionuclides."[264] While the Panel did not specify whether this means a *similar* potential for contamination for food from all origins, we noted various elements of the Panel's analysis indicating potential differences in territorial conditions concerning the potential for food contamination. This includes the Panel's apparent recognition of the concentration of released radionuclides near their source and the localized impact of specific release events on the potential for contamination of food products. The Panel's analysis suggests that such contamination may eventually be dispersed over a longer period of time, but does not address whether this renders concentration levels near the sources of contamination comparable to global contamination levels existing in other territories.

5.83. The Panel's comparison of the potential for contamination in food of Japanese and other origins reflects the contradiction between, on the one hand, its generalized description of global radionuclide contamination and, on the other hand, its observation of conditions related to specific events and locations. In the context of its comparison of foods from different origins, the Panel cited the explanation of an expert that "there is sufficient data to conclude that caesium is present in food from all over the world in trace amounts, mainly from nuclear weapons testing fallout, but also from Chernobyl", and that "these levels [of caesium] are[,] in general, very low and significantly lower than 100 Bq/kg."[265] The Panel also cited the expert's view that "concentrations of caesium in Japanese foods *are likely to be higher than in non-Japanese foods*", even though concentration levels "would also be very low and significantly lower than 100 Bq/kg".[266]

5.84. These expert views cited by the Panel are consistent with the Panel's earlier conclusion that "food from anywhere in the world has the potential to be contaminated with radionuclides."[267] However, the expert specifically indicated a higher likelihood of caesium contamination in Japanese foods, while also expressing the view that the concentration levels in Japanese and non-Japanese foods would both be "very low and significantly lower than 100 Bq/kg".[268] The Panel thus cited expert views that there is in fact a *dissimilar potential* for caesium contamination in Japanese and non-Japanese products, but that caesium levels would similarly be "significantly lower than 100 Bq/kg". The Panel does not explain whether caesium concentration "significantly lower than 100 Bq/kg" means that the dissimilar potential for contamination is irrelevant under Article 2.3.

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[257] Panel Report, para. 7.303.
[258] Panel Report, para. 7.311.
[259] Panel Report, para. 7.306.
[260] Panel Report, para. 7.312.
[261] Panel Report, para. 7.312.
[262] Panel Report, para. 7.312.
[263] Panel Report, para. 7.312.
[264] Panel Report, para. 7.298.
[265] Panel Report, para. 7.313 (referring to Ms Brown's response to Panel question No. 49 to the experts).
[266] Panel Report, para. 7.313 (referring to Ms Brown's response to Panel question No. 49 to the experts). (emphasis added)
[267] Panel Report, para. 7.298.
[268] Panel Report, para. 7.313 (referring to Ms Brown's response to Panel question No. 49 to the experts).

5.85. This apparent gap in the Panel's reasoning is unresolved in the Panel's concluding comparisons on the existence of "similar conditions" for Japanese and non-Japanese products, which reflect the Panel's focus on the presence of contamination in food without accounting for differences in territorial conditions affecting the *potential* for contamination. Referring to the "test results" for Japanese and non-Japanese food products, and "taking into account the Panel's findings about past releases of caesium, their global reach and potential to transfer to food products", the Panel concluded that "the majority of both Japanese and non-Japanese products have potential to contain caesium in amounts below the 100 Bq/kg tolerance level."[269] The Panel's conclusion refers simply to "potential" to contain caesium below the 100 Bq/kg tolerance level in both Japanese and non-Japanese products, but does not address the relative degree of the potential for contamination, or at least whether such products have a *similar* potential for caesium contamination. Indeed, the Panel noted an expert's recognition "that the risk of higher absolute contamination levels is of course larger in a really contaminated area"[270], which is consistent with observations made by the Panel in its assessment of the sources of contamination. It would appear that, notwithstanding this difference in territorial conditions in relation to the potential for contamination, the Panel effectively discounted, in its assessment under Article 2.3 of whether conditions are similar, the relevance of such differences based on actual product test data showing caesium concentration below the level of 100 Bq/kg.

5.86. In its identification of the relevant "conditions" to be compared under Article 2.3, the Panel stated that it would compare the "potential to be contaminated" with the relevant radionuclides, and "whether the levels of contamination would be below Korea's tolerance levels".[271] The Panel did not address or clarify the exact relationship between these two aspects for the purposes of assessing whether "similar conditions" prevailed between Japan and other Members. While the "potential to be contaminated" appears to concern a question of degree taking into account Korea's regulatory objective, the other condition identified by the Panel appears to entail a more binary assessment of whether contamination levels would, or would not, fall below a given quantitative threshold.

5.87. In identifying the relevant "conditions" that it would compare under Article 2.3, the Panel did not explicitly indicate that similarity based on contamination levels below a certain tolerance level would necessarily amount to similar "potential" to be contaminated generally. Rather, the Panel presented these as combined elements of the relevant "conditions" that would need to be demonstrated to be "similar" for the purposes of Article 2.3. However, the Panel's conclusions concerning caesium contamination solely refer to whether the contamination would be below a given tolerance level, without otherwise accounting for the dissimilarity of certain territorial conditions between Japan and other Members that the Panel recognized at various points in its assessment. The relevant similarity for caesium contamination is thus expressed as a "potential to contain caesium in amounts below the 100 Bq/kg tolerance level" for "the majority of both Japanese and non-Japanese products".[272]

5.88. The Panel's conclusion regarding strontium and plutonium is likewise cast in terms of "similar potential for containing strontium and plutonium *below their respective tolerance levels*".[273] In reaching this conclusion, the Panel consulted data on actual concentrations in Japanese food with reference to Korea's tolerance levels[274] and, with regard to sampling sufficiency, referred to its earlier finding "that data provided by Japan allows valid conclusions on the levels of caesium, strontium and plutonium in Japanese food products".[275] The Panel further stated that available data from Korea's internal testing on non-Japanese food showed either non-detectable levels of strontium or plutonium, or detectable amounts below their respective tolerance levels.[276] The Panel thus reached its conclusion on strontium and plutonium based on product test data, combined with its assessment of caesium contamination and "taking into account generally low levels of strontium and plutonium released globally and from the FDNPP".[277] This conclusion accords with factual evidence considered by the Panel about the relatively lower levels of strontium and plutonium released from the FDNPP accident as

[269] Panel Report, para. 7.314.
[270] Panel Report, para. 7.314 (referring to Dr Skuterud's response to Panel question No. 49 to the experts).
[271] Panel Report, para. 7.283.
[272] Panel Report, para. 7.314.
[273] Panel Report, para. 7.319. (emphasis added)
[274] Panel Report, para. 7.315.
[275] Panel Report, para. 7.316. (fn omitted)
[276] Panel Report, para. 7.317.
[277] Panel Report, para. 7.319.

compared to the level of caesium[278], and to that extent may be understood as reflecting relevant territorial conditions concerning environmental contamination of these radionuclides. At the same time, the Panel's conclusion on similar conditions regarding strontium and plutonium is explicitly based on its comparison of *actual* caesium contamination in Japanese and non-Japanese food, and is not curative of the shortcomings we have identified in relation to the Panel's assessment of relevant territorial conditions concerning the *potential* for caesium contamination in food.

5.89. In sum, we consider the Panel's comparison of "conditions" under Article 2.3 to be effectively based on actual radionuclide concentration levels in samples of food products as measured against quantitative tolerance levels corresponding to each radionuclide. In this respect, we agree with Korea's claim on appeal that the Panel erred in the application of Article 2.3 by focusing on product test data without properly accounting for whether the territorial conditions in Japan and the rest of the world were similar within the meaning of Article 2.3. The Panel effectively treated evidence of actual contamination of samples within tolerance levels as being decisive of whether "similar conditions" prevail between Members within the meaning of Article 2.3. As noted earlier, the Panel did not account for the different degrees of potential contamination or reconcile its conclusions with territorial conditions that the Panel suggested could differently affect the potential for contamination.[279] Importantly, the Panel neither explained how contamination within certain quantitative levels would be determinative of "similar" potential for contamination[280], nor whether the measurement of product contamination within those limits would fully capture the territorial dimensions of the different *potential* for contamination between the territories of different Members.[281] For these reasons, we find that the Panel failed to account for relevant territorial conditions and therefore erred in its application of the first sentence of Article 2.3.

5.90. Our finding of error as to the Panel's application of Article 2.3 concerns its legal assessment of the similarity of the relevant conditions it had identified. We do not address in this appeal whether evidence before the Panel could, under an analysis properly accounting for differences in relevant territorial conditions, support a conclusion that the potential for contamination in Japanese and non-Japanese food products is sufficiently similar or dissimilar for purposes of applying the requirements of Article 2.3.

5.2.4 Conclusion

5.91. Under the first sentence of Article 2.3 of the SPS Agreement, a complainant must show that a measure arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Article 2.3 therefore requires demonstrating as a threshold matter that "identical or similar conditions prevail" between Members. While the analysis under Article 2.3 may include consideration of conditions that can be characterized as being present in the products from different Members, a proper interpretation of Article 2.3 includes consideration of other relevant conditions, such as territorial conditions, to the extent that they have the potential to affect the products at issue. The analysis under Article 2.3 thus entails consideration of all relevant conditions in different Members, including territorial conditions that may not yet have manifested in products but are relevant in light of the regulatory objective and specific SPS risks at issue. We find that the Panel erred in its interpretation of Article 2.3 when it concluded that this provision permits consideration of the "risk present in products in international

[278] See e.g. Panel Report, para. 7.186.

[279] Specifically, despite suggestions that specific releases such as those from the FDNPP accident could represent an incremental and territorially concentrated addition to prior global contamination, the Panel appears to have assimilated the leaks and releases of radionuclides at the time of the FDNPP accident and thereafter as part of an undifferentiated global contamination due to dispersion of radionuclides over certain time periods in its actual comparison of the relevant conditions.

[280] We recall in this regard our finding with respect to the qualitative aspects of Korea's ALOP that were identified by the Panel under Article 5.6. Inasmuch as the ALOP is an expression of the regulatory objective pursued by a Member under the SPS Agreement, its proper characterization may also inform the nature of the relevant "conditions" that must be accounted for under Article 2.3. As the ALOP identified by the Panel in this dispute appeared to comprise multiple elements, the overall significance of purely quantitative thresholds in that context may also have informed the nature of the comparison to be carried out under Article 2.3.

[281] We recall our view that, while evidence concerning radionuclide concentration levels in food may be relevant to whether similar conditions prevail between Members, an Article 2.3 analysis includes consideration of other relevant conditions, such as territorial conditions, to the extent they have the potential to affect the products at issue. (See para. 5.64. above)

trade as *the* relevant condition" because we understand the Panel to have concluded that the scope of relevant "conditions" under Article 2.3 may be exclusively limited to "the risk present in products".

5.92. In its application of Article 2.3, the Panel effectively relied on actual contamination levels in food without reconciling its findings as to other pertinent territorial conditions affecting the potential for contamination of food. Such findings include the Panel's recognition of greater potential for contamination near the source and its indications that specific release events could result in a localized and incremental increase in the potential for contamination of food. The Panel's findings under Article 2.3 on the sole basis of actual measurement levels in product samples ultimately fail to account for the *potential* for contamination in light of relevant conditions prevailing in the territories of different Members.

5.93. We therefore find that the Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement in finding that similar conditions prevail between Japan and other Members. Consequently, we reverse the Panel's findings of inconsistency with Article 2.3 with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures. In light of the reversal of the Panel's findings regarding the existence of "similar conditions" within the meaning of Article 2.3, it is not necessary to address Korea's additional claims of error regarding arbitrary or unjustifiable discrimination, and whether Korea's measures constitute disguised restrictions on international trade.

5.3 Article 5.7 of the SPS Agreement

5.3.1 Introduction

5.94. Korea appeals the Panel's finding that its measures do not fulfil the requirements of Article 5.7 of the SPS Agreement.[282] First, Korea claims that the Panel was not authorized to make findings under Article 5.7 and thus erred under Articles 6.2, 7, and 11 of the DSU in making findings under that provision.[283] Second, Korea claims that the Panel made several errors in its interpretation and application of Article 5.7 in finding that Korea's measures do not meet the requirements of this provision. In particular, Korea claims that the Panel erred in allocating the burden of proof under Article 5.7 to Korea.[284] Korea also claims that the Panel erred in finding that: (i) relevant scientific evidence was "not insufficient" with respect to the product-specific import bans, the blanket import ban, and the 2013 additional testing requirements[285]; (ii) the blanket import ban and the 2013 additional testing requirements were not adopted on the basis of available pertinent information[286]; and (iii) Korea did not review its measures within a reasonable period of time.[287] Korea requests us to reverse the Panel's finding that its measures do not fulfil the requirements of Article 5.7.[288] By contrast, Japan requests us to uphold the Panel finding at issue.[289]

5.95. In this section, we begin by summarizing the Panel's findings under Article 5.7 of the SPS Agreement. Then, we address Korea's claim that the Panel erred under Articles 6.2, 7, and 11 of the DSU in making findings as to the consistency of Korea's measures with the requirements of Article 5.7. Finally, we turn to Korea's claims that the Panel erred in its interpretation and application

[282] Korea's appellant's submission, para. 387.b-g.
[283] Korea's appellant's submission, paras. 53-54 and 58-59.
[284] Korea's appellant's submission, para. 83.
[285] Korea's appellant's submission, paras. 91 and 120.
[286] Korea's appellant's submission, paras. 133-139, 144-152, and 154. Korea also claims that the Panel failed to comply with its duty under Article 11 of the DSU by engaging in internally inconsistent reasoning in finding that the 2011 additional testing requirements and the product-specific import bans, but not the blanket import ban and the 2013 additional testing requirements, had been adopted on the basis of available pertinent information. (Korea's appellant's submission, paras. 128 and 153-154)
[287] Korea's appellant's submission, paras. 155 and 168-169.
[288] Korea's appellant's submission, para. 387.b-g (referring to Panel Report, paras. 7.75-7.112 and 8.1). As a consequence, Korea also requests us to reverse the Panel's findings under Articles 2.3 and 5.6 of the SPS Agreement. Korea refers to Panel Report, paras. 7.321-7.322, 7.349-7.350, 7.355, 7.359-7.360, and 8.3.a-b (in relation to Article 2.3 of the SPS Agreement) and paras. 7.251-7.256 and 8.2.b-e (in relation to Article 5.6 of the SPS Agreement). (Korea's appellant's submission, para. 387.b)
[289] Japan's appellee's submission, para. 925.

of Article 5.7 and under Article 11 of the DSU in finding that Korea's measures do not meet the requirements of this provision.

5.3.2 The Panel's findings

5.96. Before the Panel, Japan raised claims of inconsistency under Articles 2.3, 5.6, 7, and 8 of the SPS Agreement as well as under paragraphs 1 and 3 of Annex B and paragraphs 1(a), 1(c), 1(e), and 1(g) of Annex C to the SPS Agreement.[290] Before addressing Japan's claims, the Panel noted Korea's argument that "its measures were adopted provisionally pursuant to Article 5.7 of the SPS Agreement" and that "this affects the Panel's analysis of the substantive elements of Japan's claims under other provisions of the SPS Agreement."[291] To Korea, Article 5.7 provides "context" for the interpretation of every provision of the SPS Agreement.[292] The Panel therefore decided to assess first whether Korea's measures fulfil the requirements of Article 5.7. If necessary, the Panel would then turn to the question of how that might affect its analysis of Japan's claims.[293]

5.97. At the outset of its analysis under Article 5.7, the Panel noted that Korea had asserted "several factual premises underlying its arguments – most importantly that there was insufficient scientific evidence to conduct an objective assessment of the risk" arising from the consumption of certain food products from Japan.[294] The Panel allocated the burden of proof to Korea under Article 5.7.[295] With this consideration in mind, the Panel turned to assess Korea's measures in light of each of the four requirements set out in Article 5.7, namely, the requirements that: (i) the relevant scientific evidence be insufficient to conduct a risk assessment; (ii) the provisional measure be adopted on the basis of available pertinent information; (iii) the Member adopting the provisional measure seek to obtain the additional information necessary for a more objective assessment of risk; and (iv) the measure be reviewed within a reasonable period of time.[296]

5.98. The Panel first assessed whether the "relevant scientific evidence" was "insufficient" when Korea adopted each of its measures. With respect to the 2011 additional testing requirements, the Panel observed that they had been adopted at a time when the regulators were uncertain about the extent of the FDNPP accident and the types and amounts of radionuclides that had been released. The Panel further observed that in March 2011 Japan had also adopted measures on an emergency basis and in the absence of a risk assessment. The Panel therefore found that there was insufficient scientific evidence when Korea adopted the 2011 additional testing requirements.[297]

5.99. By contrast, the Panel found that scientific evidence was not insufficient in 2012 and 2013 when Korea adopted the product-specific import bans, the blanket import ban, and the 2013 additional testing requirements.[298] The Panel reached this conclusion after an analysis of the factors that Korea claimed affected the sufficiency of the relevant scientific evidence.[299] In particular, the Panel observed that the blanket import ban and the 2013 additional testing requirements had been adopted in response to the disclosure of leaks at the FDNPP.[300] The Panel took the view that, although specific amounts of radioactive materials released into the ocean following those leaks could not be tied to specific dates, some estimates were publicly available.[301] Moreover, the Panel addressed the relevance of: (i) additional leaks or an uncertainty about the amounts and share of radionuclides; (ii) uncertainty about the amounts of radionuclides remaining in the reactor; (iii) uncertainty about environmental contamination levels in seawater, sediment, soil, and air; (iv) if there was a significant new leak; (v) the potential presence of caesium-rich microparticles in soil; (vi) radionuclide deposits in river catchments, marine estuaries, and coastal areas; and (vii) the ratio between caesium and other radionuclides. With respect to these elements, the Panel relied on the experts' consensus that "the best way to know what is in food consumed is by testing it"[302] and that information about these

[290] Panel Report, para. 3.1.
[291] Panel Report, para. 7.67. See also ibid., para. 7.17.
[292] Panel Report, para. 7.70 (referring to Korea's response to Panel question No. 108).
[293] Panel Report, paras. 7.67 and 7.111-7.112.
[294] Panel Report, para. 7.75.
[295] Panel Report, para. 7.75.
[296] Panel Report, para. 7.76.
[297] Panel Report, paras. 7.84 and 7.108.
[298] Panel Report, paras. 7.96, 7.108, and 7.111.
[299] Panel Report, paras. 7.80-7.81 and 7.85-7.95.
[300] Panel Report, para. 7.87.
[301] Panel Report, para. 7.91.
[302] Panel Report, para. 7.92.

elements is not critical to an assessment of the risk to humans from consumption of food containing radionuclides.[303]

5.100. The Panel then assessed whether Korea's measures had been adopted "on the basis of available pertinent information". With respect to the 2011 additional testing requirements and the product-specific import bans, the Panel recalled that these measures had been adopted shortly after the FDNPP accident and closely mirrored Japan's own measures. Therefore, the Panel found that they had been adopted on the basis of available pertinent information.[304]

5.101. The Panel, however, found that Korea had not based the blanket import ban and the 2013 additional testing requirements on available pertinent information.[305] In its analysis leading up to this finding, the Panel observed that Korea had listed various kinds of information, including the Codex Standard, claiming that this information served as the basis for its measures.[306] The Panel took the view that a mere listing of documents is not enough to show that a measure was adopted on the basis of available pertinent information. The Panel further considered the text of the measures and the contemporaneous "Q&A on Radioactivity Safety Management of Fishery Products Imported from Japan", observing that the latter contained a reference to the Codex Standard.[307] The Panel thus proceeded to assess the relevance of the Codex Standard, but ultimately could not conclude that the Codex Standard had served as a basis for the measures at issue.[308]

5.102. Finally, the Panel assessed whether Korea had sought additional information and whether Korea had reviewed its measures "within a reasonable period of time". In this context, the Panel reviewed a number of activities undertaken by Korea since 2011.[309] Based on the evidence on the record, the Panel found that Korea had sought additional information from Japan and had regularly accessed the publicly available data.[310] The Panel, however, observed that, whereas, in 2014, Korea had announced the commencement of a review of its 2013 measures, that review had not been concluded. The Panel pointed to the lack of evidence on the record of specific activity undertaken by the Korean Government related to this review since September 2014. The Panel also observed that Korea had provided no legitimate justification for the suspension of this review. Therefore, the Panel found that Korea did not review its measures within a reasonable period of time.[311]

5.103. In conclusion, the Panel found that Korea had failed to: (i) establish that there was insufficient scientific evidence with respect to the product-specific import bans, the blanket import ban, or the 2013 additional testing requirements; (ii) demonstrate that it had based the blanket import ban or the 2013 additional testing requirements on available pertinent information; and (iii) review any of its measures within a reasonable period of time. Consequently, the Panel found that none of Korea's measures fulfils all of the requirements of Article 5.7.[312]

5.3.3 Whether the Panel erred under Articles 6.2, 7, and 11 of the DSU in making findings under Article 5.7 of the SPS Agreement

5.104. Korea's first claim on appeal is that Article 5.7 of the SPS Agreement was outside the Panel's terms of reference and that the Panel erred under Articles 6.2, 7, and 11 of the DSU in making findings

[303] Panel Report, paras. 7.92-7.94. The Panel also addressed the uncertainty "with respect to the potential for future nuclear accidents at the FDNPP or elsewhere", but considered that "this uncertainty does not relate to the science necessary to assess the risks associated with the consumption of contaminated food." (Panel Report, para. 7.108. See also ibid., para. 7.95)

[304] Panel Report, para. 7.98.

[305] Panel Report, paras. 7.109 and 7.111.

[306] Panel Report, para. 7.99.

[307] Panel Report, para. 7.100 (referring to Korea Office for Government Policy Coordination, Ministry of Food and Drug Safety, Ministry of Oceans and Fisheries, and Nuclear Safety and Security Commission, "Q&A on Radioactivity Safety Management of Fishery Products Imported from Japan" (September 2013) (Panel Exhibit JPN-4.b)).

[308] Panel Report, para. 7.100.

[309] Panel Report, para. 7.105.

[310] Panel Report, para. 7.107. See also ibid., para. 7.110.

[311] Panel Report, paras. 7.107 and 7.110.

[312] Panel Report, paras. 7.111 and 8.1.

under Article 5.7.[313] Japan responds that the Panel correctly addressed Article 5.7 by recognizing that Korea had invoked this provision as part of its defence.[314]

5.105. Article 5.7 of the SPS Agreement provides:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. 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.

5.106. Pursuant to this provision, a Member may provisionally adopt an SPS measure where relevant scientific evidence is insufficient. The Appellate Body has said that the relevant scientific evidence will be considered insufficient for purposes of Article 5.7 "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".[315] The Appellate Body has further said that under Article 5.1, "WTO Members are allowed to base SPS measures on divergent or minority views provided they are from a respected and qualified source."[316] It may thus be possible to perform a risk assessment that meets the requirements of Article 5.1 "even when there are divergent views in the scientific community in relation to a particular risk".[317] By contrast, Article 5.7 is concerned with "situations where deficiencies in the body of scientific evidence do not allow a WTO Member to arrive at a sufficiently objective conclusion in relation to risk".[318] The Appellate Body has also considered that "Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 [of the SPS Agreement] not to maintain SPS measures without sufficient scientific evidence."[319] When such a situation of insufficiency of relevant scientific evidence arises, a Member may adopt a provisional SPS measure on the basis of available pertinent information, but it must then seek to obtain the additional information necessary for a more objective risk assessment and review the provisional measure within a reasonable period of time.

5.107. Accordingly, there are four cumulative requirements in Article 5.7[320]: (i) the provisional measure is adopted with respect to a situation where "relevant scientific evidence is insufficient"; (ii) the provisional measure is adopted "on the basis of available pertinent information"[321]; (iii) the Member adopting the measure "seek[s] to obtain the additional information necessary for a more objective assessment of risk"; and (iv) the Member adopting the measure reviews that measure "accordingly within a reasonable period of time".[322] The latter two requirements "highlight the *provisional* nature of measures adopted pursuant to Article 5.7".[323]

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[313] Korea's appellant's submission, paras. 53 and 59.

[314] Japan's appellee's submission, paras. 665 and 670.

[315] Appellate Body Report, *Japan – Apples*, para. 179. See also Appellate Body Reports, *Australia – Apples*, paras. 238-239; *Canada – Continued Suspension*, para. 677; *US – Continued Suspension*, para. 677.

[316] Appellate Body Reports, *Canada – Continued Suspension*, para. 677; *US – Continued Suspension*, para. 677. See also Appellate Body Report, *EC – Hormones*, para. 194.

[317] Appellate Body Reports, *Canada – Continued Suspension*, para. 677; *US – Continued Suspension*, para. 677.

[318] Appellate Body Reports, *Canada – Continued Suspension*, para. 677; *US – Continued Suspension*, para. 677.

[319] Appellate Body Report, *Japan – Agricultural Products II*, para. 80. (emphasis original) See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2969, 7.2974, and 7.2976; *US – Animals*, paras. 7.292-7.293; *Russia – Pigs (EU)*, para. 7.643.

[320] Appellate Body Reports, *Japan – Agricultural Products II*, para. 89; *Japan – Apples*, para. 176.

[321] The Appellate Body has emphasized that "there must be a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure." (Appellate Body Reports, *Canada – Continued Suspension*, para. 678; *US – Continued Suspension*, para. 678)

[322] The Appellate Body has held that "'a reasonable period of time' has to 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." (Appellate Body Report, *Japan – Agricultural Products II*, para. 93 (emphasis original))

[323] Appellate Body Report, *Japan – Apples*, fn 318 to para. 176. (emphasis original)

5.108. In *EC – Hormones*, the Appellate Body recognized that Article 5.7 of the SPS Agreement reflects the precautionary principle. The Appellate Body emphasized:

> [A] panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.[324]

5.109. As recalled above, the Panel assessed the consistency of Korea's measures with each of the four cumulative requirements set out in Article 5.7 and found that none of Korea's measures fulfils all of these requirements.[325]

5.110. Korea, however, contends that Article 5.7 was outside the Panel's terms of reference because Japan had not made a claim of inconsistency under this provision in its panel request.[326] In addition, Korea submits that it did not argue before the Panel that, if its measures satisfied the requirements of Article 5.7, they could not be found to be inconsistent with Articles 2.3 and 5.6 of the SPS Agreement or would be excluded from the scope of these provisions.[327] Korea submits that it referred to Article 5.7 as a "contextual argument under Articles 2.3 and 5.6".[328] Therefore, according to Korea, its own reference to Article 5.7 neither required nor authorized the Panel to make an assessment of the consistency of Korea's measures under that provision.[329] Instead, the Panel should have explored the guidance provided by Article 5.7 in relation to the relevance of the insufficiency of scientific evidence in determining: (i) the similarity of conditions prevailing in Japan and the rest of the world under Article 2.3; and (ii) whether Japan's proposed alternative measure achieves Korea's ALOP and is technically and economically feasible under Article 5.6.[330] In these circumstances, Korea submits that, in making findings under Article 5.7, the Panel acted inconsistently not only with Articles 6.2 and 7 of the DSU, but also with Article 11 of the DSU, because the Panel assessed a provision that was not part of the matter before it.[331]

5.111. Japan argues that the Panel was correct to make findings in relation to Article 5.7 given that Korea had invoked that provision as part of its arguments in defence.[332] Japan contends that, "[w]hatever claims and arguments are raised in defense, Article 11 of the DSU requires that they be properly addressed by a panel as part of its 'objective assessment of the matter', which includes 'the applicability of and conformity with the relevant covered agreements'."[333] Thus, Japan contends that the Panel acted consistently with its duties under Article 11 of the DSU in assessing Korea's arguments under Article 5.7 of the SPS Agreement. Japan adds that the Panel was required to make an objective assessment of Korea's arguments under Article 5.7 even if that provision was not included in Japan's panel request.[334]

5.112. Korea's claim of error on appeal requires us to examine whether the Panel failed to comply with Articles 7 and 11 of the DSU in making findings as to the consistency of Korea's measures with the requirements of Article 5.7 of the SPS Agreement.[335]

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[324] Appellate Body Report, *EC – Hormones*, para. 124. See also Appellate Body Reports, *Canada – Continued Suspension*, para. 680; *US – Continued Suspension*, para. 680.

[325] Panel Report, paras. 7.111 and 8.1.

[326] Korea's appellant's submission, paras. 54 and 59.

[327] Korea's appellant's submission, para. 57.

[328] Korea's appellant's submission, para. 47. See also ibid., para. 55. At the oral hearing, Korea emphasized that it had not raised Article 5.7 before the Panel as a defence, but as context for the assessment of Japan's claims under other provisions of the SPS Agreement. (Korea's response to questioning at the oral hearing)

[329] Korea's appellant's submission, paras. 54-55 and 58.

[330] Korea's appellant's submission, para. 55.

[331] Korea's appellant's submission, para. 59 (referring to Appellate Body Report, *Chile – Price Band System*, para. 173).

[332] Japan's appellee's submission, para. 665.

[333] Japan's appellee's submission, para. 668 (quoting DSU, Article 11).

[334] Japan's appellee's submission, para. 670.

[335] We note that Korea also claims that the Panel acted inconsistently with Article 6.2 of the DSU. Article 6.2 sets forth the requirements applicable to a request for the establishment of a panel. Korea does not allege that Japan's panel request fails to meet the requirements set out in that provision. We therefore find that the claim of error raised by Korea on appeal does not concern Article 6.2 of the DSU.

5.113. Articles 7 and 11 of the DSU concern the terms of reference and the function of panels, respectively. The Appellate Body has said that a panel request defines the scope of the dispute.[336] The measures and the claims identified in the panel request constitute the "matter referred to the DSB", which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU.[337] Under Article 7.1, unless the parties agree otherwise, panels shall have the following terms of reference: "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". Article 7.2 of the DSU specifies that panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.[338] Like Article 7.1, Article 11 of the DSU also refers to the "matter" before a panel. Pursuant to Article 11, a panel is required to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

5.114. A panel's mandate, as reflected in Articles 7.1 and 11 of the DSU, is to examine the "matter" before it in light of the relevant provisions of the covered agreements cited by the parties and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[339] Parties may, for example, refer to a WTO provision merely to serve as relevant context to the interpretation of other WTO provisions identified in the "matter" before a panel. In such a case, while Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement … cited by the parties", a panel's mandate does not extend to making findings as to the consistency of the measure at issue with a provision cited as mere interpretative context.

5.115. It is uncontested that Japan did not make a claim of inconsistency under Article 5.7 of the SPS Agreement in its panel request.[340] Instead, it was Korea's rebuttal arguments before the Panel that prompted the Panel to examine Korea's measures under Article 5.7.[341] Thus, the issue before us is whether, in light of Korea's references to Article 5.7, the Panel was correct to make findings as to the consistency of Korea's measures with each of the requirements of Article 5.7. Accordingly, we review the Panel record to assess how Korea used Article 5.7 in the Panel proceedings.

5.116. In its first written submission to the Panel, Korea relied on the provisional nature of its measures under Article 5.7 as factual background information to the dispute.[342] Throughout the remaining stages of the Panel proceedings, Korea asserted that there is insufficient relevant scientific evidence to conduct an adequate risk assessment of consuming certain Japanese food products

[336] Appellate Body Reports, *Argentina – Import Measures*, para. 5.11. See also Appellate Body Reports, *US – Carbon Steel*, para. 124; *US – Countervailing Measures (China)*, para. 4.6; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

[337] Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *Australia – Apples*, para. 416; *China – Raw Materials*, para. 219. See also European Union's third participant's submission, para. 39; United States' third participant's submission, para. 15.

[338] The Appellate Body has said that "panels are required to address issues that are put before them by the parties to a dispute." The Appellate Body has also stated that "panels cannot simply ignore issues which go to the root of … their authority to deal with and dispose of matters"; rather, "panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed." (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36) See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 791; Brazil's third participant's submission, para. 3.

[339] Panels are called upon to examine the claims of inconsistency against the challenged measures raised by the complaining party that form part of the matter as well as the defences, including justification for a responding party's action, submitted by the responding party that are relevant for the assessment of such claims.

[340] Korea's appellant's submission, para. 59; Japan's appellee's submission, para. 670. See also Japan's panel request. We note that Japan included Article 5.7 of the SPS Agreement in its Request for Consultations. (Request for Consultations by Japan, WT/DS495/1, para. 15(b))

[341] Panel Report, para. 7.67. The Panel's "findings and recommendation(s)" confirm that the Panel did not treat Article 5.7 as part of the claims made by Japan. The Panel first recalled its finding that "the measures do not fulfil the four requirements in Article 5.7" and then summarized its findings "on Japan's specific requests". (Panel Report, para. 8.1) Accordingly, in setting out the infringements giving rise to a presumption of nullification or impairment under Article 3.8 of the DSU, the Panel listed Articles 5.6, 2.3, and 7 as well as Annexes B(1) and B(3), but made no mention of Article 5.7. (Panel Report, para. 8.6) See also the European Union's third participant's submission, para. 41.

[342] Korea's first written submission to the Panel, paras. 83-86 under Heading II entitled "Factual background to the dispute".

contaminated with radionuclides stemming from the FDNPP and that this is relevant to the assessment of Japan's claims under other provisions of the SPS Agreement.[343] Specifically, Korea argued that the available scientific evidence is insufficient to establish that Japan's proposed alternative measure under Article 5.6 of the SPS Agreement is capable of achieving Korea's ALOP.[344] Korea also argued that, for purposes of Japan's claim under Article 2.3 of the SPS Agreement, the conditions prevailing in Japan cannot be said to be similar or identical to conditions prevailing in Korea or in other countries due to the insufficiency of scientific evidence.[345] In this respect, Korea stated that it was not arguing that Article 5.7 justifies discrimination. Rather, Korea contended that "the insufficiency of the relevant scientific evidence concerning radionuclide contamination in Japan is an important factor that makes the conditions prevailing in Japan different to conditions prevailing in Korea or in third countries."[346] Moreover, Korea argued that Article 5.7 provides relevant context for the interpretation of Articles 2.3, 5.6, 7, and 8 and Annexes B and C to the SPS Agreement.[347] In its closing statement at the second Panel meeting, Korea explicitly stated that the Panel's terms of reference "d[id] not permit [the Panel] to make any findings that Korea's SPS measures depart from the requirements of Article 5.7".[348]

5.117. The Panel record shows us that Korea did not allege before the Panel that its measures would be justified or exempted from the obligations contained in Articles 2.3, 5.6, 7, and 8 and Annexes B and C to the SPS Agreement, by virtue of their alleged provisional nature under Article 5.7 of the SPS Agreement. Korea also did not argue that there are different sets of obligations for provisional measures and for definitive measures under Articles 2.3 and 5.6. Rather, Korea's main argument was that a particular situation – namely, the alleged insufficiency of scientific evidence to conduct an assessment of the risk associated with the consumption of certain food products from Japan – is relevant to the assessment of Japan's claims under Articles 2.3 and 5.6. Given the nature of Korea's reliance on Article 5.7, the Panel was called upon to explore the relevance of the alleged insufficiency of relevant scientific evidence in determining the similarity of conditions prevailing in Japan and other Members under Article 2.3 and whether Japan's proposed alternative measure achieves Korea's ALOP and is technically and economically feasible under Article 5.6.[349] The Panel was also called upon to explore whether Article 5.7 provides relevant context to the interpretation of certain provisions of the SPS Agreement at issue in this dispute.

5.118. As noted above, Japan did not include a claim under Article 5.7 in its panel request. For its part, Korea did not allege that its measures would be justified or exempted from the obligations contained in Articles 2.3, 5.6, 7, and 8 and Annexes B and C by virtue of their provisional nature under Article 5.7. Rather, Korea relied on Article 5.7 to serve as relevant context to the interpretation of certain other provisions of the SPS Agreement, which were the subject of Japan's claims of inconsistency. Korea also referred to Article 5.7 when relying on the alleged insufficiency of evidence in this case as a relevant factor to the Panel's assessment of Japan's claims of inconsistency, in particular those under Articles 2.3 and 5.6 of the SPS Agreement. Therefore, by making findings as to the consistency of Korea's measures with Article 5.7, the Panel exceeded its mandate, thereby acting inconsistently with Articles 7.1 and 11 of the DSU. For this reason, we declare the Panel's findings under Article 5.7 of the SPS Agreement moot and of no legal effect.

[343] See e.g. Korea's second written submission to the Panel, paras. 174 and 298; opening statement at the first Panel meeting, paras. 40-42; response to Panel question No. 104, para. 170.

[344] Korea's second written submission to the Panel, para. 298. See also Korea's opening statement at the first Panel meeting, para. 87; response to Panel question No. 104, para. 170.

[345] Korea's second written submission to the Panel, paras. 172-176. See also Korea's opening statement at the first Panel meeting, para. 53; response to Panel question No. 107, paras. 177-179.

[346] Korea's response to Panel question No. 107, para. 180. To Korea, given that prevailing conditions are not identical or similar, "there would be no basis to examine, let alone find, discrimination under Article 2.3." (Ibid.)

[347] Korea's response to Panel question No. 108, para. 191.

[348] Korea's closing statement at the second Panel meeting, para. 3.

[349] Despite making findings under Article 5.7, the Panel appears to have acknowledged as much. After making findings under Article 5.7, the Panel indeed referred to the relevance of "the nature, scope, and quality of scientific evidence … for determining whether the constituent elements of Japan's claims under Articles 2.3, 5.6, and 8 (Annex C) have been demonstrated" and stated that it would "carefully consider both parties' arguments on whether the scientific evidence adduced is sufficient to prove Japan's claims". (Panel Report, para. 7.112)

5.3.4 Whether the Panel erred in its interpretation and application of Article 5.7 of the SPS Agreement and under Article 11 of the DSU in finding that Korea's measures do not meet the requirements of Article 5.7 of the SPS Agreement

5.119. Korea claims on appeal that the Panel made several errors in its interpretation and application of Article 5.7 of the SPS Agreement in finding that Korea's measures do not meet the requirements of this provision. In particular, Korea claims that the Panel erroneously allocated the burden of proof under Article 5.7 to Korea.[350] Korea also claims that the Panel erred in finding that Korea's measures did not meet the requirements in Article 5.7 that scientific evidence be insufficient, provisional SPS measures be adopted on the basis of pertinent information, and provisional SPS measures be reviewed within a reasonable period of time.[351] Finally, Korea claims that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU by engaging in internally inconsistent reasoning.[352] Japan requests us to reject Korea's claims of error on appeal.[353]

5.120. Having declared the Panel's findings under Article 5.7 of the SPS Agreement moot and of no legal effect, it is not necessary for us to consider further Korea's other claims of error in relation to those same Panel findings.

5.3.5 Conclusion

5.121. A panel's mandate, as reflected in Articles 7.1 and 11 of the DSU, is to examine the "matter" before it in light of the relevant provisions of the covered agreements cited by the parties and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Japan did not make a claim under Article 5.7 of the SPS Agreement in its panel request. While Korea raised arguments in relation to Article 5.7 as part of its rebuttal arguments, Korea did not allege that its measures would be justified or exempted from the obligations contained in Articles 2.3, 5.6, 7, and 8 and Annexes B and C to the SPS Agreement by virtue of their provisional nature under Article 5.7. Rather, Korea relied on Article 5.7 to serve as relevant context to the interpretation of certain other provisions of the SPS Agreement, which were the subject of Japan's claims of inconsistency. Korea also referred to Article 5.7 when relying on the alleged insufficiency of evidence in this case as a relevant factor to the Panel's assessment of Japan's claims of inconsistency, in particular those under Articles 2.3 and 5.6. By making findings as to the consistency of Korea's measures with Article 5.7, the Panel exceeded its mandate, thereby acting inconsistently with Articles 7.1 and 11 of the DSU.

5.122. For this reason, we declare the Panel's findings under Article 5.7 of the SPS Agreement moot and of no legal effect. Consequently, it is not necessary for us to consider further Korea's other claims of error in relation to those same Panel findings under Article 5.7.

5.4 The Panel's treatment of evidence

5.123. Both Korea and Japan claim on appeal that the Panel erred in its treatment of evidence when assessing the consistency of Korea's measures with Articles 2.3 and 5.6 of the SPS Agreement. Korea claims that the Panel erred under Article 11 of the DSU by considering evidence that either was not available to the Korean authorities at the time of the adoption of the challenged measures or did not exist at the time of the Panel's establishment. Korea contends that the Panel relied on such evidence to find that the alternative measure proposed by Japan would meet Korea's ALOP under Article 5.6 and that similar conditions existed under Article 2.3. Therefore, Korea requests us to reverse the Panel's findings concerning the use of such evidence as well as the ultimate findings of inconsistency under Articles 2.3 and 5.6.[354]

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[350] Korea's appellant's submission, paras. 62 and 83.

[351] Korea's appellant's submission, paras. 91, 120, 128, 154-155, and 169.

[352] Korea's appellant's submission, para. 153.

[353] Japan submits that Korea bore the burden of proof under Article 5.7 of the SPS Agreement and that the Panel correctly examined each requirement under Article 5.7. (Japan's appellee's submission, paras. 677, 687-790, and 797-817) In addition, Japan disagrees with Korea that the Panel engaged in internally inconsistent reasoning and failed to comply with its duties under Article 11 of the DSU. (Japan's appellee's submission, paras. 791-796)

[354] Korea's Notice of Appeal, paras. 11-12 and 14; appellant's submission, paras. 229 and 346 (referring to Panel Report, paras. 7.5, 7.8, 7.134, 7.142, 7.207, 7.219, 7.226, 7.236, 7.245, 7.251-7.256, 7.307-7.308, 7.311, 7.315, 7.319, 7.321-7.322, 7.355, 7.360, 8.2.b-e, and 8.3.a-b).

5.124. In response, Japan requests us to reject Korea's claims of error on appeal. With regard to evidence not available to the Korean authorities at the time of the adoption of the challenged measures, Japan submits that the Panel did not err in relying on such evidence when assessing the maintenance of the measures[355], and did not rely on such evidence to reach conclusions as to the adoption of the measures.[356] Regarding evidence that post-dated the Panel's establishment, Japan contends that the Panel was not permitted to exclude such evidence when assessing the maintenance of the challenged measures, as Articles 2.3 and 5.6 impose continuing obligations.[357] Alternatively, Japan submits that the Panel did not err in considering such evidence to confirm Japan's *prima facie* case.[358]

5.125. In its Other Appeal, Japan claims that the Panel erred in the interpretation and application of Articles 3.3-3.4, 3.7, and 11 of the DSU, as well as the application of Articles 2.3 and 5.6 of the SPS Agreement, by disregarding timely submitted evidence relating to the situation after the Panel's establishment in its assessment of Japan's claims that the challenged measures were maintained inconsistently with Articles 2.3 and 5.6. Nonetheless, Japan considers that these errors do not vitiate the Panel's ultimate findings under Articles 2.3 and 5.6, and requests us to uphold these findings.[359] If we consider that the Panel's errors in this regard do vitiate its ultimate findings under Articles 2.3 and 5.6, Japan requests us to complete the legal analysis and find that, based on all timely submitted evidence, Korea's measures are maintained inconsistently with these provisions.[360]

5.126. By contrast, Korea requests us to reject Japan's claims of error on appeal. Korea submits that the Panel was required to assess whether there was an inconsistency with the SPS Agreement as of the date of the Panel's establishment. Korea further submits that the SPS Agreement and the DSU precluded the Panel from considering evidence that post-dated the Panel's establishment.[361]

5.127. Korea's and Japan's claims of error on appeal concerning the Panel's treatment of evidence relate to the Panel's application of Articles 2.3 and 5.6 of the SPS Agreement. We have found that the Panel erred in its application of Article 5.6 with regard to Korea's ALOP. We have also found that the Panel erred in its interpretation and application of Article 2.3 with regard to whether identical or similar conditions prevail between Japan and other Members. Accordingly, we have reversed the Panel's findings of inconsistency under Articles 2.3 and 5.6.[362] Given that the participants' claims of error in relation to evidence concern Panel findings that have already been reversed, we do not consider it necessary to examine further these claims of error.

5.5 The Panel's expert selection

5.128. Korea appeals the Panel's decision to consult with two experts.[363] Korea claims that the Panel erred under Article 11 of the DSU by appointing these two experts in disregard of Korea's due process rights. Korea contends that the Panel should have found that there was an objective basis to conclude that these experts' independence or impartiality was likely to be affected or that there were justifiable doubts about their independence or impartiality.[364] Given that the Panel relied on its consultation with these experts in its assessment under Articles 2.3, 5.6, and 5.7 of the SPS Agreement, Korea requests us to reverse the Panel findings under these provisions.[365]

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[355] Japan's appellee's submission, paras. 615-616.
[356] Japan's appellee's submission, paras. 620, 630-631, and 637.
[357] Japan's appellee's submission, paras. 380-381.
[358] Japan's appellee's submission, para. 382.
[359] Japan's other appellant's submission, paras. 244 and 357.a-b.
[360] Japan's Notice of Other Appeal, para. 3; other appellant's submission, paras. 245, 294, 356, and 357.c.
[361] Korea's appellee's submission, paras. 9, 30, and 48. Korea also submits that the Panel's errors concerning evidence warrant reversal of its ultimate findings under Articles 2.3 and 5.6 of the SPS Agreement, and that the Appellate Body should decline to complete the legal analysis after reversing these Panel findings. (Ibid., paras. 89 and 102)
[362] See paras. 5.39. and 5.93. above.
[363] Korea's appellant submission, para. 38; Panel Report, para. 1.28 and Annex D-2.
[364] Korea's appellant's submission, para. 38 (referring to Appellate Body Reports, *Canada – Continued Suspension*, para. 454; *US – Continued Suspension*, para. 454).
[365] Korea's appellant's submission, paras. 39 and 387.a. Korea refers to Panel Report, paras. 7.96, 7.108-7.109, 7.111, 7.251-7.256, 7.321-7.322, 7.349-7.350, 7.355, 7.359-7.360, 8.1, 8.2.b-e, and 8.3.a-b.

5.129. By contrast, Japan requests us to reject Korea's challenge on appeal. Japan submits that the Panel was rigorous in its expert selection process and that it observed Korea's due process rights. To Japan, Korea has failed to demonstrate that the Panel erred under Article 11 of the DSU.[366]

5.130. Korea's claim of error at issue is connected with the Panel's application of Articles 2.3, 5.6, and 5.7 of the SPS Agreement. The two experts at issue provided responses to the majority of the questions posed by the Panel, and the Panel relied on these responses in its assessment of the consistency of Korea's measures with Articles 2.3, 5.6, and 5.7.[367] We have found above that the Panel erred in its findings under Articles 2.3 and 5.6, and in making findings under Article 5.7. We have reversed the Panel's findings of inconsistency under Articles 2.3 and 5.6, and declared the Panel's findings under Article 5.7 moot and of no legal effect.[368] Consequently, Korea's claim of error under Article 11 of the DSU and request on appeal in relation to the Panel's expert selection concern Panel findings that have been reversed or declared moot and of no legal effect. For this reason, we do not consider it necessary to examine further Korea's claim that the Panel erred under Article 11 of the DSU by appointing the two experts that Korea challenges on appeal.

5.6 Article 7 and Annex B to the SPS Agreement

5.131. Korea appeals the Panel's interpretation and application of Article 7 and Annex B(1) to the SPS Agreement, as well as the Panel's interpretation and application of Article 7 and Annex B(3) to the SPS Agreement. We examine these aspects of Korea's appeal in sections 5.6.1 and 5.6.2 below.

5.6.1 Annex B(1) to the SPS Agreement

5.6.1.1 Introduction

5.132. Korea appeals the Panel's finding that Annex B(1) to the SPS Agreement requires that the publication of an SPS regulation "contain sufficient content that the [interested][369] Member will know the conditions (including specific principles and methods) that apply to its goods".[370] Korea claims that the Panel erred in its interpretation of Annex B(1) by imposing additional obligations not included in this provision.[371] Korea also appeals several aspects of the Panel's application of Annex B(1) to the measures at issue in this dispute. In particular, Korea claims that the Panel erred in finding that: (i) the press release announcing the blanket import ban did not include the full product coverage of the measure[372]; (ii) the press releases announcing the 2011 and 2013 additional testing requirements did not include sufficient content to enable Japan to know the conditions that would be applied to its goods[373]; and (iii) Korea did not show that interested Members would have known to look to certain websites for information on each of the challenged measures.[374] In addition, Korea claims that the Panel erred under Article 11 of the DSU by finding that the Panel could not know whether the web addresses provided by Korea were available on the day Korea announced the measures at issue and what content was available on that day.[375] Korea requests us to reverse the relevant Panel findings at issue.[376] Japan, for its part, requests us to reject Korea's claims of error on appeal and uphold the relevant findings by the Panel.[377]

5.133. Before examining Korea's claims of error on appeal, we summarize the relevant Panel findings. We then set out our understanding of Annex B(1) to the SPS Agreement. Thereafter, we examine the

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[366] Japan's appellee's submission, paras. 31-32, 57-58, 65, 76, and 925.
[367] Korea's appellant's submission, para. 39; Panel Report, paras. 1.32-1.33 and 1.35-1.36.
[368] See paras. 5.39. , 5.93. , and 5.122. above.
[369] The Panel appears to have inadvertently referred to "importing" Member. Given the Panel's reasoning and how this expression was used in this sentence, we understand the Panel to have intended to refer to "interested" Member instead.
[370] Korea's appellant's submission, para. 351 (quoting Panel Report, para. 7.464).
[371] Korea's appellant's submission, paras. 347, 358, and 363-364.
[372] Korea's appellant's submission, paras. 366-367 (referring to Panel Report, paras. 7.483 and 7.487).
[373] Korea's appellant's submission, paras. 368-369 (referring to Panel Report, paras. 7.492, 7.494, and 7.500-7.501).
[374] Korea's appellant's submission, paras. 372-373 (referring to Panel Report, paras. 7.474, 7.476, 7.485, and 7.497).
[375] Korea's appellant's submission, para. 376 (referring to Panel Report, paras. 7.474, 7.485, and 7.497).
[376] Korea's appellant's submission, paras. 364, 375, and 379 (referring to Panel Report, paras. 7.461-7.464, 7.474-7.476, 7.483, 7.485-7.487, 7.492, 7.494, 7.496-7.502, and 8.5.a).
[377] Japan's appellee's submission, paras. 821, 859, 869, 871, 892, and 925.

merits of Korea's claims of error on appeal that the Panel erred in its interpretation and application of this provision. In the final step of our analysis, we address Korea's claim that the Panel acted inconsistently with Article 11 of the DSU.

5.6.1.2 The Panel's findings

5.134. At the outset, the Panel found that Japan had established that Korea's measures at issue are SPS regulations subject to Annex B(1) to the SPS Agreement.[378] The Panel then recalled that, under Annex B(1), Members are obliged to ensure that an adopted measure is published promptly in such a manner as to enable interested Members to become acquainted with it. The Panel noted that Japan did not dispute the promptness of Korea's actions; rather, Japan questioned whether Korea's actions to post press releases on certain websites were sufficient to fulfil the other elements in Annex B(1).[379]

5.135. The Panel noted that Annex B(1) refers to the term "regulation". The Panel contrasted this term with the term "notice" in Annex B(5)(a) to the SPS Agreement, which refers to the publication of a notice of a proposal to introduce a particular SPS regulation. The Panel considered that this difference demonstrates that the publication requirements in the two provisions must be qualitatively different and that, therefore, Annex B(1) requires publication of something more than an announcement that the regulation exists. In addition, the Panel observed that Annex B(5)(c) and Annex B(6)(b) require Members to provide copies of the (proposed) regulation itself, a requirement that is absent from Annex B(1). To the Panel, this difference supported a conclusion that the obligation under Annex B(1) is to publish the content of the SPS regulation; otherwise, the drafters would have included a similar obligation, as those in Annex B(5)(c) and Annex B(6)(b), to provide a copy of the (proposed) regulation itself separately.[380] The Panel thus considered that the obligation under Annex B(1) is to publish the content of the SPS regulation, and not an announcement of its existence or a brief summary. To the Panel, this can be achieved by publishing the actual regulation "through a formal legal instrument, such as in an official gazette, through decision, or by reproducing the content of the regulation in a press release or on a webpage".[381]

5.136. The Panel also considered that Annex B(2) to the SPS Agreement provides relevant context for the interpretation of Annex B(1) to the SPS Agreement. The Panel noted that Annex B(2) requires Members to allow a reasonable interval between publication and entry into force of SPS regulations "in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member".[382] To the Panel, producers in exporting Members cannot adapt their products and methods to the requirements of the importing Member if they do not understand them in sufficient detail. The Panel considered that the specific elements that will allow interested Members to become acquainted with an SPS regulation may vary from regulation to regulation. That said, the Panel took the view that some of the essential elements can be inferred from the substantive requirements for promulgating SPS regulations found in the SPS Agreement, and from a proper interpretation of Annex B(1). In this respect, the Panel stated that, in light of the goal of enabling Members to know what conditions apply to their products and to give them time to adapt to the new requirements, "one would also expect information on: the substantive and procedural requirements that an exporter must fulfil, the date on which the regulation takes effect, the products affected by the SPS regulation, as well as, in the case of regulations affecting specific Members or regions, the Members or regions the regulation applies to."[383]

5.137. The Panel concluded that, in order to comply with the requirement in Annex B(1) to the SPS Agreement, the publication must make the measures generally known or available through an appropriate medium and contain sufficient content that the interested Member "will know the conditions (including specific principles and methods) that apply to its goods".[384]

5.138. Turning to the product-specific import bans, the Panel found that the press releases announcing those bans contain the content of the regulation, as they list the goods, the origin, and

[378] Panel Report, para. 7.456.
[379] Panel Report, para. 7.458.
[380] Panel Report, para. 7.461.
[381] Panel Report, para. 7.461.
[382] Panel Report, para. 7.463 (quoting Annex B(2) to the SPS Agreement).
[383] Panel Report, para. 7.463.
[384] Panel Report, para. 7.464.

the applicable conditions.[385] With respect to the accessibility of these press releases on the web address provided by Korea, the Panel found that it had "no way of knowing" whether that web address was available on the day Korea announced the measures and what content was available on that day. The Panel noted that Korea had not provided "an archived version of the website from the appropriate time-period".[386] In addition, the Panel considered that Korea did not provide any evidence to demonstrate that at the time of adoption of the measure interested Members would have known to look to the website indicated by Korea for information on SPS measures governing these products.[387] As Japan had made a *prima facie* case that Korea did not publish the product-specific import bans in a manner so as to enable Japan to become acquainted with them, the Panel found that, with respect to the product-specific import bans, Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement.[388]

5.139. In relation to the blanket import ban, the Panel noted that it was undisputed that the press release announcing this measure contains the origin and the conditions applicable to the products concerned. Korea and Japan, however, disagreed on whether the reference to "all fishery products" in the press release is sufficient to specify the products covered by the blanket import ban.[389] The Panel noted that the press release does not refer to either Chapter 3 of the Harmonized System (HS) nomenclature[390] or to the World Organisation for Animal Health (OIE) Aquatic Animal Health Code.[391] The Panel then observed that, in its WTO notification of the blanket import ban, Korea provided more details on the product scope of this measure when compared to the press release. In its WTO notification, Korea included "aquatic animals" as well as products not included in Chapter 3 of the HS, such as algae. To the Panel, Japanese exporters could lack clarity on whether the term "aquatic animals" is limited to a more traditional understanding of fishery products or also extends to other products.[392] The Panel considered that Korea used a vague term in its press release rather than referring to common sources of definitions for the phrase "fishery products", and then included in the scope of the blanket import ban, as described in its notification to the WTO, products that would normally be considered in other categories. Given that the press release did not include the products that would be subject to the ban set forth in the measure, the Panel found that Korea did not publish the full content of the regulation.[393] With respect to the accessibility of the press release, the Panel found that it had "no way of knowing" whether the web address provided by Korea was available on the day Korea announced the measures and what content was available on that day.[394] The Panel noted that Korea had not provided "an archived version of the website from the date of release".[395] In addition, the Panel observed that Korea did not explain how Japan would have been aware that it had to go to the Korean prime minister's website to find SPS measures relating to food imports, especially given that the prime minister is not the authority that is directly in charge of regulating the items subject to the blanket import ban.[396] As Japan had made a *prima facie* case that Korea did not publish the blanket import ban in a manner so as to enable Japan to become acquainted with it, the Panel found that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement.[397]

5.140. In relation to the 2011 additional testing requirements, the Panel noted that the relevant press release does not refer to the levels of caesium or iodine that would trigger the additional testing, which specific radionuclides would be tested, or the maximum levels for those radionuclides that would result in products being rejected. The Panel thus concluded that the press release announcing the 2011 additional testing requirements does not include the entire content of the regulation.[398] With respect to the accessibility of the press release, the Panel found that it had "no way of knowing" whether the web address provided by Korea was available on the day Korea announced the measures and what

[385] Panel Report, para. 7.472.
[386] Panel Report, para. 7.474.
[387] Panel Report, para. 7.474.
[388] Panel Report, paras. 7.476 and 7.503.
[389] Panel Report, para. 7.479.
[390] Chapter 3 of the HS nomenclature refers to "Fish and crustaceans, molluscs and other aquatic invertebrates". (Panel Report, para. 7.481)
[391] Panel Report, para. 7.481. The OIE Aquatic Animal Health Code provides a common definition of "aquatic animals". (Ibid.)
[392] Panel Report, para. 7.482.
[393] Panel Report, paras. 7.483 and 7.487.
[394] Panel Report, para. 7.485.
[395] Panel Report, para. 7.485.
[396] Panel Report, para. 7.485.
[397] Panel Report, paras. 7.485, 7.487, and 7.503.
[398] Panel Report, para. 7.492.

content was available on that day.[399] The Panel noted that Korea had not provided "an archived version of the website from the appropriate time period".[400] In addition, the Panel stated that Korea did not explain how Japan would have known to go to that website to find SPS measures relating to food imports.[401] The Panel found that Japan had made a *prima facie* case that Korea did not publish the 2011 additional testing requirements in a manner so as to enable Japan to become acquainted with the measure, and that, thus, Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement.[402]

5.141. In relation to the 2013 additional testing requirements, the Panel noted that the relevant press release does not refer to the levels of caesium that would trigger the additional testing, which specific radionuclides would be tested, the maximum levels for those radionuclides that would result in products being rejected, or the procedure and location of the testing required for the additional radionuclides.[403] Therefore, the Panel concluded that the press release announcing the 2013 additional testing requirements does not include the entire content of the regulation.[404] With respect to the accessibility of the press release, the Panel referred to its earlier analysis, and found that, in addition to the missing content, the location of the press release prevented Japan from becoming acquainted with the 2013 additional testing requirements.[405] The Panel thus concluded that, in relation to the 2013 additional testing requirements, Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement.[406]

5.6.1.3 Annex B(1) to the SPS Agreement: "in such a manner as to enable interested Members to become acquainted with them"

5.142. Korea's appeal calls for us to examine the final part of Annex B(1) to the SPS Agreement, namely, the requirement that adopted SPS regulations be published promptly "in such a manner as to enable interested Members to become acquainted with them".

5.143. Annex B(1) to the SPS Agreement provides:

> Members shall ensure that all sanitary and phytosanitary regulations**[*]** which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.
>
> **[*fn original]** [5] Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

5.144. Article 7 of the SPS Agreement provides 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." Annex B(1) imposes an obligation on Members to ensure that adopted SPS regulations[407] are published promptly "in such a manner as to enable interested Members to become acquainted with them". This dispute concerns only the latter part of this obligation.[408]

[399] Panel Report, para. 7.498.
[400] Panel Report, para. 7.498.
[401] Panel Report, para. 7.498.
[402] Panel Report, paras. 7.498, 7.501, and 7.503.
[403] Panel Report, para. 7.494.
[404] Panel Report, para. 7.496.
[405] Panel Report, para. 7.500.
[406] Panel Report, paras. 7.500 and 7.502-7.503.
[407] SPS regulations are defined in footnote 5 of the SPS Agreement as "[s]anitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally". The Appellate Body has observed that the list of instruments contained in this footnote is, as indicated by the words "such as", not exhaustive in nature. To the Appellate Body, the scope of application of the publication requirement in Annex B(1) is not limited to "laws, decrees or ordinances", but also includes other instruments which are applicable generally and are similar in character to the instruments explicitly referred to in the illustrative list of the footnote 5 to Annex B(1). (Appellate Body Report, *Japan – Agricultural Products II*, para. 105)
[408] As noted by the Panel, Japan does not dispute the promptness of Korea's actions. Rather, Japan questions whether Korea's actions are sufficient to fulfil the other elements of Annex B(1). (Panel Report, para. 7.458)

5.145. On the basis of relevant dictionary definitions[409], the terms "to enable … to become acquainted" can be understood as to give the means to become familiar. Thus, to enable interested Members to become acquainted with an adopted SPS regulation, a publication must give the means to interested Members to become familiar with it. In our view, this suggests that the publication of an adopted SPS regulation must be accessible to interested Members and contain sufficient information so as to give the means to interested Members to become familiar with it. A publication that is not accessible to interested Members would not enable interested Members to become acquainted with the adopted SPS regulation. Similarly, a publication that contains insufficient information regarding the adopted SPS regulation would not enable interested Members to become acquainted with that SPS regulation. This reading of the publication requirement in Annex B(1) is also a prerequisite for giving meaning to Annex B(2) to the SPS Agreement, which requires Members to provide a reasonable interval between the publication of an SPS regulation and its entry into force, in order to allow producers time to adapt their products and methods of production. Annex B(2) thus provides relevant context to the interpretation of the last phrase of Annex B(1). Annex B(2) provides:

> Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

5.146. Annex B(2) refers to the publication under Annex B(1) when it provides that Members shall allow a reasonable interval between the publication of an SPS regulation and the entry into force of that regulation. As noted earlier, it is the publication pursuant to Annex B(1) that enables interested Members to become acquainted with adopted SPS regulations. Producers in exporting Members will be informed of adopted SPS regulations in importing Members as a consequence of the Annex B(1) publication. Thus, when interpreted in light of the context of Annex B(2), the final part of Annex B(1) suggests that the publication under that annex must inform of the product scope and include adequate information about the requirements contained in the adopted SPS regulation. This is because, as specified in Annex B(2), the purpose of the interval between publication and entry into force of an SPS regulation is to allow time for producers in exporting Members to adapt "their products and methods of production" to the requirements of the importing Member.

5.147. In sum, to enable interested Members to become acquainted with an adopted SPS regulation, an Annex B(1) publication must be accessible to interested Members and contain sufficient information, including the product scope and the requirements of the adopted SPS regulation, to give the means to interested Members to become familiar with it. The precise content and amount of information that must be included in an Annex B(1) publication to enable interested Members to become acquainted with an adopted SPS regulation will depend on the particular SPS regulation at issue.

5.6.1.4 Whether the Panel erred in its interpretation of Annex B(1) to the SPS Agreement

5.148. The Panel found that Annex B(1) to the SPS Agreement requires the publication of the content of the SPS regulation, which can be achieved by publishing the actual regulation through a formal legal instrument, such as in an official gazette, through decision, or by reproducing the content of the regulation in a press release or on a webpage.[410] According to the Panel, in order to meet the requirements in Annex B(1), the publication of an SPS regulation must make the measures generally known and contain sufficient content that the exporting Member "will know the conditions (including specific principles and methods) that apply to its goods".[411]

5.149. On appeal, Korea claims that the Panel erred in the interpretation of Annex B(1) to the SPS Agreement in finding that this provision requires that the publication of an adopted SPS regulation include sufficient content so that the interested Member will know the conditions, including specific principles and methods, that apply to its goods. Korea argues that Annex B(1) does not refer to "conditions", "specific principles", or "methods" that must be published. To Korea, by finding that

[409] The definition of "enable" includes "[m]ake able, give the means, to be or to do something". (*Shorter Oxford English Dictionary*, 6th edn, A. Stephenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 824) The definition of "acquainted" includes "familiar through being known". (Ibid., p. 20)

[410] Panel Report, para. 7.461.

[411] Panel Report, para. 7.464.

Annex B(1) requires that detailed methodologies for compliance be included in the publication, the Panel imposed additional obligations not present in Annex B(1).[412] Korea notes, however, that the publication obligation of Annex B(1) requires only that the publication of SPS regulations enable interested Members to become acquainted with them.[413]

5.150. Japan disagrees with Korea that the Panel erred in the interpretation of Annex B(1) to the SPS Agreement. To Japan, the Panel correctly found that the publication under Annex B(1) must contain sufficient information, comprising the "conditions (including specific principles and methods)" that apply to goods in order to allow producers in exporting Members to "adapt their products and production methods" to the importing Member's "requirements".[414] Japan contends that the legitimate commercial interests of traders and exporting Members would be frustrated if SPS regulations were published in a manner that does not allow them to know how to comply with and adapt to the importing Member's "requirements".[415]

5.151. The Panel began by noting that, in light of the goal of enabling Members to know what conditions apply to their products and to give them time to adapt to the new requirements, "one would also expect information on: the substantive and procedural requirements that an exporter must fulfil, the date on which the regulation takes effect, the products affected by the SPS regulation, as well as, in the case of regulations affecting specific Members or regions, the Members or regions the regulation applies to."[416] The Panel further stated that, in order to meet the requirements in Annex B(1) to the SPS Agreement, the publication of an SPS regulation must make the measures generally known and contain sufficient content that the exporting Member "will know the conditions (including specific principles and methods) that apply to its goods".[417] To the extent the Panel's reference to "conditions" means the requirements of the adopted SPS regulation, that aspect of the Panel's interpretation would comport with our interpretation of Annex B(1) set out above. We read, however, the latter part of this Panel statement as requiring that the publication of an SPS regulation under Annex B(1) always contain conditions that apply to products, as well as "specific principles and methods". We disagree with the Panel's reference to "specific principles and methods" to the extent the Panel suggested that this undefined requirement must, *in all cases*, be met in the publication of an SPS regulation. As explained above, to enable interested Members to become acquainted with an adopted SPS regulation, an Annex B(1) publication must contain sufficient information, including the product scope and the requirements of the adopted SPS regulation, to give the means to interested Members to become familiar with it. That said, the precise content and amount of information, in particular any information in addition to the product scope and requirements of the SPS regulation, that must be included in an Annex B(1) publication to enable interested Members to become acquainted with an adopted SPS regulation, will depend on the specific circumstances of each case, including the nature of the SPS regulation at issue, the products covered, and the nature of the SPS risks involved. In particular situations, Annex B(1) may require publication of the "specific principles and methods" relating to an adopted SPS regulation so as to enable interested Members to become acquainted with that adopted SPS regulation. We do not read, however, Annex B(1) as imposing such a requirement *in all cases*, regardless of a consideration of the particular SPS regulation, the products covered, the SPS risk, and other relevant circumstances at issue.

5.152. Japan submits that, in reaching its finding, the Panel drew on the context in Annex B(5)(b) and Annex B(6)(a) to the SPS Agreement.[418] Indeed, we note that the Panel appears to have found support in these provisions for its interpretation of Annex B(1). The Panel noted that Annex B(5)(b) requires that a notification include information on the products covered, and the objective and rationale of a proposed regulation. The Panel also noted that Annex B(6)(a) requires the same information, as well as the nature of the urgent problem. The Panel then concluded that it would be "paradoxical if Annex B(1) required less information in the publication of an adopted regulation than that required in the notification of a proposed regulation or one adopted on an emergency basis".[419]

[412] Korea's appellant's submission, paras. 347, 357-358, and 363-364 (referring to Panel Report, para. 7.464).
[413] Korea's appellant's submission, para. 358.
[414] Japan's appellee's submission, paras. 850-852 (referring to Panel Report, paras. 7.463-7.464).
[415] Japan's appellee's submission, para. 854.
[416] Panel Report, para. 7.463.
[417] Panel Report, para. 7.464.
[418] Japan's appellee's submission, paras. 855-856 (referring to Panel Report, para. 7.463).
[419] Panel Report, para. 7.463.

5.153. We note that Annex B(5) to the SPS Agreement sets forth notification procedures for a proposal to introduce an SPS regulation. Annex B(6) to the SPS Agreement concerns the notification procedures in situations where urgent problems of health protection arise or threaten to arise for a Member. In particular, Annex B(5)(b) requires Members to notify other Members, through the WTO, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Annex B(6)(a) similarly requires a Member relying on that provision to notify other Members, through the WTO, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s). We observe that neither Annex B(5) nor Annex B(6) refers to the "specific principles" or "methods" of SPS regulations. Therefore, we do not see how the Panel found contextual support in Annex B(5) or Annex B(6) for the proposition that the publication of an SPS regulation under Annex B(1) must always include such "specific principles and methods".[420]

5.154. For the reasons set out above, we consider that the publication of an adopted SPS regulation must contain sufficient information, including the product scope and the requirements of the SPS regulation, so as to enable Members to become acquainted with it. In this respect, we agree with the Panel to the extent the Panel's reference to "conditions" means the requirements of the adopted SPS regulation. We modify, however, the Panel's finding, in paragraph 7.464 of the Panel Report, to the extent it considered that Annex B(1) requires, in all cases, that the publication of an SPS regulation include the "specific principles and methods" applicable to the products. We instead find that whether a publication of an adopted SPS regulation under Annex B(1) needs to include the "specific principles and methods" applicable to the products may only be determined with reference to the specific circumstances of each case, such as the nature of the SPS regulation at issue, the products covered, and the nature of the SPS risks involved.

5.6.1.5 Whether the Panel erred in its application of Annex B(1) to the SPS Agreement and acted inconsistently with Article 11 of the DSU

5.155. We turn to examine Korea's claims on appeal that the Panel erred in the application of Annex B(1) to the SPS Agreement and acted inconsistently with Article 11 of the DSU in finding that Korea had failed to publish all of its measures at issue in accordance with Annex B(1) to the SPS Agreement. Before the Panel, the parties disagreed on whether Korea's publication of the press releases announcing its measures on certain websites was compliant with Annex B(1).[421] The Panel found that Korea had not complied with Annex B(1) with respect to each measure at issue and provided several bases for this finding.[422]

5.156. First, with respect to the blanket import ban, the 2011 additional testing requirements, and the 2013 additional testing requirements, the Panel found that the press releases announcing those measures did not provide sufficient content to meet Korea's obligation under Annex B(1) to the SPS Agreement.[423] Korea separately appeals the Panel's findings with respect to each of these measures.[424]

5.157. Second, with respect to the accessibility of all measures at issue, the Panel found that Korea failed to publish the press releases announcing the measures in such a manner as to enable Japan to become acquainted with the SPS regulations at issue. The Panel provided two reasons for this finding: (i) Korea had not explained how interested Members would have known to look to the websites indicated by Korea for information on SPS measures governing the products at issue; and (ii) the Panel was unable to know whether the press releases announcing those measures were available on the designated websites when Korea announced those measures.[425] Korea challenges both reasons provided by the Panel, claiming that, in basing its finding on the first reason, the Panel erred in the application of Annex B(1) to the SPS Agreement, and in basing its finding on the second reason, it acted inconsistently with Article 11 of the DSU.[426]

[420] Panel Report, para. 7.464.
[421] Panel Report, para. 7.449.
[422] Panel Report, paras. 7.476, 7.487, 7.498, and 7.500-7.503.
[423] Panel Report, paras. 7.487, 7.492, and 7.496.
[424] Korea's appellant's submission, paras. 366 and 368.
[425] Panel Report, paras. 7.474, 7.485, 7.498, and 7.500.
[426] Korea's appellant's submission, paras. 373 and 376.

5.158. Below we address Korea's challenges on appeal in the following order. We begin with the assessment of whether the Panel erred in the application of Annex B(1) to the SPS Agreement in finding that Korea acted inconsistently with this provision by not publishing the full content of the blanket import ban, the 2011 additional testing requirements, and the 2013 additional testing requirements. Subsequently, we turn to examine whether the Panel erred in the application of Annex B(1) in finding that Korea acted inconsistently with this provision by not demonstrating that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue. Lastly, we will consider whether the Panel acted inconsistently with Article 11 of the DSU in finding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day.

5.6.1.5.1 Application of Annex B(1) to the SPS Agreement

5.6.1.5.1.1 Blanket import ban

5.159. In relation to the blanket import ban, the Panel first noted that it is undisputed that the press release announcing this measure contains the origin of the products concerned and the conditions applicable to them. Korea and Japan, however, disagreed on whether the reference to "all fishery products" in the press release is sufficient to specify the products covered by the blanket import ban.[427] After observing that Korea's press release does not refer to Chapter 3 of the HS nomenclature or to the OIE Aquatic Animal Health Code[428], the Panel highlighted that Korea, in its WTO notification of the SPS measure at issue, included "aquatic animals" as well as products not included in Chapter 3 of the HS, such as algae. The Panel considered that Korea used a vague term in its press release rather than referring to common sources of definitions for the phrase "fishery products", and then included in the scope of the blanket import ban, as described in its notification to the WTO, products that would normally be considered in other categories. Given that the press release did not include the products that would be subject to the ban, the Panel found that Korea did not publish the full content of the regulation.[429] The Panel thus found that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing the blanket import ban in such a manner as to enable Japan to become acquainted with it.[430]

5.160. On appeal, Korea claims that the Panel erred in its application of Annex B(1) by finding that Korea had not published the full content of the blanket import ban.[431] Korea contends that the reference to "all fishery products" in the press release is clear in relation to the scope of the measure.[432] Korea argues that Annex B(1) "does not require the publication of each and every HS code, as long as the product scope is defined, as was done by Korea".[433]

5.161. Japan responds that Korea fails to engage with the Panel's specific reasons for finding that the reference in the press release to "all fishery products" was inadequate to communicate the product coverage of the blanket import ban.[434] Japan notes, in particular, that the Panel conducted its assessment of whether the term "fishery products" described the product coverage of the measure on the basis of commonly used sources of defining terms in international trade, such as the HS nomenclature and the OIE Aquatic Animal Health Code.[435]

5.162. We recall that an Annex B(1) publication must contain sufficient information, including the product scope and the requirements of the adopted SPS regulation, to enable interested Members to become acquainted with an adopted SPS regulation. The question before us is thus whether the Panel correctly found that the press release announcing the blanket import ban did not sufficiently specify the product scope of that SPS measure.

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[427] Panel Report, para. 7.479.
[428] Panel Report, para. 7.481. The OIE Aquatic Animal Health Code provides a common definition of "aquatic animals". (Ibid.)
[429] Panel Report, paras. 7.483 and 7.487.
[430] Panel Report, para. 7.487.
[431] Korea's appellant's submission, para. 366.
[432] Korea's appellant's submission, para. 367.
[433] Korea's appellant's submission, para. 367.
[434] Japan's appellee's submission, para. 868.
[435] Japan's appellee's submission, paras. 864-866.

5.163. We note that the press release announcing the blanket import ban refers to "all fishery products".[436] The Panel examined the documentation surrounding the adoption of the blanket import ban to verify whether the phrase "all fishery products" was based on commonly used sources for defining terms in international trade in fishery or other aquatic products. In this respect, the Panel noted that the press release does not refer to Chapter 3 of the HS nomenclature, which is entitled "Fish and crustaceans, molluscs and other aquatic invertebrates".[437] The Panel also noted that the press release does not refer to the OIE Aquatic Animal Health Code, which provides a common definition of "aquatic animals".[438] The Panel then noted that Korea's notification to the WTO of the blanket import ban contains the following definition of fishery products: "Aquatic animals and algae … being consumed as food".[439] On appeal, Korea confirmed that its notification accurately describes the product scope of the blanket import ban.[440]

5.164. We agree with the Panel that the press release announcing the blanket import ban does not contain the full product scope of the blanket import ban. As observed by the Panel, Korea's notification to the WTO of the blanket import ban includes algae. This is a product that falls outside Chapter 3 of the HS nomenclature covering "[f]ish and crustaceans, molluscs and other aquatic invertebrates". Given that the blanket import ban covers products that would normally be included in a category other than "fishery products", we do not consider that the press release at issue published the blanket import ban in such a manner as to enable Japan to become acquainted with this ban.

5.165. In view of the foregoing, we find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the blanket import ban in relation to the product scope of this measure. Thus, we uphold the Panel's finding, in paragraph 7.487 of the Panel Report, that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing the full product scope of the blanket import ban.

5.6.1.5.1.2 2011 and 2013 additional testing requirements

5.166. The Panel found that Korea did not publish the 2011 additional testing requirements and the 2013 additional testing requirements in accordance with Annex B(1) to the SPS Agreement because the press releases announcing those measures did not provide the full content of the measures.[441] The Panel considered that the press releases did not include the following information: (i) the levels of caesium (and iodine in the 2011 press release) that would trigger the additional testing; (ii) the specific radionuclides to be tested; (iii) the maximum levels for those radionuclides that would result in products being rejected; and (iv) in relation to the 2013 press release only, the procedure and location of the testing required for the additional radionuclides.[442]

5.167. On appeal, Korea claims that the Panel erred in its application of Annex B(1) by finding that the press releases announcing the 2011 additional testing requirements and the 2013 additional testing requirements did not contain sufficient information to enable an interested Member to know the conditions that would apply to its goods.[443] Korea argues that the Panel's application goes beyond what is required under Annex B(1).[444] Korea submits that "both the 2011 and 2013 press releases state that if caesium (and iodine in the 2011 press release) was detected, certificates of other radionuclides, such as strontium and plutonium, would be required."[445] Korea contends that this would allow interested Members to become acquainted with the measures and their requirements.[446]

5.168. Japan disagrees with Korea's claim of error on appeal. Japan submits that Korea's claim is based on Korea's view that the Panel erred in interpreting Annex B(1) to the SPS Agreement to require

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[436] Panel Report, para. 7.477; Korea Prime Minister's Office, Press Release, "Government Bans Import of All Fishery Products from 8 *ken* near Fukushima" (6 September 2013) (PMO blanket import ban and additional testing requirements press release) (Panel Exhibit JPN-3.b).
[437] Panel Report, para. 7.481.
[438] Panel Report, para. 7.481.
[439] Panel Report, para. 7.481 (quoting Korea's Addendum to Notification of Emergency Measures, G/SPS/N/KOR/454/Add.1).
[440] Korea's response to questioning at the oral hearing.
[441] Panel Report, paras. 7.492, 7.496, and 7.501-7.502.
[442] Panel Report, paras. 7.492, 7.494, and 7.496.
[443] Korea's appellant's submission, para. 368 (referring to Panel Report, paras. 7.500-7.501).
[444] Korea's appellant's submission, para. 368.
[445] Korea's appellant's submission, para. 370 (referring to Panel Report, paras. 7.491 and 7.493).
[446] Korea's appellant's submission, para. 370.

the publication to include the "conditions (including specific principles and methods) that apply to its goods".[447] Japan reiterates that the publication under Annex B(1) should communicate enough information to enable traders and interested Members to know how to comply with the importing Member's requirements.[448]

5.169. As explained earlier, an Annex B(1) publication must contain sufficient information, including the requirements of the adopted SPS regulation, to enable interested Members to become acquainted with an adopted SPS regulation. In the present case, the Panel found that the press releases announcing the 2011 additional testing requirements and the 2013 additional testing requirements did not include the full content of the measures. The Panel considered that the elements of the measures that were missing included the levels of caesium (and iodine in the 2011 press release) that would trigger the additional testing; the specific radionuclides to be tested; the maximum levels for those radionuclides that would result in products being rejected; and, in relation to the 2013 press release only, the procedure and location of the testing required for the additional radionuclides.[449] We agree with the Panel that, in light of the SPS regulations at issue, the press releases announcing the 2011 additional testing requirements and the 2013 additional testing requirements should have contained these elements to meet the publication requirements in Annex B(1). In our view, without these elements, the press releases do not enable interested Members to become acquainted with the 2011 additional testing requirements and the 2013 additional testing requirements.[450]

5.170. In view of the foregoing, we find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the 2011 additional testing requirements and the 2013 additional testing requirements in relation to the requirements of these measures. Thus, we uphold the Panel's findings, in paragraphs 7.501-7.502 of the Panel Report, that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing sufficient information to enable Japan to become acquainted with the requirements of the 2011 additional testing requirements and the 2013 additional testing requirements.

5.6.1.5.1.3 All measures – accessibility of the press releases

5.171. With respect to all SPS measures at issue, the Panel found that Korea had not shown that interested Members would have known to look to the websites indicated by Korea for information on these measures.[451]

5.172. On appeal, Korea claims that the Panel erred in applying Annex B(1) of the SPS Agreement to the measures at issue because, in reaching these findings, the Panel set a standard of certainty not called for under this provision.[452] Japan does not specifically respond to this aspect of Korea's appeal, and contends in general that the Panel properly found that Korea did not satisfy the Annex B(1) publication requirements with respect to all of its measures.[453]

5.173. As noted above, the requirement in Annex B(1) to publish adopted SPS regulations "in such a manner as to enable interested Members to become acquainted with them" concerns not only the content of publication but also its accessibility. In order to comply with Annex B(1), the publication of an adopted SPS regulation must be accessible to interested Members. Where an adopted SPS regulation is published in a manner that prevents interested Members from locating and accessing it, we do not consider that such publication could be said to enable interested Members to become acquainted with the SPS regulation.

5.174. In the present case, Korea published its measures on certain government websites.[454] Before the Panel, Korea submitted a table indicating that its measures were published on the following government websites: the blanket import ban and the 2013 additional testing requirements on the websites of the Ministry of Food and Drug Safety (MFDS) and the Prime Minister's Office; the product-

[447] Japan's appellee's submission, para. 871 (referring to Korea's appellant's submission, para. 357, in turn quoting Panel Report, para. 7.464).
[448] Japan's appellee's submission, para. 871.
[449] Panel Report, paras. 7.492, 7.494, and 7.496.
[450] Panel Report, paras. 7.492, 7.494, and 7.496.
[451] Panel Report, paras. 7.474, 7.485, 7.498, and 7.500.
[452] Korea's appellant's submission, para. 373.
[453] Japan's appellee's submission, paras. 821 and 925.
[454] Panel Report, paras. 7.473, 7.484, 7.497-7.498, and 7.500.

specific import bans on the website of the Ministry of Food, Agriculture, Forestry and Fisheries (later changed to the Ministry of Agriculture, Food and Rural Affairs); and the 2011 additional testing requirements on the website of Korea's Food and Drug Administration (later changed to MFDS).[455] There were thus websites of three different governmental entities where Korea posted the press releases announcing the SPS measures at issue.

5.175. We note that, before the Panel and, on appeal, Japan argued that it is not for Members and their economic operators to "search for scattered information on government websites, and … piece together the information [they] might discover by chance on different websites, in hopes of becoming acquainted with the measure".[456] In this respect, Japan submitted that the press releases announcing the measures at issue were not generally known and Japan's ability to become acquainted with the measures was inhibited by the location of the websites where the press releases were posted.[457] In light of the case presented by Japan, it was for Korea to provide some evidence or explanation that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue. In our view, this could have included a showing that these websites were the customary locations in Korea to publish SPS regulations on certain products.[458] Korea, however, did not provide a clear explanation concerning whether interested Members would have been able to locate and access these press releases. In particular, it remains unclear to us why certain of Korea's SPS measures were published on the website of the Prime Minister's Office, some were published on the website of the Ministry of Food, Agriculture, Forestry and Fisheries (later changed to the Ministry of Agriculture, Food and Rural Affairs), and others were published on the website of Korea's Food and Drug Administration (later changed to MFDS). In addition, as noted by the Panel, Korea did not explain how Japan would have been aware that it would have had to access the prime minister's website to find the publication of an SPS measure relating to food imports, "especially given that the Prime Minister is not the authority that is directly in charge of regulating the items subject to the blanket import ban".[459]

5.176. In view of the foregoing, we find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the SPS measures at issue in relation to the accessibility of the publications. Thus, we uphold the Panel's findings, in paragraphs 7.474, 7.485, 7.498, and 7.500 of the Panel Report, that Korea did not show that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue.

5.6.1.5.2 Article 11 of the DSU

5.177. The Panel found that Korea did not publish all measures at issue in accordance with Annex B(1) to the SPS Agreement because, *inter alia*, it could not know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day. The Panel reasoned that it could not do so because Korea did not provide the archived versions of those websites from the appropriate time period.[460]

5.178. On appeal, Korea claims that, in reaching this finding, the Panel acted inconsistently with Article 11 of the DSU. According to Korea, there was no question before the Panel regarding the dates of publication of the press releases, or whether they were available on the websites on those dates. Korea further submits that Japan expressly acknowledged the dates of publication of several of the press releases in its panel request.[461] Korea thus considers that it was inappropriate for the Panel to

[455] Korea's response to Panel question No. 114.
[456] Japan's second written submission to the Panel, para. 344. See also Japan's response to Panel question No. 81; comments to Korea's responses to Panel question No. 114; appellee's submission, para. 882.
[457] Panel Report, paras. 7.465 and 7.497 (referring to Japan's second written submission to the Panel, paras. 317 and 349; response to Panel question No. 81).
[458] Our understanding is not meant to imply that SPS regulations must be published on the website of a particular governmental entity. Provided that the publication meets the requirements in Annex B(1) to the SPS Agreement, including that the publication be accessible to interested Members, Members are, in principle, free to publish them in the location they deem appropriate. We note that accessibility is particularly important in the case of perishable goods, such as those at issue in the present dispute.
[459] Panel Report, para. 7.485 (referring to Korea's response to Panel question No. 114).
[460] Panel Report, paras. 7.474, 7.485, 7.498, and 7.500.
[461] Korea's appellant's submission, para. 377 (referring to Japan's panel request).

require Korea to bring evidence on an uncontested matter, especially given that the Panel never requested Korea to provide archived versions of the webpages.[462]

5.179. Japan disagrees with Korea's assertion and submits that Korea is incorrect to suggest that the publication dates of the press releases were uncontested before the Panel. This is because, according to Japan, the Panel's assessment at issue related to a question that was contested, namely, the accessibility of Korea's press releases.[463]

5.180. We recall that Article 11 of the DSU imposes on panels a comprehensive obligation to make an "objective assessment of the matter", an obligation that embraces all aspects of a panel's examination of the "matter", both factual and legal.[464] A panel's duty as the trier of facts requires it to consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that the panel's factual findings have a proper basis in that evidence.[465] As an initial trier of facts, a panel must also provide reasoned and adequate explanations, and coherent reasoning[466], and not reveal a lack of even-handedness in the treatment of the evidence.[467] Moreover, a panel must ensure that the due process rights of parties to a dispute are respected.[468] Within these parameters, however, it is generally within the discretion of a panel to decide which evidence it chooses to utilize in making its findings[469], and to determine how much weight to attach to the various items of evidence placed before it by the parties.[470] A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.[471]

5.181. In support of its claim that the Panel acted inconsistently with Article 11 of the DSU, Korea argues that it was inappropriate for the Panel to require Korea to bring evidence on an uncontested factual issue that was not the subject of a claim before the Panel.[472] We observe that, before the Panel, Japan did not develop arguments regarding the dates of publication of the press releases announcing Korea's measures on the websites provided by Korea. In our view, however, this does not mean that the Panel was obliged simply to accept, on this basis alone, that the press releases were available on those websites on the dates Korea's measures were announced. Rather, as indicated above, Article 11 of the DSU required the Panel to base its factual conclusions on the evidence on the record, or at least on the basis of a clear statement on the record that a party admits a certain fact.[473] Thus, a panel is not precluded from objectively determining the accuracy of a factual assertion even when it is not disputed between the parties.

5.182. Korea argues that Japan expressly acknowledged the dates of publication of several of the press releases in its panel request.[474] We note that Japan's panel request lists Korea's press releases accompanied by certain dates.[475] In our view, however, this is not necessarily an admission that the press releases were available on the websites on those specific dates. Rather, the list with dates presented by Japan in its panel request can be understood as a way of specifying that those were the press releases at issue in this dispute. We thus do not share Korea's view that Japan's inclusion of a

[462] Korea's appellant's submission, paras. 377-378.
[463] Japan's appellee's submission, para. 879 (referring to Korea's appellant's submission, para. 377).
[464] Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.
[465] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 992 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133; referring to Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).
[466] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293.
[467] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.
[468] Appellate Body Reports, *Canada – Continued Suspension*, para. 482; *US – Continued Suspension*, para. 482 (referring to Appellate Body Report, *US – Gambling*, para. 273).
[469] Appellate Body Report, *EC – Hormones*, para. 135.
[470] Appellate Body Report, *Korea – Dairy*, para. 137.
[471] Appellate Body Reports, *Australia – Salmon*, para. 267; *Japan – Apples*, para. 221; *Korea – Alcoholic Beverages*, para. 164.
[472] Korea's appellant's submission, paras. 377-378.
[473] See e.g. Panel Report, *US – Shrimp*, para. 7.15. In the context of anti-dumping investigations, see Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina*), para. 112.
[474] Korea's appellant's submission, para. 377 (referring to Japan's panel request).
[475] See e.g. Japan's panel request, paras. 13-14 (such as "Press release by MIFAFF, *dated 13 November 2012*, 'Temporary ban on import of cod from Ibaraki-*ken*'" (emphasis added)).

list of press releases with dates in its panel request amounts to a clear statement that Japan admits the publication dates of those press releases.

5.183. We note, at the same time, that the press releases themselves contain certain dates in their texts. More precisely, the English translation of the press release announcing the 2011 additional testing requirements submitted by Japan states that it was "[d]istributed on April 14, 2011" and "[r]eported on April 14, 2011", while the English translation submitted by Korea states that 14 April 2011 is its "[r]elease" and "[p]ublish" date.[476] Similarly, each of the press releases announcing the product-specific import bans contains a date on which it was "provided", and from which it may be "reported".[477] Likewise, the press release announcing the blanket import ban and the 2013 additional testing requirements indicates, in its header, the date of 6 September 2013 and states "[p]lease use after 09:30, September 6 (Friday)."[478]

5.184. In our view, these exhibits submitted to the Panel could be indicative of the publication dates of the press releases on the government websites. This evidence, however, was not addressed by the Panel and is absent from its analysis. We recall that a panel's duty as the trier of facts requires it to consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that the panel's factual findings have a proper basis in that evidence.[479] In the present case, the Panel offered no explanation of whether and how it took the evidence on record concerning the press releases into account in reaching its conclusion that it could not verify the publication dates of the press releases on the government websites. We do not believe that, by disregarding pertinent evidence on the record, the Panel could have complied with its duty under Article 11 of the DSU to conduct an objective assessment of the matter.

5.185. Furthermore, at no point during the panel proceedings did the Panel indicate that it required the archived versions of the webpages, in order to confirm the publication dates of the press releases, or request Korea to submit such evidence. We note that the Panel requested Korea to provide certain information about the publication of its measures on government websites.[480] Korea provided a

[476] Korea Food and Drug Administration, Press Release, "Status of KFDA's Response and Management Measures Regarding the Japanese Nuclear Crisis (5)" / "KFDA's Response to the Fukushima Nuclear Power Plant Accident and Management Status" (14 April 2011) (KFDA 14 April 2011 press release) (Panel Exhibits JPN-55.b (revised) and KOR-72 (revised)).

[477] The press release announcing the ban on cod from Miyagi and Iwate states, in its header, "[p]rovided on: May 3, 2012" and "[p]lease report this material from its distribution on May 3, 2012". (Korea Ministry of Food, Agriculture, Forestry and Fisheries, Press Release, "Temporary Import Suspension on Cod from Miyagi-*ken* and Iwate-*ken*, Japan" (3 May 2012) (Panel Exhibit JPN-76.b)) The press release announcing the ban on 35 fishery products, including yellowfish, states "[p]rovided on: June 26, 2012" and "[p]lease report this material from its distribution on June 27, 2012". (Korea Ministry of Food, Agriculture, Forestry and Fisheries, Press Release, "Temporary Import Suspension on 35 Fishery Products, including Yellowfish from Fukushima-*ken*, Japan" (26 June 2012) (Panel Exhibit JPN-77.b)) The press release announcing the ban on cod from Aomori also states "[p]rovided on: Aug. 29, 2012" and "[p]lease report this material from its distribution on Aug. 29, 2012". (Korea Ministry of Food, Agriculture, Forestry and Fisheries, Press Release, "Temporary Import Suspension on Cod from Aomori-*ken*, Japan" (29 August 2012) (Panel Exhibit JPN-78.b))

[478] PMO blanket import ban and additional testing requirements press release (Panel Exhibit JPN-3.b). We also note that the MFDS document containing the administrative instructions sent to the relevant Korean enforcement agencies after the announcement of the blanket import ban contains the following information in its last page: "[a]pproved on September 6, 2013", "[r]eceived by International Cooperation Officer–3066 (September 6, 2013)", and "[d]isclosed to public". (See Korea Ministry of Food and Drug Safety, "Notice of Temporary Special Measure for Safety for Food Imported from Japan" (6 September 2013) (MFDS 2013 blanket import ban and additional testing requirements notice) (Panel Exhibit JPN-75.b))

[479] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 992 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133; referring to Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

[480] At the second meeting with the parties, the Panel asked Korea the following question: "To help the Panel gain a better understanding of the posting of the press releases on government websites, please fill out the following table". The table in the Panel question at issue contained the following columns to be completed by Korea: exhibit number; date; title; "Agency website where it was posted"; "Address of agency's website where the press release appears"; "Is this authority in charge of regulating the relevant products?"; "Other SPS measures posted on this website?"; "Is there an official document (e.g. Official Gazette) that indicates where

response to that request from the Panel.[481] Despite Korea's response and without asking for information on the publication dates, the Panel based its finding on the absence of further evidence pertaining to the publication dates of the press releases. Thus, even in the absence of a contestation or refutation of the publication dates of the press releases by Japan, the Panel implicitly placed the burden of further confirming the publication dates of the press releases on Korea, and then found that Korea acted inconsistently with Annex B(1) because it had not met that burden.

5.186. As observed by the Appellate Body, "it is not enough for a panel to leave it to the parties to guess what proof it will require."[482] While a panel cannot make the case for a party, Article 11 requires a panel to "test evidence with the parties, and to seek further information if necessary, in order to determine whether the evidence satisfies a party's burden of proof".[483] Thus, in the present case, the Panel should not have left it to Korea to anticipate, in the absence of a contestation of the publication dates by Japan, that it would be required to submit the archived versions of the webpages to prove the publication dates of the press releases on government websites. Rather, to the extent the Panel considered it was necessary for it to have such evidence, it should have sought it from both parties to the dispute and should only then have drawn appropriate inferences.

5.187. Therefore, on account of the Panel's failure to engage with the pertinent evidence on the record and to seek information on the publication dates of the press releases at issue that the Panel considered necessary for its finding, we consider that the Panel failed to make an objective assessment of the matter. Consequently, we find that the Panel acted inconsistently with Article 11 of the DSU in finding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day.

5.188. As explained above, the Panel's findings that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement rest on several grounds. With respect to the blanket import ban, the 2011 additional testing requirements, and the 2013 additional testing requirements, the Panel's findings are based on the following reasons: (i) the insufficient content of the publications[484]; (ii) Korea had not explained how interested Members would have known to look to the website indicated by Korea for information on SPS measures governing the products at issue[485]; and (iii) the Panel's view that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day.[486] With respect to the product-specific import bans, the Panel's findings are based on the reasons listed in items (ii) and (iii) above.[487] Our finding that the Panel acted inconsistently with Article 11 of the DSU concerns only the Panel's finding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day. We note that the remaining grounds for the Panel's ultimate finding regarding the SPS measures at issue are left undisturbed, and that each of these reasons would justify the Panel's ultimate finding. Thus, the Panel's ultimate finding that Korea failed to publish its SPS measures at issue in accordance with Annex B(1) and Article 7 of the SPS Agreement stands.[488]

5.6.1.6 Conclusion

5.189. Annex B(1) to the SPS Agreement requires Members to ensure that adopted SPS regulations are published promptly "in such a manner as to enable interested Members to become acquainted with them". An Annex B(1) publication must be accessible to interested Members and contain sufficient information, including the product scope and the requirements of the adopted SPS regulation, in order to enable interested Members to become acquainted with that adopted SPS regulation. The precise content and amount of information that must be included in an Annex B(1) publication to enable

these measures can be found? Please provide specific reference"; and "Information filters available (e.g. origin, product)". (Panel question No. 114)

[481] In its response, Korea filled out the table sent by the Panel. (Korea's response to Panel question No. 114)

[482] Appellate Body Report, *US – Continued Zeroing*, para. 347.

[483] Appellate Body Report, *US – Continued Zeroing*, para. 347.

[484] Panel Report, paras. 7.487, 7.492, and 7.496.

[485] Panel Report, paras. 7.485, 7.498, and 7.500.

[486] Panel Report, paras. 7.485, 7.498, and 7.500.

[487] Panel Report, para. 7.474.

[488] Panel Report, paras. 7.503 and 8.5.a.

interested Members to become acquainted with an adopted SPS regulation will depend on the particular SPS regulation at issue.

5.190. Therefore, we agree with the Panel to the extent the Panel's reference to "conditions" means the requirements of the adopted SPS regulation. We modify, however, the Panel's finding, in paragraph 7.464 of the Panel Report, to the extent it considered that Annex B(1) requires, in all cases, that the publication of an SPS regulation include the "specific principles and methods" applicable to the products. We instead find that whether the publication of an adopted SPS regulation under Annex B(1) needs to include the "specific principles and methods" applicable to the products may be determined only with reference to the specific circumstances of each case, such as the nature of the SPS regulation at issue, the products covered, and the nature of the SPS risks involved.

5.191. In relation to the product scope of the blanket import ban, we agree with the Panel that the reference to "all fishery products" in the press release announcing this measure is not sufficient to comply with Annex B(1) to the SPS Agreement. The blanket import ban covers products that would normally be included in a category other than "fishery products". For this reason, we do not consider that the press release at issue published the blanket import ban in such a manner as to enable Japan to become acquainted with this ban.

5.192. Therefore, we find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the blanket import ban in relation to the product scope of this measure. Consequently, we uphold the Panel's finding, in paragraph 7.487 of the Panel Report, that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing the full product scope of the blanket import ban.

5.193. In relation to the publication of the additional testing requirements, we agree with the Panel that, in light of the SPS regulations at issue, the press releases announcing the 2011 additional testing requirements and the 2013 additional testing requirements should have contained the levels of caesium (and iodine in the 2011 press release) that would trigger the additional testing; the specific radionuclides to be tested; the maximum levels for those radionuclides that would result in products being rejected; and, in relation to the 2013 press release only, the procedure and location of the testing required for the additional radionuclides. In our view, without these elements, the press releases do not enable interested Members to become acquainted with the 2011 additional testing requirements and the 2013 additional testing requirements.

5.194. We therefore find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the 2011 additional testing requirements and the 2013 additional testing requirements in relation to the requirements of these measures. Consequently, we uphold the Panel's findings, in paragraphs 7.501-7.502 of the Panel Report, that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing sufficient information to enable Japan to become acquainted with the requirements of the 2011 additional testing requirements and the 2013 additional testing requirements.

5.195. In relation to the accessibility of the publication of all the SPS measures at issue, we agree with the Panel that, in light of the case presented by Japan, it was for Korea to provide some evidence or explanation that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue. Korea, however, did not provide a clear explanation concerning whether interested Members would have been able to locate and access the press releases announcing those measures.

5.196. We therefore find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the SPS measures at issue in relation to the accessibility of the publications. Consequently, we uphold the Panel's findings, in paragraphs 7.474, 7.485, 7.498, and 7.500 of the Panel Report, that Korea did not show that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue.

5.197. In relation to Korea's claim of error under Article 11 of the DSU, we consider that the Panel failed to engage with the pertinent evidence on the record. Moreover, the Panel should not have left it to Korea to anticipate, in the absence of a contestation of the publication dates by Japan, that it would be required to submit the archived versions of the webpages to prove the publication dates of the press releases on government websites. Rather, to the extent the Panel considered it was

necessary for it to have such evidence, it should have sought it from both parties to the dispute and should only then have drawn appropriate inferences.

5.198. We therefore find that the Panel acted inconsistently with Article 11 of the DSU in concluding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day.

5.199. Given that the remaining grounds for the Panel's ultimate finding regarding the SPS measures at issue are left undisturbed, and that each of these reasons would justify that finding, the Panel's ultimate finding in paragraphs 7.503 and 8.5.a of the Panel Report, that Korea acted inconsistently with Annex B(1) and, as a consequence, Article 7 of the SPS Agreement, stands.

5.6.2 Annex B(3) to the SPS Agreement

5.6.2.1 Introduction

5.200. Korea appeals the Panel's finding that Korea acted inconsistently with Annex B(3) to the SPS Agreement because Korea's SPS enquiry point did not respond to Japan's second query after it had responded in August 2014 to Japan's first query.[489] Korea claims that the Panel erred in its interpretation and application of Annex B(3) in finding that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement, because of Korea's SPS enquiry point's failure to respond to Japan's second request and its earlier failure to enable Japan to relate the documents provided to their relevance for the questions Japan had posed in its first request.[490] Korea requests us to reverse the Panel's finding that Korea acted inconsistently with Annex B(3), and, as a consequence, Article 7 of the SPS Agreement.[491] Japan, for its part, requests us to uphold the Panel's finding.[492]

5.201. At the outset, we briefly summarize the relevant Panel findings. We then examine the merits of Korea's claims of error on appeal that the Panel erred in its interpretation and application of Annex B(3) to the SPS Agreement.

5.6.2.2 The Panel's findings

5.202. Before the Panel, Japan argued that Korea acted inconsistently with Annex B(3) to the SPS Agreement because Korea's SPS enquiry point failed to respond adequately to Japan's request of 24 June 2014 and failed to respond to its request of 13 November 2014.[493] Also before the Panel, Korea responded that, as acknowledged by Japan, Korea's SPS enquiry point replied to Japan's earlier request of 24 June 2014, which, in Korea's view, means that it fulfilled its obligations under Annex B(3). Korea did not contest the enquiry point's failure to respond to Japan's follow-up request of 13 November 2014.[494] Korea, however, argued that a single instance of no response by an enquiry point does not give rise to a violation of Annex B(3).[495]

5.203. The Panel explained that, pursuant to Annex B(3) to the SPS Agreement, Members must ensure the existence of one enquiry point which is responsible for providing answers to all reasonable questions and relevant documents. The Panel noted that the correspondence with an enquiry point is an iterative process, and that an enquiry point must not be held to the "standard of perfection".[496] To the Panel, the incompleteness of a single answer or failure to provide a particular document as part of a response will not necessarily give rise to an inconsistency with Annex B(3). That said, the Panel explained that "failure to respond at all would result in an inconsistency with the obligation in Annex B(3)."[497] The Panel concluded that compliance with Annex B(3) is achieved not only through the formality of creating an enquiry point, but also through the actual provision of information and

[489] Korea's appellant's submission, para. 380. See also Panel Report, para. 7.519.
[490] Korea's appellant's submission, paras. 383 and 385-386.
[491] Korea's appellant's submission, paras. 386 and 387.u (referring to Panel Report, paras. 7.506-7.507, 7.509, 7.518-7.519, and 8.5.b).
[492] Japan's appellee's submission, paras. 924-925.
[493] Panel Report, para. 7.504 (referring to Japan's second written submission to the Panel, para. 362).
[494] Panel Report, para. 7.505.
[495] Panel Report, para. 7.506 (referring to Korea's first written submission to the Panel, para. 394).
[496] Panel Report, para. 7.507.
[497] Panel Report, para. 7.507. See also ibid., para. 7.520.

answers to reasonable questions.[498] The Panel reasoned that it would be "incongruous" to conclude that the drafters of the SPS Agreement would establish an obligation for Members to set up an enquiry point, endow it with responsibility, and then not require that the concomitant benefit to interested Members of receiving the answers and documents be provided.[499]

5.204. Turning to examine whether Korea acted inconsistently with Annex B(3) to the SPS Agreement, the Panel found that Korea's SPS enquiry point provided a response to Japan's request of 24 June 2014. The Panel noted that Korea's response to this request was not complete and was not done in a manner that would easily enable Japan to relate the documents provided to the questions Japan had posed.[500] That said, the Panel considered that Korea's response, on its own, did not rise to the level of an inconsistency with Annex B(3).[501]

5.205. The Panel then noted that Korea did not provide any response to Japan's request of 13 November 2014.[502] The Panel considered that, even though Korea's response to Japan's first request was not sufficient on its own to establish an inconsistency with Annex B(3), Korea failed to comply with its obligations under Annex B(3) because Korea's SPS enquiry point did not respond to Japan's second request.[503] The Panel clarified that it based its finding of inconsistency on the SPS enquiry point's failure both to respond to Japan's second request and to relate the answers and documents provided to their relevance for the questions Japan had posed in its first request.[504]

5.6.2.3 Whether the Panel erred in finding that Korea acted inconsistently with Annex B(3) to the SPS Agreement

5.206. On appeal, Korea claims that the Panel erred in its interpretation and application of Annex B(3) to the SPS Agreement in finding that a single omission of Korea's SPS enquiry point to respond to a request from Japan constitutes an inconsistency with this provision.[505] In Korea's view, the obligation contained in Annex B(3) is for a Member to ensure that one enquiry point exists and that it is given the responsibilities described in this provision. Korea argues that there is nothing in Annex B(3) suggesting that an individual failure to respond to a question would necessarily result in an inconsistency with this provision.[506] Korea agrees that a persistent or repeated failure to respond to requests may constitute an inconsistency with Annex B(3), because, despite its existence "on paper", the enquiry point could not be said to have the responsibilities set out in Annex B(3).[507] Thus, Korea submits that a claim of inconsistency with Annex B(3) must be based on allegations and evidence that the Member has failed to ensure that one enquiry point exists which is responsible for the provision of answers to reasonable questions and relevant documents.[508] Korea contends that, in the present case, Japan failed to demonstrate that the failure of Korea's SPS enquiry point to respond to one query makes it "non-responsive" such that it exists only "on paper".[509]

5.207. Japan considers that Korea's arguments on appeal take issue with "where the Panel drew the line … between acceptable and unacceptable failures to respond to reasonable questions"[510] in the application of Annex B(3) to the SPS Agreement, rather than with the interpretation of this provision.[511] Japan contends that the Panel did not base its conclusion of an inconsistency with Annex B(3) on a single failure of Korea's SPS enquiry point to respond to Japan's request.[512] According to Japan, the Panel rather reached its conclusion in light of both: (i) Korea's SPS enquiry point's failure to respond to Japan's first request in a manner that would have enabled Japan to relate the documents

[498] Panel Report, paras. 7.510 and 7.520.
[499] Panel Report, para. 7.508.
[500] Panel Report, para. 7.516.
[501] Panel Report, paras. 7.516 and 7.519-7.520.
[502] Panel Report, para. 7.517.
[503] Panel Report, paras. 7.518-7.519.
[504] Panel Report, para. 7.520.
[505] Korea's appellant's submission, paras. 383 and 385-386 (referring to Panel Report, para. 7.518).
[506] Korea's appellant's submission, para. 383.
[507] Korea's appellant's submission, paras. 383-384.
[508] Korea's appellant's submission, para. 383.
[509] Korea's appellant's submission, para. 384.
[510] Japan's appellee's submission, para. 916. (emphasis omitted)
[511] Japan's appellee's submission, paras. 915-916.
[512] Japan's appellee's submission, paras. 919 and 922.

provided to their relevance for the questions Japan had posed; and (ii) Korea's SPS enquiry point's failure to respond to Japan's second request.[513]

5.208. We note that the introductory clause of Annex B(3) to the SPS Agreement provides that each Member "shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents". Subparagraphs (a) through (d) of Annex B(3) detail the matters regarding which an enquiry point provides answers to reasonable questions and relevant documents.[514]

5.209. In its interpretation of Annex B(3) to the SPS Agreement, the Panel considered that the incompleteness of an answer or failure to provide a particular document as part of a response will not necessarily give rise to an inconsistency with Annex B(3).[515] The Panel then clarified, however, that "failure to respond at all would result in an inconsistency with the obligation in Annex B(3)."[516] Therefore, the Panel considered that, while an incomplete answer would not necessarily lead to an inconsistency with Annex B(3), a failure to respond would result in an inconsistency with this provision. We understand the Panel's interpretation to imply that a single failure of an enquiry point to answer a reasonable question or to provide relevant documents necessarily leads to an inconsistency with Annex B(3).

5.210. In its appeal, Korea challenges the Panel's interpretation, arguing that a single failure of an enquiry point to respond to a request is not sufficient to establish an inconsistency with Annex B(3) to the SPS Agreement. We do not consider that a single failure of an enquiry point to respond *in and of itself* would automatically result in an inconsistency with the obligation provided for in Annex B(3) to ensure the existence of an enquiry point with the responsibilities set out in this provision. As explained above, Annex B(3) requires Members to ensure the existence of one enquiry point which is responsible for the provision of answers to all reasonable questions and for the provision of relevant documents. In our view, this means that the obligation under Annex B(3) concerns ensuring the existence of an enquiry point which is responsible for providing answers and documents.

5.211. We emphasize that whether and the extent to which a particular enquiry point answers all reasonable questions and provides relevant documents are not irrelevant for the assessment under Annex B(3). Rather, it informs an assessment of whether "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents" within the meaning of Annex B(3). In our view, this assessment requires an examination of all the relevant factors, including the total number of questions received by the enquiry point and the proportion of and the extent to which questions were answered, the nature and scope of the information sought and received, and whether the enquiry point repeatedly failed to respond. Thus, we agree with the Panel that compliance with Annex B(3) is not a mere formality of establishing an enquiry point.[517] We disagree, however, with the Panel that a single failure of an enquiry point to respond to a request would result in an inconsistency with the obligation under Annex B(3).[518]

5.212. In view of the foregoing, we find that the Panel erred in its interpretation of Annex B(3) to the SPS Agreement in finding that a single failure of an enquiry point to respond to a request would result

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[513] Japan's appellee's submission, paras. 922-923 (quoting Panel Report, para. 7.520).

[514] Annex B(3) of the SPS Agreement provides:

Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;
(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;
(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;
(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

[515] Panel Report, paras. 7.507 and 7.520.

[516] Panel Report, para. 7.507.

[517] Panel Report, paras. 7.510 and 7.520.

[518] Panel Report, para. 7.507.

in an inconsistency with Annex B(3). We thus reverse the Panel's findings in paragraphs 7.507-7.510 of the Panel Report.

5.213. With respect to the Panel's application of Annex B(3) to the SPS Agreement, Japan's arguments before the Panel focused on the responses provided by Korea's enquiry point to two requests by Japan, and the Panel structured its analysis accordingly.[519] Having found that (i) the response provided to Japan's first request was not complete and did not easily enable Japan to relate the documents provided to their relevance for the questions Japan had posed[520], and (ii) that no response was provided to Japan's second request[521], the Panel found that Korea acted inconsistently with Annex B(3) to the SPS Agreement.[522]

5.214. In applying Annex B(3) to the facts of the case, the Panel thus limited its analysis to the responsiveness of Korea's enquiry point only vis-à-vis the two requests submitted by Japan, one of which was partially answered. In our view, this does not constitute a sufficient examination of all relevant factors necessary to determine whether Korea acted consistently with Annex B(3). While the Panel did assess the scope and nature of the information sought through Japan's first request, it did not do so for Japan's second request. Furthermore, the Panel did not examine how many requests had been received by Korea's enquiry point in total over a period of time and the proportion of questions that had been answered. The Panel also failed to examine whether Korea's enquiry point repeatedly failed to respond. Without assessing those factors, the Panel was not in a position to reach a conclusion as to whether Korea ensured that "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents", and, consequently, whether Korea acted inconsistently with Annex B(3).

5.215. In view of the foregoing, we find therefore that the Panel erred in its application of Annex B(3) to the SPS Agreement in finding, based only on two specific instances – Korea's SPS enquiry point's incomplete response to Japan's first request and its failure to respond to Japan's second request – that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement. We thus reverse the Panel's finding in paragraphs 7.520 and 8.5.b of the Panel Report.

5.6.2.4 Conclusion

5.216. The introductory clause of Annex B(3) to the SPS Agreement requires Members to ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions and for the provision of relevant documents. We do not consider that a single failure of an enquiry point to respond *in and of itself* would automatically result in an inconsistency with Annex B(3). In our view, however, whether and the extent to which an enquiry point actually provides answers to all reasonable questions and provides documents are not irrelevant for the assessment under Annex B(3). Rather, it informs an assessment of whether "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents" within the meaning of Annex B(3). This assessment requires an examination of all the relevant factors, including the total number of questions received by the enquiry point and the proportion of and the extent to which questions were answered, the nature and scope of the information sought and received, and whether the enquiry point repeatedly failed to respond. For these reasons, we disagree with the Panel's view that a single failure to respond would result in an inconsistency with the obligation under Annex B(3).

5.217. We therefore find that the Panel erred in its interpretation of Annex B(3) to the SPS Agreement in finding that a single failure of an enquiry point to respond to a request would result in an inconsistency with Annex B(3). Consequently, we reverse the Panel's findings in paragraphs 7.507-7.510 of the Panel Report.

5.218. With respect to the Panel's application of Annex B(3) to the SPS Agreement, the Panel limited its analysis to the responsiveness of Korea's enquiry point only vis-à-vis the two requests submitted by Japan. In our view, this does not constitute a sufficient examination of all relevant factors necessary

[519] Panel Report, paras. 7.504 and 7.511-7.519. The Panel assessment concerns Japan's requests of 24 June 2014 and of 13 November 2014.
[520] Panel Report, paras. 7.516 and 7.520.
[521] Panel Report, paras. 7.517 and 7.520.
[522] Panel Report, para. 7.520.

to determine whether Korea acted inconsistently with Annex B(3). The Panel did not assess: (i) the scope and nature of the information sought through Japan's second request; (ii) how many requests had been received by Korea's enquiry point in total over a period of time and the proportion of questions that had been answered; and (iii) whether the enquiry point repeatedly failed to respond. Without assessing those factors, the Panel was not in a position to reach a conclusion about whether Korea ensured that "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents", and, consequently, whether Korea acted inconsistently with Annex B(3).

5.219. We therefore find that the Panel erred in its application of Annex B(3) to the SPS Agreement in finding, based only on two specific instances – Korea's SPS enquiry point's incomplete response to Japan's first request and its failure to respond to Japan's second request – that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement. Consequently, we reverse the Panel's finding, in paragraphs 7.520 and 8.5.b of the Panel Report, that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement.

5.7 Article 8 and Annex C(1)(a) to the SPS Agreement

5.7.1 Introduction

5.220. In this section of the Report, we address Japan's claim of error on appeal under Annex C(1)(a) to the SPS Agreement. Japan appeals the Panel's finding that Japan failed to establish that imported and domestic products can be presumed to be "like" for the purposes of its claim under Annex C(1)(a). In Japan's view, the Panel erred in its interpretation and application of Annex C(1)(a) in articulating the conditions for presuming likeness under that provision and in finding that Japanese imported products subject to the 2011 and 2013 additional testing requirements and Korean domestic products could not be presumed to be "like".[523] Japan requests us to reverse the Panel's findings and conclusions pertaining to the presumption of likeness. Japan also requests us to reverse the Panel's finding that, as Japan had not demonstrated that Japanese and Korean products can be regarded as like products, it had also failed to establish that Korea acted inconsistently with Annex C(1)(a) and, as a consequence, Article 8 of the SPS Agreement by adopting or maintaining the 2011 and 2013 additional testing requirements.[524] By contrast, Korea requests us to uphold these Panel findings.[525]

5.221. Japan's claim on appeal under Annex C(1)(a) focuses on the Panel's decision not to *presume* that Japanese imported products and Korean domestic products are "like".[526] In this section, we therefore first summarize the relevant Panel findings with respect to the presumption of likeness. We then turn to examine the merits of Japan's claim that the Panel erred in its interpretation and application of Annex C(1)(a) in declining to presume that Japanese imported products and Korean domestic products are "like".

5.7.2 The Panel's findings

5.222. Before the Panel, Japan raised a claim of inconsistency under Article 8 and Annex C(1)(a) to the SPS Agreement in relation to two of Korea's measures, namely, the 2011 additional testing requirements and the 2013 additional testing requirements.[527] Having found that the 2011 and 2013 additional testing requirements constitute "procedures to check and ensure the fulfilment of Korea's SPS measures" falling within the scope of Article 8 and Annex C[528], the Panel recalled that the second clause of Annex C(1)(a) requires that such procedures be undertaken and completed in no less favourable manner for imported products than for "like" domestic products.[529] In assessing whether Japanese imported products and Korean domestic products are "like" under that provision, the Panel recalled the Appellate Body's statement made in the context of the General Agreement on Trade in

[523] Japan's other appellant's submission, paras. 362-365 and 384.
[524] Japan's other appellant's submission, para. 486 (referring to Panel Report, paras. 7.394-7.403, 7.409, 7.447, and 8.4).
[525] Korea's appellee's submission, paras. 126 and 136-137.
[526] Japan's other appellant's submission, paras. 358 and 395. On appeal, Japan does not challenge the Panel's subsequent analysis of whether Japanese and Korean products are "like" under Annex C(1)(a) to the SPS Agreement.
[527] Panel Report, paras. 7.363-7.364.
[528] Panel Report, para. 7.384.
[529] Panel Report, para. 7.385.

Services (GATS) that, for likeness to be presumed, a complainant must make a *prima facie* case that a measure draws a distinction based solely on origin.[530]

5.223. Turning to the procedures at issue, the Panel acknowledged that the 2011 and 2013 additional testing requirements apply only to Japanese products and that origin is a criterion that Korea uses to distinguish between domestic and Japanese products. To the Panel, however, a panel must not assume that, simply because origin is *a* criterion for distinguishing between products, the measures satisfy the test to apply the presumption. Rather, a panel must address the parties' arguments with respect to whether the distinction is based on grounds in addition to origin.[531]

5.224. The Panel relied on the press releases announcing the 2011 and 2013 additional testing requirements and a related document on the Panel record, noting that these documents refer to the FDNPP accident and health-related concerns.[532] In addition, the Panel observed that Japan did not deny that concerns other than origin underpin the 2011 and 2013 additional testing requirements. Rather, as the Panel recalled, Japan argued that such concerns are not based on science, given the allegedly similar risk profile of Japanese and Korean products.[533] To the Panel, however, this is an issue more properly addressed under Articles 2.2, 2.3, 5.1, and 5.6 of the SPS Agreement. The Panel added that, even if the 2011 and 2013 additional testing requirements are applied more than to the extent necessary, "the distinction of applying them only to Japan cannot be separated from the public health concern and the fact that it was Japan that experienced the FDNPP accident."[534] Moreover, the Panel looked at "Korea's SPS regime" and considered that it takes into account health risks posed by contaminated products from origins other than Japan. In particular, the Panel observed that Korea "closely monitors imports of food products from Ukraine, Belarus and other neighbouring countries affected by the fallout following the Chernobyl accident" and undertakes caesium testing, twice weekly, for "six fishery species caught in the Pacific region".[535] In the Panel's view, Korea has thus "a varied regime that is not based only on origin, but takes into consideration the potential of contamination of food by radionuclides".[536] For all of these reasons, the Panel found that Japan had failed to demonstrate that Japanese imported products and Korean domestic products can be presumed to be "like".[537]

5.225. The Panel further found that, even if Japan had established a *prima facie* case that the presumption of likeness applies, Korea had succeeded in rebutting that presumption. In reaching this conclusion, the Panel considered that Korea introduced arguments to support its contention that the distinction drawn by the 2011 and 2013 additional testing requirements is not solely based on origin.[538] The Panel emphasized that "the documents announcing the 2011 and 2013 additional testing requirements refer to health risks related to the contamination of Japanese food by radionuclides as the rationale for adopting the measures" and, as such, "they provide contemporaneous corroboration for Korea's contention that public health concerns constituted one of the grounds for drawing a distinction between domestic and imported products."[539]

5.226. Having concluded that likeness could not be presumed for the purposes of Japan's claim under Annex C(1)(a), the Panel turned to assess whether Japanese imported products and Korean domestic products are in fact "like".[540] Given that Japan did not elaborate further why imported and domestic products should be considered "like", the Panel found that Japan had failed to demonstrate that

[530] Panel Report, para. 7.394 (referring to Appellate Body Report, *Argentina – Financial Services*, para. 6.42).

[531] Panel Report, para. 7.397 (referring to Appellate Body Report, *Argentina – Financial Services*, paras. 6.60-6.61).

[532] Panel Report, para. 7.398 (referring to KFDA 14 April 2011 press release (Panel Exhibits JPN-55.b (revised) and KOR-72 (revised)); PMO blanket import ban and additional testing requirements press release (Panel Exhibit JPN-3.b); MFDS 2013 blanket import ban and additional testing requirements notice (Panel Exhibit JPN-75.b)).

[533] Panel Report, para. 7.399 (referring to Japan's second written submission to the Panel, para. 434).

[534] Panel Report, para. 7.399.

[535] Panel Report, para. 7.400. (fns omitted)

[536] Panel Report, para. 7.400.

[537] Panel Report, para. 7.400.

[538] Panel Report, para. 7.401.

[539] Panel Report, para. 7.401. In this context, the Panel observed that "assessing whether a presumption of likeness has been established does not imply an in-depth inquiry into the nature of the distinction, as long as the reasons given by the respondent to rebut it are genuine and corroborated by evidence." (Panel Report, para. 7.402 (referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.1496))

[540] Panel Report, para. 7.403.

domestic and imported products are "like" under Annex C(1)(a).[541] The Panel therefore found that Japan had failed to establish that Korea acted inconsistently with Annex C(1)(a) and, as a consequence, Article 8 of the SPS Agreement by adopting or maintaining the 2011 and 2013 additional testing requirements.[542]

5.7.3 Whether the Panel erred under Annex C(1)(a) to the SPS Agreement in declining to presume likeness

5.227. Japan claims that the Panel erred in its interpretation and application of Annex C(1)(a) to the SPS Agreement in declining to presume that Japanese imported products and Korean domestic products are "like".[543] According to Japan, the pertinent considerations for a panel when deciding whether to presume likeness are "the *terms of the measure itself*, and whether the measure expresses origin as the sole criterion of distinction" between imported and domestic products.[544] In Japan's view, whether the regulator considered grounds other than origin when adopting the measure should not be taken into consideration in the analysis.[545] Japan thus takes issue with the Panel's reliance on health concerns considered by Korea, which were allegedly not expressed as a criterion for the distinction between Japanese and Korean products in the 2011 and 2013 additional testing requirements themselves.[546] Japan submits that, in giving weight to such health concerns, the Panel looked beyond whether the 2011 and 2013 additional testing requirements express origin as the sole criterion of distinction.[547] Japan concludes that the Panel should have presumed likeness on the basis that Japan established a *prima facie* case that the 2011 and 2013 additional testing requirements draw a distinction exclusively on the basis of origin[548], and that Korea did not successfully rebut that *prima facie* case.[549]

5.228. Korea argues that, in determining whether a distinction is based exclusively on origin, a panel may examine "factors outside of the terms of the measure, including the objectives, rationale, and effect of the measure".[550] Korea also argues that there is no obligation for panels to presume likeness even where the measure at issue distinguishes between products solely based on origin. Therefore, to Korea, even if the presumption had been applicable, the Panel was free not to presume likeness and then turn to examine whether the products at issue were "like" under Annex C(1)(a).[551]

5.229. Annex C(1)(a) to the SPS Agreement requires Members to ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that "such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products."

5.230. Japan's appeal focuses on the likeness requirement in the second clause of Annex C(1)(a) and, more particularly, on the Panel's decision not to presume the likeness of Japanese imported products and Korean domestic products for the purposes of Japan's claim of inconsistency under that clause. We therefore examine whether the Panel erred in its interpretation and application of Annex C(1)(a) in declining to presume likeness for Japanese imported products and Korean domestic products when assessing the consistency of the 2011 and 2013 additional testing requirements with that provision.

5.231. Several panels have found, under the GATT 1994 and the GATS, that, when a measure makes a distinction between products (or between services and service suppliers) based exclusively on the origin of the products (or the services and the service suppliers), a complainant is not necessarily required to establish likeness based on the criteria traditionally employed as analytical tools for

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[541] Panel Report, paras. 7.407-7.408.
[542] Panel Report, paras. 7.409, 7.447, and 8.4.
[543] Japan's other appellant's submission, paras. 362-365 and 384.
[544] Japan's other appellant's submission, paras. 363 and 416. (emphasis original) See also ibid., para. 421.
[545] Japan's other appellant's submission, paras. 364, 416, and 424.
[546] At the oral hearing, Japan clarified that health concerns could have been relevant, had they been expressed as a criterion for the distinction in the 2011 and 2013 additional testing requirements themselves. (Japan's response to questioning at the oral hearing)
[547] Japan's other appellant's submission, para. 380. See also ibid., paras. 384 and 446.
[548] Japan's other appellant's submission, para. 437.
[549] Japan's other appellant's submission, paras. 460-461 and 469.
[550] Korea's appellee's submission, para. 119.
[551] Korea's appellee's submission, paras. 106-107 and 112.

assessing likeness.[552] Instead, those panels found that, in such cases, likeness can be presumed.[553] This approach of presuming likeness was endorsed by the Appellate Body in *Argentina – Financial Services* in the context of Articles II:1 and XVII:1 of the GATS.[554] The Appellate Body considered that "where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin" and that, as a result, likeness can be presumed.[555]

5.232. This dispute is the first in which a panel addressed the presumption of likeness in the context of the SPS Agreement. Unlike the non-discrimination provisions in the GATT 1994, the non-discrimination obligations set out in Articles 2.3 and 5.5 of the SPS Agreement do not refer to like products. In the SPS Agreement, the reference to like products is found only in Annex C(1). The Panel considered that the same likeness criteria as under Article III:4 of the GATT 1994 are appropriate for an analysis under Annex C(1)(a) to the SPS Agreement.[556] As set out above, the Panel then addressed whether likeness might be presumed and found that Japan had not made a *prima facie* case that origin is the sole basis for a distinction between Japanese and Korean products and that, to the extent Japan made such a *prima facie* case, Korea had successfully rebutted it. It is on this basis that the Panel declined to presume that Japanese imported products and Korean domestic products are "like".[557]

5.233. The Panel appears to have accepted that, in principle, likeness may be presumed for purposes of Annex C(1)(a) if a procedure distinguishes between products based exclusively on their origin. We are not convinced that the Panel could have done so under the SPS Agreement without further analysis. SPS measures are defined in Annex A(1) to the SPS Agreement as measures applied to protect human, animal, or plant life or health from a certain risk or to prevent or limit certain damage from pests. In our view, in light of Annex A(1), the question arises whether a procedure to check and ensure the fulfilment of SPS measures is at all capable of making a distinction between products based *exclusively* on their origin and thus whether likeness may be presumed in the context of Annex C(1)(a). The Panel did not explore that question and appears to have simply assumed that likeness may be presumed under Annex C(1)(a).

5.234. We consider it unnecessary, however, to reach a conclusion regarding the Panel's view that likeness may be presumed under Annex C(1)(a). We agree with the Panel that the 2011 and 2013 additional testing requirements do not draw a distinction between Japanese and Korean products

[552] In the context of the GATT 1994, the criteria traditionally employed for assessing likeness are those outlined in the Working Party Report on Border Tax Adjustments and further developed by the Appellate Body in *Japan – Alcoholic Beverages II*. (GATT Working Party Report, *Border Tax Adjustments*, L/3464, adopted 2 December 1970, BISD 18S, para. 18; Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22; DSR 1996:I, pp. 114-115)

[553] See e.g. Panel Reports, *Indonesia – Autos*, paras. 14.112-14.113; *China – Publications and Audiovisual Products*, paras. 7.975 and 7.1447; *US – Poultry (China)*, paras. 7.426-7.429; *Argentina – Import Measures*, paras. 6.275-6.276; *Brazil – Taxation*, para. 7.125.

[554] This was the first dispute in which the Appellate Body had to examine the presumption of likeness.

[555] Appellate Body Report, *Argentina – Financial Services*, para. 6.38. The Appellate Body stated that, compared to trade in goods, the scope for such a presumption under the GATS would be more limited, and establishing likeness based on the presumption may often involve greater complexity in trade in services. (Ibid., para. 6.38) The Appellate Body further stated that "[w]hether and to what extent such complexities have an impact on the determination of whether a distinction is based exclusively on origin in a particular case will depend on the nature, configuration, and operation of the measure at issue and the particular claims raised." (Ibid., para. 6.41) The Appellate Body said that it is for the complainant to make a *prima facie* case that a measure draws a distinction based exclusively on origin. The respondent may rebut such a *prima facie* case by demonstrating that origin is not the exclusive basis for the distinction drawn by the measure, or by introducing arguments and evidence relating to the criteria for determining likeness under the relevant provisions of the GATS. (Ibid., paras. 6.42 and 6.45) The measures at issue in that dispute distinguished between "cooperative" countries and "non-cooperative" countries for tax transparency purposes. In the context of that particular dispute, the Appellate Body disagreed with the panel's decision to presume likeness. The panel had noted that the distinction operated by the measures was not based on "origin *per se*", but on "the regulatory framework inextricably linked to such origin". To the Appellate Body, in light of that observation, the panel could not have concluded that the distinction drawn by the measures at issue was based exclusively on origin. (Ibid., paras. 5.3 and 6.56-6.61)

[556] Panel Report, para. 7.393. We recall that, in this appeal, we are not requested to examine whether the Panel erred in employing, under Annex C(1)(a) to the SPS Agreement, the criteria for assessing likeness traditionally employed as analytical tools in the context of the GATT 1994.

[557] Panel Report, paras. 7.400 and 7.402.

based solely on origin.[558] Thus, it is inconsequential whether likeness may be presumed under Annex C(1)(a), because, in the particular circumstances of this case, the Panel, in any event, would not have been in a position to presume that Japanese and Korean products are "like" in relation to the procedures at issue. In the following paragraphs, we examine whether our preliminary assessment should be maintained in light of Japan's arguments on appeal that challenge the Panel's view that the measures at issue do not draw a distinction between Japanese and Korean products based solely on origin.

5.235. On appeal, Japan notes that, under Articles 2.3 and 5.6 of the SPS Agreement, the Panel found that Japanese products do not differ in terms of "health risks". Specifically, Japan notes that the Panel examined in detail Korea's alleged public health "rationale for adopting the measures", and rejected Korea's argument that Japanese food products raise particular health concerns that would justify distinguishing Japanese products from Korean food products.[559] In Japan's view, the Panel could not decline to presume likeness because of alleged public health concerns underpinning the 2011 and 2013 additional testing requirements when the Panel had already found that those public health concerns are not warranted as they do not support the distinction drawn between Japanese and Korean food products.[560]

5.236. We are not convinced by Japan's argument. In arguing that both domestic and imported products present similar "health risks", Japan in effect appears to acknowledge that the 2011 and 2013 additional testing requirements were adopted to address certain health risks. We agree with the Panel that, regardless of whether Korea's measures are consistent with Articles 2.3 and 5.6, the distinction of applying the 2011 and 2013 additional testing requirements only to Japan cannot be separated "from the public health concern and the fact that it was Japan that experienced the FDNPP accident".[561] Moreover, the fact that a measure does not distinguish products based exclusively on the origin of those products does not prevent domestic and imported products that pose similar health risks from being considered "like" under the likeness analysis in Annex C(1)(a).

5.237. Japan also takes issue with the Panel's reliance on health concerns considered by Korea because they were allegedly not expressed as a criterion for the distinction between Japanese and Korean products in the 2011 and 2013 additional testing requirements themselves.[562] In the same vein, Japan faults the Panel for having examined other measures in Korea's SPS regime in its analysis of the presumption.[563] Korea in turn argues that, in determining whether a distinction is based exclusively on origin, a panel may examine the objectives, rationale, and effect of the measure.[564] We note that the Panel focused its analysis on the documents announcing the 2011 and 2013 additional testing requirements.[565] In addition, the Panel examined the 2011 and 2013 additional testing requirements against Korea's SPS regime.[566] As noted above, we agree with the Panel that the documents announcing the 2011 and 2013 additional testing requirements refer to the FDNPP accident and certain health-related concerns.[567] Thus, we are not convinced by Japan's argument that the Panel erred by taking into account the health-related concerns underpinning the 2011 and 2013 additional testing requirements reflected in the documents announcing those measures.

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[558] The Panel found that the documents announcing the 2011 and 2013 additional testing requirements refer to the FDNPP accident and health-related concerns. (Panel Report, para. 7.398) Specifically, these documents refer to the FDNPP accident, "the recent level-up in nuclear incident rating", "nuclear event scale of FDNPP that has been revised upward", "imports of fishery products that have been contaminated with radiation", and measures taken "for safety management of imported fishery products" with respect to the FDNPP accident. (KFDA 14 April 2011 press release (Panel Exhibits JPN-55.b (revised) and KOR-72 (revised)); PMO blanket import ban and additional testing requirements press release (Panel Exhibit JPN-3.b); MFDS 2013 blanket import ban and additional testing requirements notice (Panel Exhibit JPN-75.b)) We agree with the Panel that "the distinction of applying [the 2011 and 2013 additional testing requirements] only to Japan cannot be separated from the public health concern and the fact that it was Japan that experienced the FDNPP accident." (Panel Report, para. 7.399) Finally, we note that Japan acknowledged that health concerns are a factor in Korea's adoption of its measures. (Panel Report, para. 7.399 (referring to Japan's second written submission to the Panel, para. 434))

[559] Japan's other appellant's submission, para. 450 (referring to Panel Report, paras. 7.355 and 7.359).

[560] Japan's other appellant's submission, paras. 450 and 463-468.

[561] Panel Report, para. 7.399.

[562] Japan's other appellant's submission, paras. 363-364, 416, 421, 448-449, and 453.

[563] Japan's other appellant's submission, para. 452.

[564] Korea's appellee's submission, para. 119.

[565] Panel Report, para. 7.398.

[566] Panel Report, para. 7.400.

[567] Panel Report, para. 7.398.

5.238. Finally, Japan submits that, while the Panel states that it relied on "the text of the measure [at issue] or other documents on the record", the Panel merely relied on one internal unpublished document and two press releases announcing the 2011 and 2013 additional testing requirements.[568] Japan contends that these documents did not include the entire content of the regulations.[569] In its analysis, the Panel indeed relied on the documents announcing the 2011 and 2013 additional testing requirements as well as a related document on the Panel record, namely, an MFDS communication to a number of Korean agencies.[570] Before the Panel, Korea confirmed that this latter document contains the administrative instructions sent to the relevant enforcement agencies after the announcement of the 2013 additional testing requirements.[571] In our view, the documents on the Panel record examined by the Panel were relevant to the analysis under Annex C(1)(a). Japan has neither identified other documents that the Panel should have considered, nor explained how such other documents would have affected the Panel's analysis. Thus, we are not convinced by Japan's argument.

5.239. For all of these reasons, in relation to this dispute, we see no error in the Panel's decision to decline to presume that Japanese imported products and Korean domestic products are "like" for purposes of Annex C(1)(a) to the SPS Agreement. We therefore confirm our view that it is not necessary for the purposes of Japan's claim of error on appeal to consider whether the presumption of likeness may at all be used in the context of Annex C(1)(a).

5.7.4 Conclusion

5.240. Annex C(1)(a) to the SPS Agreement requires Members to ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that such procedures are undertaken and completed in no less favourable manner for imported products than for "like domestic products". In our view, in light of the definitions of SPS measures in Annex A(1) to the SPS Agreement, the question arises whether a procedure to check and ensure the fulfilment of SPS measures is at all capable of making a distinction between products based exclusively on their origin and thus whether likeness may be presumed in the context of Annex C(1)(a). The Panel did not explore that question and appears to have simply assumed that likeness may be presumed under Annex C(1)(a). That said, for the purposes of Japan's claim of error on appeal, it is inconsequential whether likeness may be presumed under Annex C(1)(a), because, in the particular circumstances of this case, the Panel, in any event, would not have been in a position to presume that Japanese and Korean products are "like" in relation to the procedures at issue. This is because we agree with the Panel's statement, in paragraph 7.399 of its Report, that the distinction of applying the 2011 and 2013 additional testing requirements only to Japan "cannot be separated from the public health concern and the fact that it was Japan that experienced the FDNPP accident". On this basis, the Panel was correct to conclude that the 2011 and 2013 additional testing requirements do not distinguish between Japanese and Korean products solely based on origin.

5.241. We therefore find that the Panel did not err in declining to presume that Japanese imported products and Korean domestic products are "like" for purposes of Annex C(1)(a) to the SPS Agreement. Consequently, we uphold the Panel's finding, in paragraph 7.403 of the Panel Report, that Japan has failed to establish that imported and domestic products can be presumed to be "like". Therefore, the Panel's finding, in paragraph 8.4 of the Panel Report, that Japan has failed to establish that Korea acted inconsistently with Annex C(1)(a) and Article 8 of the SPS Agreement stands.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

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[568] Japan's other appellant's submission, para. 442 (referring to Panel Report, paras. 7.398 and 7.490-7.494).

[569] Japan's other appellant's submission, para. 442.

[570] Panel Report, para. 7.398 (referring to KFDA 14 April 2011 press release (Panel Exhibits JPN-55.b (revised) and KOR-72 (revised)); PMO blanket import ban and additional testing requirements press release (Panel Exhibit JPN-3.b); MFDS 2013 blanket import ban and additional testing requirements notice (Panel Exhibit JPN-75.b)).

[571] Panel Report, para. 7.477 (referring to Korea's responses to Panel questions Nos. 72 and 130). See also ibid., para. 2.101.

6.1 Article 5.6 of the SPS Agreement

6.2. A panel examining a claim under Article 5.6 of the SPS Agreement is charged with, *inter alia*, ascertaining the respondent's ALOP on the basis of the totality of the arguments and evidence on the Panel record. A panel is also required to identify the level of protection that would be achieved by the alternative measure proposed by the complainant. The Panel in this dispute accepted Korea's own articulation of the relevant ALOP as one containing the following elements concerning radioactivity levels in food consumed by Korean consumers: (i) the levels that exist in the ordinary environment; (ii) exposure "as low as reasonably achievable"; and (iii) the quantitative dose exposure of 1 mSv/year. While the Panel accepted Korea's articulation of this multi-faceted ALOP, its analysis focuses on the quantitative element of 1 mSv/year. The Panel reached conclusions with respect to Japan's alternative measure that leave unclear whether it considered the alternative measure to satisfy *all* of the elements of Korea's ALOP it had identified. The Panel's findings effectively subordinated the elements of ALARA and radioactivity levels "in the ordinary environment" to the quantitative element of exposure below 1 mSv/year. This is at odds with the articulation of the ALOP explicitly accepted by the Panel at the outset of its analysis.

a. We therefore find that the Panel erred in its application of Article 5.6 of the SPS Agreement in finding that Japan's proposed alternative measure achieves Korea's ALOP.

b. Consequently, we reverse the Panel's findings of inconsistency with Article 5.6 with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures.

6.2 Article 2.3 of the SPS Agreement

6.3. Under the first sentence of Article 2.3 of the SPS Agreement, a complainant must show that a measure arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Article 2.3 therefore requires demonstrating as a threshold matter that "identical or similar conditions prevail" between Members. While the analysis under Article 2.3 may include consideration of conditions that can be characterized as being present in the products from different Members, a proper interpretation of Article 2.3 includes consideration of other relevant conditions, such as territorial conditions, to the extent that they have the potential to affect the products at issue. The analysis under Article 2.3 thus entails consideration of all relevant conditions in different Members, including territorial conditions that may not yet have manifested in products but are relevant in light of the regulatory objective and specific SPS risks at issue. We find that the Panel erred in its interpretation of Article 2.3 when it concluded that this provision permits consideration of the "risk present in products in international trade as *the* relevant condition" because we understand the Panel to have concluded that the scope of relevant "conditions" under Article 2.3 may be exclusively limited to "the risk present in products".

6.4. In its application of Article 2.3, the Panel effectively relied on actual contamination levels in food without reconciling its findings as to other pertinent territorial conditions affecting the potential for contamination of food. Such findings include the Panel's recognition of greater potential for contamination near the source and its indications that specific release events could result in a localized and incremental increase in the potential for contamination of food. The Panel's findings under Article 2.3 on the sole basis of actual measurement levels in product samples ultimately fail to account for the *potential* for contamination in light of relevant conditions prevailing in the territories of different Members.

a. We therefore find that the Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement in finding that similar conditions prevail between Japan and other Members.

b. Consequently, we reverse the Panel's findings of inconsistency with Article 2.3 with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures.

c. In light of the reversal of the Panel's findings regarding the existence of "similar conditions" within the meaning of Article 2.3, it is not necessary to address Korea's additional claims of error regarding arbitrary or unjustifiable discrimination, and whether Korea's measures constitute disguised restrictions on international trade.

6.3 Article 5.7 of the SPS Agreement

6.5. A panel's mandate, as reflected in Articles 7.1 and 11 of the DSU, is to examine the "matter" before it in light to the relevant provisions of the covered agreements cited by the parties and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Japan did not make a claim under Article 5.7 of the SPS Agreement in its panel request. While Korea raised arguments in relation to Article 5.7 as part of its rebuttal arguments, Korea did not allege that its measures would be justified or exempted from the obligations contained in Articles 2.3, 5.6, 7, and 8 and Annexes B and C to the SPS Agreement by virtue of their provisional nature under Article 5.7. Rather, Korea relied on Article 5.7 to serve as relevant context to the interpretation of certain other provisions of the SPS Agreement, which were the subject of Japan's claims of inconsistency. Korea also referred to Article 5.7 when relying on the alleged insufficiency of evidence in this case as a relevant factor to the Panel's assessment of Japan's claims of inconsistency, in particular those under Articles 2.3 and 5.6. By making findings as to the consistency of Korea's measures with Article 5.7, the Panel exceeded its mandate, thereby acting inconsistently with Articles 7.1 and 11 of the DSU.

a. For this reason, we declare the Panel's findings under Article 5.7 of the SPS Agreement moot and of no legal effect.

b. Consequently, it is not necessary for us to consider further Korea's other claims of error in relation to those same Panel findings under Article 5.7.

6.4 The Panel's treatment of evidence

6.6. Korea's and Japan's claims of error on appeal concerning the Panel's treatment of evidence relate to the Panel's application of Articles 2.3 and 5.6 of the SPS Agreement. We have found that the Panel erred in its application of Article 5.6 with regard to Korea's ALOP. We have also found that the Panel erred in its interpretation and application of Article 2.3 with regard to whether identical or similar conditions prevail between Japan and other Members. Accordingly, we have reversed the Panel's findings of inconsistency under Articles 2.3 and 5.6.

a. Given that the participants' claims of error in relation to evidence concern Panel findings that have already been reversed, we do not consider it necessary to examine further these claims of error.

6.5 The Panel's expert selection

6.7. Korea's claim of error concerning the Panel's expert selection is connected with the Panel's application of Articles 2.3, 5.6, and 5.7 of the SPS Agreement. The two experts at issue provided responses to the majority of the questions posed by the Panel, and the Panel relied on these responses in its assessment of the consistency of Korea's measures with Articles 2.3, 5.6, and 5.7. We have found above that the Panel erred in its findings under Articles 2.3 and 5.6, and in making findings under Article 5.7. We have reversed the Panel's findings of inconsistency under Articles 2.3 and 5.6, and declared the Panel's findings under Article 5.7 moot and of no legal effect. Consequently, Korea's claim of error under Article 11 of the DSU and request on appeal in relation to the Panel's expert selection concern Panel findings that have been reversed or declared moot and of no legal effect.

a. For this reason, we do not consider it necessary to examine further Korea's claim that the Panel erred under Article 11 of the DSU by appointing the two experts that Korea challenges on appeal.

6.6 Article 7 and Annex B(1) to the SPS Agreement

6.8. Annex B(1) to the SPS Agreement requires Members to ensure that adopted SPS regulations are published promptly "in such a manner as to enable interested Members to become acquainted with

them". An Annex B(1) publication must be accessible to interested Members and contain sufficient information, including the product scope and the requirements of the adopted SPS regulation, in order to enable interested Members to become acquainted with that adopted SPS regulation. The precise content and amount of information that must be included in an Annex B(1) publication to enable interested Members to become acquainted with an adopted SPS regulation will depend on the particular SPS regulation at issue.

a. Therefore, we agree with the Panel to the extent the Panel's reference to "conditions" means the requirements of the adopted SPS regulation. We modify, however, the Panel's finding, in paragraph 7.464 of the Panel Report, to the extent it considered that Annex B(1) requires, in all cases, that the publication of an SPS regulation include the "specific principles and methods" applicable to the products. We instead find that whether the publication of an adopted SPS regulation under Annex B(1) needs to include the "specific principles and methods" applicable to the products may be determined only with reference to the specific circumstances of each case, such as the nature of the SPS regulation at issue, the products covered, and the nature of the SPS risks involved.

6.9. In relation to the product scope of the blanket import ban, we agree with the Panel that the reference to "all fishery products" in the press release announcing this measure is not sufficient to comply with Annex B(1) to the SPS Agreement. The blanket import ban covers products that would normally be included in a category other than "fishery products". For this reason, we do not consider that the press release at issue published the blanket import ban in such a manner as to enable Japan to become acquainted with this ban.

a. Therefore, we find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the blanket import ban in relation to the product scope of this measure.

b. Consequently, we uphold the Panel's finding, in paragraph 7.487 of the Panel Report, that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing the full product scope of the blanket import ban.

6.10. In relation to the publication of the additional testing requirements, we agree with the Panel that, in light of the SPS regulations at issue, the press releases announcing the 2011 additional testing requirements and the 2013 additional testing requirements should have contained the levels of caesium (and iodine in the 2011 press release) that would trigger the additional testing; the specific radionuclides to be tested; the maximum levels for those radionuclides that would result in products being rejected; and, in relation to the 2013 press release only, the procedure and location of the testing required for the additional radionuclides. In our view, without these elements, the press releases do not enable interested Members to become acquainted with the 2011 additional testing requirements and the 2013 additional testing requirements.

a. We therefore find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the 2011 additional testing requirements and the 2013 additional testing requirements in relation to the requirements of these measures.

b. Consequently, we uphold the Panel's findings, in paragraphs 7.501-7.502 of the Panel Report, that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing sufficient information to enable Japan to become acquainted with the requirements of the 2011 additional testing requirements and the 2013 additional testing requirements.

6.11. In relation to the accessibility of the publication of all the SPS measures at issue, we agree with the Panel that, in light of the case presented by Japan, it was for Korea to provide some evidence or explanation that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue. Korea, however, did not provide a clear explanation concerning whether interested Members would have been able to locate and access the press releases announcing those measures.

a. We therefore find that the Panel did not err in its application of Annex B(1) to the SPS Agreement to the SPS measures at issue in relation to the accessibility of the publications.

b. Consequently, we uphold the Panel's findings, in paragraphs 7.474, 7.485, 7.498, and 7.500 of the Panel Report, that Korea did not show that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue.

6.12. In relation to Korea's claim of error under Article 11 of the DSU, we consider that the Panel failed to engage with the pertinent evidence on the record. Moreover, the Panel should not have left it to Korea to anticipate, in the absence of a contestation of the publication dates by Japan, that it would be required to submit the archived versions of the webpages to prove the publication dates of the press releases on government websites. Rather, to the extent the Panel considered it was necessary for it to have such evidence, it should have sought it from both parties to the dispute and should only then have drawn appropriate inferences.

a. We therefore find that the Panel acted inconsistently with Article 11 of the DSU in concluding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day.

6.13. Given that the remaining grounds for the Panel's ultimate finding regarding the SPS measures at issue are left undisturbed, and that each of these reasons would justify that finding, the Panel's ultimate finding, in paragraphs 7.503 and 8.5.a of the Panel Report, that Korea acted inconsistently with Annex B(1) and, as a consequence, Article 7 of the SPS Agreement, stands.

6.7 Article 7 and Annex B(3) to the SPS Agreement

6.14. The introductory clause of Annex B(3) to the SPS Agreement requires Members to ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions and for the provision of relevant documents. We do not consider that a single failure of an enquiry point to respond *in and of itself* would automatically result in an inconsistency with Annex B(3). In our view, however, whether and the extent to which an enquiry point actually provides answers to all reasonable questions and provides documents are not irrelevant for the assessment under Annex B(3). Rather, it informs an assessment of whether "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents" within the meaning of Annex B(3). This assessment requires an examination of all the relevant factors, including the total number of questions received by the enquiry point and the proportion of and the extent to which questions were answered, the nature and scope of the information sought and received, and whether the enquiry point repeatedly failed to respond. For these reasons, we disagree with the Panel's view that a single failure to respond would result in an inconsistency with the obligation under Annex B(3).

a. We therefore find that the Panel erred in its interpretation of Annex B(3) to the SPS Agreement in finding that a single failure of an enquiry point to respond to a request would result in an inconsistency with Annex B(3).

b. Consequently, we reverse the Panel's finding in paragraphs 7.507-7.510 of the Panel Report.

6.15. With respect to the Panel's application of Annex B(3) to the SPS Agreement, the Panel limited its analysis to the responsiveness of Korea's enquiry point only vis-à-vis the two requests submitted by Japan. In our view, this does not constitute a sufficient examination of all relevant factors necessary to determine whether Korea acted inconsistently with Annex B(3). The Panel did not assess: (i) the scope and nature of the information sought through Japan's second request; (ii) how many requests had been received by Korea's enquiry point in total over a period of time and the proportion of questions that had been answered; and (iii) whether the enquiry point repeatedly failed to respond. Without assessing those factors, the Panel was not in a position to reach a conclusion about whether Korea ensured that "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents", and, consequently, whether Korea acted inconsistently with Annex B(3).

a. We therefore find that the Panel erred in its application of Annex B(3) to the SPS Agreement in finding, based only on two specific instances – Korea's SPS enquiry point's incomplete response to Japan's first request and its failure to respond to Japan's second request – that

Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement.

b. Consequently, we reverse the Panel's finding, in paragraphs 7.520 and 8.5.b of the Panel Report, that Korea acted inconsistently with Annex B(3) and, as a consequence, Article 7 of the SPS Agreement.

6.8 Article 8 and Annex C(1)(a) to the SPS Agreement

6.16. Annex C(1)(a) to the SPS Agreement requires Members to ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that such procedures are undertaken and completed in no less favourable manner for imported products than for "like domestic products". In our view, in light of the definitions of SPS measures in Annex A(1) to the SPS Agreement, the question arises whether a procedure to check and ensure the fulfilment of SPS measures is at all capable of making a distinction between products based exclusively on their origin and thus whether likeness may be presumed in the context of Annex C(1)(a). The Panel did not explore that question and appears to have simply assumed that likeness may be presumed under Annex C(1)(a). That said, for the purposes of Japan's claim of error on appeal, it is inconsequential whether likeness may be presumed under Annex C(1)(a), because, in the particular circumstances of this case, the Panel, in any event, would not have been in a position to presume that Japanese and Korean products are "like" in relation to the procedures at issue. This is because we agree with the Panel's statement, in paragraph 7.399 of its Report, that the distinction of applying the 2011 and 2013 additional testing requirements only to Japan "cannot be separated from the public health concern and the fact that it was Japan that experienced the FDNPP accident". On this basis, the Panel was correct to conclude that the 2011 and 2013 additional testing requirements do not distinguish between Japanese and Korean products solely based on origin.

a. We therefore find that the Panel did not err in declining to presume that Japanese imported products and Korean domestic products are "like" for purposes of Annex C(1)(a) to the SPS Agreement.

b. Consequently, we uphold the Panel's finding, in paragraph 7.403 of the Panel Report, that Japan has failed to establish that imported and domestic products can be presumed to be "like".

c. Therefore, the Panel's finding, in paragraph 8.4 of the Panel Report, that Japan has failed to establish that Korea acted inconsistently with Annex C(1)(a) and Article 8 of the SPS Agreement stands.

6.9 Recommendation

6.17. The Appellate Body recommends that the DSB request Korea to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 28th day of February 2019 by: