



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

AB-2018-1

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS495/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A-1****KOREA'S NOTICE OF APPEAL\***

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Korea hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides* (WT/DS495/R) ("Panel Report").

2. Pursuant to Rules 21 of the Working Procedures, Korea files this Notice of Appeal together with its Appellant Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

4. Korea seeks review by the Appellate Body of the Panel's expert selection. In particular, the Panel acted inconsistently with Article 11 of the DSU in selecting experts that had a conflict of interest in the matter.<sup>1</sup> Korea requests the Appellate Body to find that in consulting such experts, the Panel acted inconsistently with Korea's due process rights under Article 11 of the DSU. Since the Panel relied on its consultations with such experts in its assessment under Articles 5.7, 5.6, and 2.3 of the SPS Agreement<sup>2</sup>, Korea requests that the Appellate Body reverse the Panel's findings under these provisions, including in paragraphs 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. Korea seeks review by the Appellate Body of the Panel's findings under Article 5.7 of the SPS Agreement. The Panel erred in making findings under Article 5.7 even though the provision was not within its terms of reference.<sup>3</sup> Korea requests the Appellate Body to find that, in proceeding in this manner, the Panel acted inconsistently with Articles 6.2, 7, and 11 of the DSU.

6. Korea also seeks review by the Appellate Body of the Panel's interpretation and application of Article 5.7. In particular, the Panel erred in finding that:

- Korea had the burden proof under Article 5.7.<sup>4</sup>
- There was not insufficient scientific evidence to conduct a risk assessment with respect to the product specific import bans, the blanket import ban, and the extension of the additional testing requirements to fishery and livestock products in 2013.<sup>5</sup>
- The 2013 blanket import ban and the 2013 additional testing requirements were not based on pertinent available information.<sup>6</sup>
- Korea did not review the measures within a reasonable period of time.<sup>7</sup>

7. Korea also seeks review by the Appellate Body of the Panel's analysis of whether the measures were based on pertinent available information in light of Article 11 of the DSU. The Panel's failure to

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\* This document, dated 9 April 2018, was circulated to Members as document WT/DS495/8.

<sup>1</sup> See, for example, Panel Report, paras. 1.26, 1.27, and 1.28.

<sup>2</sup> See, for example, Panel Report, paras. 7.92, 7.93, 7.167, 7.190, 7.195(e), 7.197, 7.199, 7.203, 7.205, 7.206, 7.208, 7.209, 7.210, 7.216, 7.223, 7.230, 7.236, 7.238, 7.239, 7.243, and 7.315.

<sup>3</sup> See, for example, Panel Report, paras. 7.75, 7.93, 7.96, 7.107, 7.108, 7.109, 7.111 and 8.1.

<sup>4</sup> See, for example, Panel Report, para. 7.75.

<sup>5</sup> See, for example, Panel Report, paras. 7.93, 7.96, 7.108, and 7.111.

<sup>6</sup> See, for example, Panel Report, paras. 7.109 and 7.111.

<sup>7</sup> See, for example, Panel Report, paras. 7.107, 7.110, and 7.111.

make an objective assessment of the matter under Article 11 of the DSU includes the Panel's internally contradictory reasoning in relation to the product-specific bans and the import ban.<sup>8</sup>

8. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.75, 7.93, 7.96, 7.100, 7.106-7.112, and 8.1. The Panel's errors in interpretation and application under Article 5.7 also invalidated the Panel's findings under Articles 2.3 and 5.6. As a consequence, Korea requests that the Appellate Body reverse the Panel's findings under Article 2.3, in paragraphs 7.321-7.322, 7.349-7.350, 7.355, 7.359-7.360, and 8.3 a-b, and under Article 5.6, in paragraphs 7.251-7.256 and 8.2 b-e.

9. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article 5.6 of the SPS Agreement. Korea requests the Appellate Body to find that the Panel erred in the interpretation and application of Article 5.6.<sup>9</sup> The Panel's errors under Article 5.6 include the findings that:

- Japan had established that the suggested alternative measure achieves Korea's ALOP with regard to the adoption of the 2013 additional testing requirements and import bans on the 28 fishery products, with the exception of Pacific cod from Fukushima and Ibaraki.<sup>10</sup>
- Japan had established that its alternative measure would achieve Korea's ALOP with regard to the maintenance of all the measures.<sup>11</sup>

10. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.251-7.256, and 8.2 b-e, that Korea's measures were more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection within the meaning of Article 5.6.

11. Korea also seeks review of the Panel's findings under Article 5.6 because the Panel applied an incorrect standard of review and therefore failed to make an objective assessment of the matter under Article 11 of the DSU. The Panel's failure to make an objective assessment of the matter included its consideration of evidence that was not available to the Korean authorities at the time of the adoption of the measures and consideration of data that did not exist at the time the Panel was established.<sup>12</sup>

12. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings concerning the use of such evidence and data, in particular in paragraphs 7.5, 7.8, 7.134, 7.142, 7.207, 7.219, 7.226, 7.236, and 7.245. Since the Panel relied on such evidence and data in its assessment under Article 5.6, Korea further requests that the Appellate Body reverse the Panel's findings that Korea's SPS measures are inconsistent with Article 5.6 of the SPS Agreement, including in paragraphs 7.251-7.256, and 8.2(b)-(e).<sup>13</sup>

13. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article 2.3 of the SPS Agreement. The Panel erred, *inter alia*, in finding that:

- Similar conditions existed in Japan and in other Members with regard to the adoption of the 2013 additional testing requirements and of the blanket import ban with respect to the 27 fishery products covered by Japan's claim and for Pacific cod originating from Aomori, Chiba, Gunma, Iwate, Miyagi, and Tochigi prefectures, and similar conditions existed in Japan and in other Members for all food products, including the 28 fishery products, with regard to the maintenance of Korea's measures.<sup>14</sup>

<sup>8</sup> See, for example, Panel Report, paras. 7.98, 7.100, 7.109 and 7.111.

<sup>9</sup> See, for example, Panel Report, paras. 7.172-7.173.

<sup>10</sup> See, for example, Panel Report, paras. 7.251 and 7.253.

<sup>11</sup> See, for example, Panel Report, paras. 7.252 and 7.253.

<sup>12</sup> See, for example, Panel Report, paras. 7.4-7.6, 7.129, 7.142, and 7.199-7.200.

<sup>13</sup> See, for example, Panel Report, paras. 7.199, 7.200, 7.207, 7.219, 7.222-7.223, 7.225-7.226, and 7.235, 7.251-7.256, and 8.2(b)-(e).

<sup>14</sup> See, for example, Panel Report, paras. 7.321 and 7.322.

- The import ban and the additional testing requirements arbitrarily or unjustifiably discriminate.<sup>15</sup>
- The 2013 additional testing requirements and the blanket import ban with respect to the 27 fishery products subject to Japan's claim from the 8 prefectures and Pacific cod from 6 prefectures, i.e. excluding Pacific cod from Fukushima and Ibaraki, were inconsistent with Article 2.3, first sentence of the SPS Agreement when Korea adopted them, and that by maintaining the product-specific and blanket import bans on the 28 fishery products from the 8 prefectures and the 2011 and 2013 additional testing requirements on Japanese products, Korea acted inconsistently with Article 2.3, first sentence of the SPS Agreement.<sup>16</sup>
- Korea's measures constitute disguised restrictions on international trade and thereby violate the second sentence of Article 2.3 of the SPS Agreement.<sup>17</sup>

14. Korea additionally requests that the Appellate Body find that the Panel failed to make an objective assessment of the matter and acted inconsistently with Article 11 of the DSU in considering evidence and data that was not available to the Korean regulator when the measures were adopted and evidence and data that post-dated the establishment of the Panel. As the Panel's finding that similar conditions existed was based on such evidence and data, Korea requests the Appellate Body to reverse the Panel's findings concerning the use of such evidence and data, in particular in paragraphs 7.5, 7.8, 7.134, 7.142, 7.307-7.308, 7.311, 7.315, 7.319, as well as the ultimate findings of inconsistency with Article 2.3, in paragraphs 7.321-7.322, 7.355, 7.360, and 8.3(a) and (b).<sup>18</sup>

15. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.276, 7.283, 7.321-7.322, 7.349-7.350, 7.355, 7.359, 7.360, and 8.3 a-b, that Korea's measures are inconsistent with Article 2.3.

16. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article 7 and Annex B(1) and B(3) of the SPS Agreement. The Panel erred, *inter alia*, in finding that:

- Annex B(1) requires that the content of the regulation be published and that such publication must make the publication contain sufficient content that the importing Member will know the conditions, including specific principles and methods, that apply to its goods.<sup>19</sup>
- Korea had not published the full content of the blanket import ban and the additional testing requirements.<sup>20</sup>
- The 2011 and 2013 press releases announcing the additional testing requirements did not include content that is sufficient to enable an interested Member to know the conditions that would be applied to its goods.<sup>21</sup>
- Korea did not publish the measures in a manner so as to enable Japan to become acquainted with the challenged measures.<sup>22</sup>
- Korea acted inconsistently with Annex B(1), as a consequence with Article 7 of the SPS Agreement, with respect to the publication of all of the challenged measures.<sup>23</sup>

<sup>15</sup> See, for example, Panel Report, paras. 7.349-7.350, 7.355, 7.360, and 8.3 (a) and (b).

<sup>16</sup> See, for example, Panel Report, paras. 7.360 and 8.3(a) and (b).

<sup>17</sup> See, for example, Panel Report, paras. 7.359, 7.360, and 8.3(a) and (b).

<sup>18</sup> See, for example, Panel Report, paras. 7.5, 7.8, 7.134, 7.142, 7.307-7.308, 7.311, 7.315, 7.319, 7.321-7.322, 7.360, and 8.3(a) and (b).

<sup>19</sup> See, for example, Panel Report, paras. 7.461 and 7.464.

<sup>20</sup> See, for example, Panel Report, paras. 7.483, 7.487, 7.492, and 7.496.

<sup>21</sup> See, for example, Panel Report, paras. 7.500-7.501.

<sup>22</sup> See, for example, Panel Report, paras. 7.474, 7.476, 7.485, 7.487, 7.497, 7.500, and 7.501.

<sup>23</sup> See, for example, Panel Report, paras. 7.474, 7.476, 7.487, 7.499-7.502, and 8.5(a).

- Korea's SPS Enquiry Point's failure to respond to Japan's follow-up query in conjunction with its earlier failure to relate the answers and documents provided to their relevance for the questions Japan had posed, is sufficient to establish that Korea acted inconsistently with Annex B(3) and as a consequence Article 7 of the SPS Agreement.<sup>24</sup>

17. Furthermore, Korea requests that the Appellate Body find that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU, and thereby acted inconsistently with Article 11, in faulting Korea for not having provided archived links of web-pages.<sup>25</sup> Accordingly, Korea requests the Appellate Body to reverse the Panel's findings in paragraphs 7.474-7.476, 7.485-7.487, 7.497-7.502, and 8.5(a).

18. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.464, 7.474-7.476, 7.483, 7.485-7.487, 7.492, 7.496-7.502, 7.509, 7.518-7.519, and 8.5 that Korea failed to publish the measures consistently with Article 7 and Annex B(1), and that Korea did not comply with Article 7 and Annex B(3).

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<sup>24</sup> See, for example, Panel Report, paras. 7.518, 7.519 and 8.5(b).

<sup>25</sup> See, for example, Panel Report, paras. 7.474, 7.485, and 7.497.

**ANNEX A-2****JAPAN'S NOTICE OF OTHER APPEAL\***

Pursuant to Articles 16.4 and 17.1 of the DSU, Japan hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides* (WT/DS495). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, Japan simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Japan's ability to refer to other paragraphs of the Panel Report in the context of its appeal.

For the reasons to be further elaborated in its submissions to the Appellate Body, Japan appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report:

1. The Panel erred in the interpretation and application of Articles 3.3, 3.4, 3.7 and 11 of the DSU, by disregarding timely-submitted evidence relating to the situation after the date of establishment of the Panel, when assessing whether Japan had made a *prima facie* case that Korea's additional testing requirements and import bans were being maintained inconsistently with Articles 2.3 and 5.6 of the SPS Agreement.<sup>1</sup>
2. The Panel erred in the application of Articles 2.3 and 5.6 of the SPS Agreement, by disregarding timely-submitted evidence relating to the situation after the date of establishment of the Panel, when assessing whether Japan had made a *prima facie* case that Korea's additional testing requirements and import bans were being maintained inconsistently with Articles 2.3 and 5.6 of the SPS Agreement.<sup>2</sup>
3. Should the Appellate Body, as a result of its consideration of the grounds for appeal addressed in paragraphs 1 and 2, consider that the Panel's errors in defining the temporal scope of its assessment of Japan's *prima facie* case vitiate the Panel's ultimate findings under Articles 2.3 and 5.6 of the SPS Agreement, Japan requests that the Appellate Body complete the analysis, and find that, in light of all timely-submitted evidence, including relating to the situation after the date of establishment of the Panel, Korea's additional testing requirements and import bans are maintained inconsistently with Articles 2.3 and 5.6 of the SPS Agreement.<sup>3</sup>
4. The Panel erred in the interpretation and application of Annex C(1)(a) of the SPS Agreement, when it articulated the conditions under which domestic and imported products may be presumed to be "like" under Annex C(1)(a);<sup>4</sup> when it found that likeness could not be presumed for purposes of Japan's claim under Annex C(1)(a);<sup>5</sup> and when it found, therefore, that Japan had failed to establish that Korea acted inconsistently with Annex C(1)(a) and, as a consequence, with Article 8 of the SPS Agreement.<sup>6</sup>

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\* This document, dated 16 April 2018, was circulated to Members as document WT/DS495/9.

<sup>1</sup> Panel Report, paras. 7.134-7.143.

<sup>2</sup> Panel Report, paras. 7.134-7.143.

<sup>3</sup> Panel Report, paras. 7.113-7.256, 7.257-7.360, 8.2(b), (c) and (e), and 8.3(b).

<sup>4</sup> Panel Report, paras. 7.394-7.403.

<sup>5</sup> Panel Report, paras. 7.394-7.403.

<sup>6</sup> Panel Report, paras. 7.409, 7.447, and 8.4.



**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

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**ANNEX B-1****EXECUTIVE SUMMARY OF KOREA'S APPELLANT'S SUBMISSION**

1. Korea appeals the Panel Report in *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*.<sup>1</sup> The Panel made serious errors of law and legal interpretation, and failed to make an objective assessment of the matter, in finding that Korea's measures are inconsistent with the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement").

**A. THE PANEL'S EXPERT SELECTION WAS INCONSISTENT WITH KOREA'S DUE PROCESS RIGHTS**

2. Korea first appeals the Panel's expert selection. Korea questioned the impartiality and independence of two of the experts that the Panel consulted. Despite Korea raising such concerns, the Panel consulted these experts during the proceedings, and thus acted in violation of Korea's due process rights.

3. Dr. Patsy Thompson had written articles in which she had provided her own assessment of the risk posed by the Fukushima Dai-ichi Nuclear Power Plant ("FDNPP") accident. This raised serious concerns as to whether she would be able to provide fair and impartial advice to the panel. Dr. Thompson's statements indicated her inherent bias and inclination to "pre-judge" the positions of the parties in the dispute.<sup>2</sup> Dr. Lynn Anspaugh participated in the preparation of the United Nations Scientific Committee on the Effects of Atomic Radiation ("UNSCEAR") report on the FDNPP accident, which was specifically cited by Japan in support of its contention that there was no insufficiency in the scientific evidence that would justify discrimination against Japanese food products or that would render necessary the trade restrictions imposed on these products.<sup>3</sup> Dr. Anspaugh was in effect called to review his own work and to compare his assessment with Korea's assessment. Dr. Anspaugh also assisted in preparing reports funded by the Japanese government regarding concerns about radiation effects.

4. The standard set forth in Section VI.2 of the Rules of Conduct is strict. Based on the concerns raised by Korea, the Panel should have concluded that Dr. Thompson and Dr. Anspaugh were not "independent and impartial", and that they had "direct or indirect conflicts of interest" By consulting these experts, the Panel seriously undermined Korea's due process rights. Therefore, Korea requests the Appellate Body to find that, in consulting these experts, the Panel acted inconsistently with Article 11 of the DSU. Since the Panel relied on its consultations with these experts in its assessment under Articles 5.7, 5.6, and 2.3 of the SPS Agreement, Korea requests that the Appellate Body reverse the Panel's findings under these provisions.

**B. THE PANEL'S ERRORS IN RELATION TO ARTICLE 5.7 OF THE SPS AGREEMENT**

5. The Panel erred under Article 5.7 in several respects. First, the Panel erred by making findings under Article 5.7 when Article 5.7 was not within the Panel's terms of reference. Japan did not raise a claim under 5.7. The Panel nevertheless proceeded to make findings on whether Korea's measures satisfy each of the requirements of Article 5.7.<sup>4</sup> By making findings on claims that were not within its terms of reference, the Panel acted inconsistently with Articles 6.2, 7, and 11 of the DSU, and therefore these findings should be overturned by the Appellate Body.<sup>5</sup>

6. Second, the Panel erred in finding that Korea bore the burden of proof under Article 5.7.<sup>6</sup> Article 5.7 establishes an autonomous right, and therefore it was for Japan to make an initial *prima facie* case of inconsistency with that provision.<sup>7</sup> The Panel reached its conclusion based on an

<sup>1</sup> Panel Report, *Korea – Radionuclides (Japan)* ("Panel Report").

<sup>2</sup> Korea's letter to the Panel, 13 June 2016.

<sup>3</sup> Panel Report, para. 7.82.

<sup>4</sup> Panel Report, paras. 7.111-7.112, and 8.1.

<sup>5</sup> See Appellate Body Report, *Chile – Price Band System*, para. 173.

<sup>6</sup> Panel Report, para. 7.75.

<sup>7</sup> See *EC – Approval and Marketing of Biotech Products*, paras. 7.3000-7.3002.

erroneous reading of previous cases under Article 2.2 which explicitly allows the respondent to invoke Article 5.7 as an exception. Korea did not invoke Article 5.7 as an exception to Article 2.2 and never argued that its measures were excluded from Articles 2.3 or 5.6 by the operation of Article 5.7. The Panel's approach also lacked even-handedness, since the Panel was mainly concerned about any impact on the complaining party and inappropriately assumed that the respondent party is not proceeding in good faith. The Panel further erred in characterizing the legal question of whether there was insufficient scientific evidence to conduct an objective assessment of the risk as a "factual premise".<sup>8</sup> Since the Panel's findings under Article 5.7 were based on an incorrect allocation of the burden of proof, the Panel's findings should be reversed. The Panel's approach, if accepted, would turn Article 5.7 into an exception.

7. Third, the Panel erred in finding that there was not insufficient scientific evidence to conduct a risk assessment with respect to the measures imposed in 2013.<sup>9</sup> Before the Panel, Korea identified several factors for which scientific evidence was insufficient.<sup>10</sup> The Panel findings confirm that there were substantial deficiencies in the information with respect to these factors.<sup>11</sup> Moreover, the Panel record confirms that the environmental and ecological conditions to which Korea referred were relevant to the Korean regulator's ability to conduct a risk assessment.<sup>12</sup>

8. Article 5.1 refers to an assessment of risk "as appropriate to the circumstances". Article 5.2 lists "relevant ecological and environmental conditions" as a factor to be considered in the assessment of risks. The Panel, by failing to properly account for the deficiencies relating to ecological and environmental factors, took an overly narrow approach to a risk assessment, in contradiction to the Appellate Body's guidance.<sup>13</sup> Furthermore, in dismissing the significance of the continuing and potential leaks, the Panel effectively negated the possibility of Members to take preventive measures.<sup>14</sup> For these reasons, as well as due to the Panel's internally contradictory assessment of certain factual issues<sup>15</sup>, and its failure to take into account the limitations in the information about the status of the FDNPP<sup>16</sup>, Korea requests that the Appellate Body reverse the Panel's findings that there was not insufficient scientific evidence to conduct a risk assessment with respect to the measures adopted in 2013.

9. Fourth, the Panel incorrectly interpreted and applied the requirement for provisional SPS measures to be taken "on the basis of available pertinent information". Article 5.7 requires "a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure".<sup>17</sup> The Panel adopted an incorrect standard that required the "available pertinent information" to be expressly mentioned in the challenged SPS measure.<sup>18</sup> This overly narrow standard is inconsistent with the plain text of Article 5.7 and with the Appellate Body's understanding of this provision. There is no requirement in the text of Article 5.7 that the "available pertinent information" be expressly identified in the SPS measure taken by the regulating Member or that the inquiry of a rational and objective relationship be limited to information about certain risks expressly mentioned in the SPS measure itself. As the Panel reached its finding on the basis of this incorrect standard, Korea respectfully requests that the Appellate Body reverse the Panel's finding that Korea has not demonstrated that the 2013 blanket import ban or the 2013 testing requirements were adopted on the basis of available pertinent information.

10. Furthermore, the Panel erred by oversimplifying the requirements under the CODEX STAN 193-1995, and essentially imposing an obligation on Members to base their SPS measures on the relevant international standard.<sup>19</sup> If the Panel's approach were accepted, Members would be precluded from adopting temporary import bans in emergency situations where an international standard exists. The Panel also failed to make an objective assessment of the matter under Article 11

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<sup>8</sup> Panel Report, para. 7.75.

<sup>9</sup> Panel Report, para. 7.96.

<sup>10</sup> Panel Report, para. 7.80.

<sup>11</sup> For example, Panel Report, paras. 2.46, 2.47, 2.52, 2.57, 2.59, and 2.62.

<sup>12</sup> Expert Meeting Transcript, paras. 1.5, 3.34, and 4.135.

<sup>13</sup> See Appellate Body Reports, *US / Canada – Continued Suspension*, para. 527.

<sup>14</sup> Panel Report, para. 7.95.

<sup>15</sup> Panel Report, paras. 2.63, 2.64, and 7.90-7.91.

<sup>16</sup> Panel Report, para. 7.95.

<sup>17</sup> Appellate Body Reports, *US / Canada – Continued Suspension*, para. 678.

<sup>18</sup> Panel Report, para. 7.100.

<sup>19</sup> Panel Report, paras. 7.98 and 7.100.

of the DSU because of internally contradictory reasoning in relation to the product-specific bans and the import ban.<sup>20</sup>

11. Lastly, the Panel applied an incorrect test and erred in finding that Korea's SPS measures were not reviewed within a reasonable period of time.<sup>21</sup> The Panel ignored the standard set out by the Appellate Body that the "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.<sup>22</sup> Instead, the Panel relied on an incorrect interpretation developed by a previous panel<sup>23</sup>, according to which "a reasonable period of time would mean as quickly as legally possible while accepting legitimate reasons for delay".<sup>24</sup> The Panel gave no explanation as to why it was entitled to disregard the test articulated by the Appellate Body. Consequently, the Panel did not properly assess the specific circumstances of the case, and thus erred in its analysis. For these reasons, Korea respectfully requests that the Appellate Body reverse the Panel's finding that Korea did not review the measures within a reasonable period of time.<sup>25</sup>

12. For these reasons, Korea requests the Appellate Body to find that Article 5.7 was not within the Panel's terms of reference. Korea also requests the Appellate Body to reverse all the Panel's findings under Article 5.7.

### **C. THE PANEL ERRED IN FINDING THAT KOREA'S MEASURES WERE MORE TRADE-RESTRICTIVE THAN REQUIRED UNDER ARTICLE 5.6**

13. The Panel erred in finding under Article 5.6 that Korea's measures are more trade-restrictive than required. The Panel applied an incorrect ALOP in its assessment, and as a result erred in finding that Japan's proposed alternative measure would meet Korea's ALOP.

14. The Panel initially correctly identified Korea's ALOP as consisting of: (1) maintenance of radioactivity levels at levels that exist in the ordinary environment; (2) maintenance of levels of radioactive contamination in food "as low as reasonably achievable"; and (3) maintenance of levels of radioactive contamination in food as low as reasonably achievable below the 1 mSv/year radiation dose limit.<sup>26</sup> The Panel also initially correctly concluded that Korea's ALOP is not quantified at 1 mSv per year.<sup>27</sup> In its assessment, however, the Panel erroneously applied a quantitative standard of 1 mSv/year.<sup>28</sup> The Panel considered 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".<sup>29</sup> The Panel's assessment was fundamentally flawed, as an examination into whether a measure fulfills a 1 mSv/year threshold is not an examination into whether that measure fulfills Korea's ALOP.

15. There is no requirement for Members to adopt a quantitative ALOP.<sup>30</sup> Nevertheless, the Panel incorrectly found 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".<sup>31</sup> The Panel's statement shows that it was incapable of applying a qualitative ALOP. If the Panel needed a practical indicator on the basis of which to make its determination, it could have relied on the ALARA approach adopted by CODEX STAN 193-1995 which Korea had presented.<sup>32</sup> The Panel, however, completely disregarded this approach, and instead relied on an incorrect quantitative approach. As the Panel's analysis is based on an incorrect standard, the Panel's conclusion that Japan's proposed alternative measure achieves Korea's ALOP is

<sup>20</sup> See, for example, Panel Report, paras. 7.98, 7.100, 7.109, and 7.111.

<sup>21</sup> Panel Report, para. 7.107.

<sup>22</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

<sup>23</sup> Panel Report, para. 7.102.

<sup>24</sup> Panel Report, para. 7.102 (referring to Panel Report, *US – Animals*, para. 7.301).

<sup>25</sup> Panel Report, paras. 7.107, 7.110-7.111, and 8.1.

<sup>26</sup> Panel Report, paras. 7.171-7.172.

<sup>27</sup> Panel Report, para. 7.247.

<sup>28</sup> See Panel Report, para. 7.173.

<sup>29</sup> Panel Report, para. 7.173.

<sup>30</sup> Panel Report, *India – Agricultural Products*, para. 7.562.

<sup>31</sup> Panel Report, para. 7.172.

<sup>32</sup> See Korea's opening statement at the second substantive meeting of the Panel, paras. 76-80.

also incorrect. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings that Korea's measures were more trade-restrictive than required within the meaning of Article 5.6.

16. Additionally, the Panel acted inconsistently with Article 11 of the DSU by applying an incorrect standard of review. The Panel took into consideration evidence presented by Japan that was not available to the Korean authorities at the time the measures were adopted. The Panel also took into consideration data that did not exist at the time the panel was established.

17. A panel must not consider evidence which did not exist at the time a regulator makes its determination because a regulator cannot be faulted for not having taken into account what it could not have known when making its determination.<sup>33</sup> Furthermore, once such measurements and analyses are available, the regulator must have an opportunity to consider and evaluate such analysis.<sup>34</sup>

18. Accordingly, the Panel should not have considered evidence that was not available to the Korean authorities at the time the measures were adopted. In addition, the Panel had to assess whether Japan had established that a violation existed on the date of Panel establishment. The measurements taken after that day, and any analyses relying on those measurements, are incapable of demonstrating that the breach of Article 5.6 had materialized at the time the Panel was established.<sup>35</sup> At the very least, the Panel should have limited the scope of its assessment to evidence that related to the time period before its establishment. The Panel should also not have considered conclusions made based on information that both post- and pre-dated its establishment.<sup>36</sup>

19. The Panel, however, erroneously considered that it was free to accept any evidence.<sup>37</sup> Consequently, it took into consideration evidence that did not exist when the measures were adopted.<sup>38</sup> By taking the evidence into consideration, the Panel conducted a *de novo* review and exceeded its mandate under Article 11 of the DSU. What is more, the Panel ended up considering evidence containing post-establishment data in its assessment.<sup>39</sup> Korea requests that the Appellate Body find that the Panel acted inconsistently with Article 11 in considering such evidence and data. Since the Panel relied on such evidence and data in its assessment under Article 5.6, Korea further requests that the Appellate Body reverse the Panel's findings that Korea' SPS measures are inconsistent with Article 5.6 of the SPS Agreement.

#### **D. THE PANEL ERRED IN FINDING THAT KOREA'S MEASURES ARBITRARILY OR UNJUSTIFIABLY DISCRIMINATE BETWEEN MEMBERS WHERE SIMILAR CONDITIONS PREVAIL UNDER ARTICLE 2.3**

20. The Panel erred in its interpretation and application under Article 2.3. First, the Panel erred in its interpretation and application of "relevant conditions" under Article 2.3. The text and context of Article 2.3 indicate that the term "conditions" must be understood to include any condition that may be "relevant" in the light of the nature of the measure at issue and the particular circumstances of the case, as well as the policy objectives of the measure. The relevant conditions in this case include the environmental and ecological conditions in Japan and the status of the FDNPP. The ecological conditions and the status of the FDNPP were part of the particular circumstances of the case and thus properly inform the relevant conditions.<sup>40</sup> The insufficiencies of the information about the ecological conditions in Japan, as well as about the status of the FDNPP, similarly were part of the relevant conditions.

21. The Panel, however, applied an overly narrow test and only focused on the risk present in products as the relevant conditions.<sup>41</sup> Even if the level of contamination of the products may be relevant in light of the regulatory objective, the Panel failed to explain why it should be the defining standard and why all other circumstances or factors are irrelevant to defining the relevant conditions

<sup>33</sup> Appellate Body Report, *US – Cotton Yarn*, para. 78.

<sup>34</sup> See Panel Report, *Russia – Pigs (EU)*, para. 7.705; and Appellate Body Report, *Russia – Pigs (EU)*, para. 5.80.

<sup>35</sup> Panel Report, para. 7.130.

<sup>36</sup> Panel Report, *US – Animals*, para. 7.447.

<sup>37</sup> Panel Report, para. 7.5.

<sup>38</sup> Appellate Body Report, *US – Cotton Yarn*, para. 78.

<sup>39</sup> Panel Report, paras. 7.129 and 7.199-7.200.

<sup>40</sup> Appellate Body Report, *EC – Seal Products*, para. 5.299.

<sup>41</sup> Panel Report, para. 7.276.

in this dispute. Other than providing estimates of the release of some of the radionuclides, the Panel did not make an effort at assessing the levels of these radionuclides that were released from the FDNPP during the accident and after the accident. Other than making an overly general statement that there would have been some dispersion<sup>42</sup>, the Panel did not engage in an assessment of the dispersion of the radionuclides released during the FDNPP accident and after the accident. The Panel failed to assess the different ways in which radionuclides released to the environment can contaminate agricultural and livestock products and fish and other marine species in the context of the FDNPP. Importantly, the Panel's assessment did not take account of the continuing release of radionuclide contamination from the FDNPP, which constituted part of the relevant conditions in Japan.<sup>43</sup> Therefore, the Panel failed to take into account the character of the measures and the particular circumstances of the case by focusing almost exclusively on the product test data. Because the Panel erred in the interpretation and application of "similar conditions" in Article 2.3, the Appellate Body must reverse all the Panel's findings under Article 2.3.

22. Second, the Panel erred in finding that Korea's measures discriminate arbitrarily or unjustifiably under the first sentence of Article 2.3. The record demonstrates that Korea's measures are properly calibrated to the differences in the relevant risks existing inside and outside Japan's territory. While Korea and the rest of the world are exposed to pre-existing contamination, the Japanese territory and surrounding sea was directly exposed to the contamination from the FDNPP in addition to the pre-existing contamination.<sup>44</sup> The Panel itself found that certain differences in absolute concentration levels of caesium between Japanese and non-Japanese food products might justify some level of discrimination.<sup>45</sup>

23. The Panel made a fundamental error in its treatment of background contamination, and in dismissing the relevance of the Appellate Body report in *EC – Hormones*.<sup>46</sup> Even the CODEX STAN 193-1995 relied on by the Panel in its erroneous finding recognizes the distinction between the additional radionuclides and the pre-existing radionuclide contamination, and allows for regulatory intervention on the basis of this distinction.<sup>47</sup> This confirms that any distinctions that Korea draws between food contaminated with the additional radionuclides released from the FDNPP and food contaminated with pre-existing radionuclides does not constitute arbitrary or unjustifiable discrimination.

24. The Panel should have analyzed the cause or the rationale of the discrimination to determine whether the reasons for the discrimination bore no rational connection to the objective of the measure or when the reasons go against the objective.<sup>48</sup> The Panel however applied an incorrect standard and required that the measure be exclusively concerned with its regulatory objective.<sup>49</sup> The Panel failed to recognize that there may be a rational connection between the reasons for the discrimination and the measure's objective even where a measure pursues multiple objectives. The Panel also erred in dismissing certain evidence provided by Korea relating to forging of origin certificates in Japan on the basis that Korea had not demonstrated a systemic failure in Japanese monitoring and certification of food products.<sup>50</sup> The Panel's findings that the import ban and the additional testing requirements arbitrarily or unjustifiably discriminate are thus based on an erroneous interpretation and application of Article 2.3. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings that Korea's measures discriminate arbitrarily or unjustifiably.

25. The Panel further erred by relying on its erroneous findings under Articles 5.6 and 5.7 in concluding that Korea's measures arbitrarily or unjustifiably discriminate under Article 2.3.<sup>51</sup> As a consequence, reversal of the Panel's findings under Articles 5.6 and 5.7 must also result in reversal of the Panel's findings under Article 2.3.

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<sup>42</sup> Panel Report, para. 7.291.

<sup>43</sup> Panel Report, paras. 7.87 and 7.320.

<sup>44</sup> Korea's first written submission, para. 190.

<sup>45</sup> Panel Report, para. 7.351.

<sup>46</sup> Panel Report, para. 7.335.

<sup>47</sup> Exhibit JPN-32.

<sup>48</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

<sup>49</sup> Panel Report, paras. 7.344, 7.353, and 7.354.

<sup>50</sup> Panel Report, para. 7.346.

<sup>51</sup> Panel Report, paras. 7.341, 7.343, 7.352, and 7.354.

26. Third, the Panel erred in finding that Korea's measures constitute disguised restrictions on international trade. The Panel's finding of disguised restriction is based exclusively on the Panel's earlier finding that Korea's measures are inconsistent with the first sentence of Article 2.3.<sup>52</sup> However, the first and second sentences of Article 2.3 of the SPS Agreement establish separate and distinct obligations. The Appellate Body has suggested that similar factors could be considered in assessing whether a measure was applied in a manner that constituted a disguised restriction.<sup>53</sup> However, the Panel failed to assess to what extent this guidance by the Appellate Body under Article XX of the GATT 1994 was applicable to Article 2.3 of the SPS Agreement. Furthermore, contrary to the Panel's erroneous reading of the report<sup>54</sup>, the Appellate Body's finding does not suggest that a panel may entirely dispense with the assessment of whether a measure constitutes a disguised restriction.<sup>55</sup> A finding under the first sentence is insufficient, without more, to sustain a finding of violation of the second sentence. Consequently, Korea requests that the Appellate Body reverse the Panel's findings that Korea's measures constitute disguised restrictions on international trade.

27. The Panel also applied an incorrect standard of review and acted inconsistently with Article 11 of the DSU by considering evidence that was not available to the Korean regulator at the time the measures were adopted, and by considering post-establishment data. The Panel's errors are similar to its errors explained above under Article 5.6. Thus, Korea requests that the Appellate Body find that the Panel failed to make an objective assessment of the matter and acted inconsistently with Article 11 of the DSU. As the Panel's finding that similar conditions existed was based on such evidence and data, Korea requests the Appellate Body to reverse this finding, as well as the ultimate findings of inconsistency with Article 2.3.

#### **E. The PANEL ERRED IN ITS INTERPRETATION AND APPLICATION UNDER ARTICLE 7 AND ANNEX B**

28. Korea appeals the Panel's finding that Korea acted inconsistently with Annex B(1) and Article 7 with respect to the publication of the challenged measures.<sup>56</sup>

29. The Panel erred in its interpretation by finding that Annex B(1) requires that the content of the regulation be published<sup>57</sup>, and that such publication must make the measures generally known or available through an appropriate medium and contain sufficient content that the importing Member will know the conditions, including specific principles and methods, that apply to its goods.<sup>58</sup> Annex B(1) requires Members to publish promptly all sanitary and phytosanitary regulations "in such a manner as to enable interested Members to become acquainted with them". It does not refer to any "conditions", "specific principles", or "methods" that must be published. The Panel's interpretation expanded the scope of the provision by effectively converting the language "to become acquainted with" into "to comply with". Thus, the Panel interpreted Article 7 and Annex B(1) incorrectly by imposing additional obligations not included in the provision.

30. The Panel also erred in finding that Korea did not publish the content of the blanket import ban.<sup>59</sup> The information set out in the published press release included the origin of the products to which it applied, the nature of the measure (a ban on all imports), and the scope of the measure (fishery products), and thus provided all the necessary information for interested Members to become acquainted with the measures. Contrary to the Panel's finding, a reference to "all fishery products" is not vague, but rather clear in its scope. The requirement to publish measures in such a manner as to enable interested Members to become acquainted with them does not require the publication of each and every HS code, as long as the product scope is defined.

31. Furthermore, the Panel erred by finding that the 2011 and 2013 press releases announcing the additional testing requirements did not include sufficient content<sup>60</sup> because they did not refer to the levels of caesium or iodine that would trigger the additional testing, which specific radionuclides

<sup>52</sup> Panel Report, para. 7.359.

<sup>53</sup> Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:I, p. 3 at 23.

<sup>54</sup> Panel Report, para. 7.356.

<sup>55</sup> Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:I, p. 3 at 23.

<sup>56</sup> Panel Report, para. 8.5.

<sup>57</sup> Panel Report, para. 7.461.

<sup>58</sup> Panel Report, para. 7.464.

<sup>59</sup> Panel Report, paras. 7.483 and 7.487.

<sup>60</sup> Panel Report, paras. 7.500-7.501.

will be tested, the maximum levels for those radionuclides<sup>61</sup>, or the procedure and location of the testing required for the additional radionuclides.<sup>62</sup> The press releases allowed interested Members "to become acquainted with" the measures and their requirements, consistently with Annex B(1). Furthermore, it was undisputed that Japan was acquainted with the measures, as Japan had expressly acknowledged that it was aware of the measures<sup>63</sup>, had been complying with the measures, and had properly issued the certificate of origin of production for the food products from Japan.<sup>64</sup>

32. In addition, the Panel erred in faulting Korea<sup>65</sup> for not providing any evidence to demonstrate that at the time of adoption of the measures, interested Members would have known to look to the specific website for information<sup>66</sup>, and for not providing archived versions of the web links.<sup>67</sup> In reaching its findings, the Panel set a standard of certainty, which is not called for in Annex B(1). Moreover, Japan had expressly acknowledged that it was aware of the measures.<sup>68</sup> Based on the facts of the case, there was no doubt that Japan was acquainted with Korea's measures.<sup>69</sup> The Panel again applied a standard that does not stem from Annex B(1).

33. Furthermore, the Panel acted inconsistently with Article 11 of the DSU by faulting Korea for not having provided archived versions of the webpages from the date of the publications. Japan did not contest the date of publication.

34. Finally, the Panel erred in its interpretation and application of Article 7 and Annex B(3) by finding that, because Korea's SPS Enquiry Point did not respond to a request from Japan made on 13 November 2014, it did not comply with the obligation in Annex B(3).<sup>70</sup> The obligation in Annex B(3) is for each Member to "ensure that one enquiry point exists". Annex B(3) does not impose a strict liability standard. It imposes an obligation to ensure that a Member's respective enquiry point is given the responsibilities described therein, but is silent on the manner in which they function. Even if the manner in which an enquiry point functions or performs would be relevant under Annex B(3), at most a violation could be found if there existed a persistent failure to respond to requests so that the enquiry point was found not to be "responsible" for its functions. The Panel erred in finding that a single omission to respond to a query amounts to a violation of Annex B(3).<sup>71</sup>

35. For these reasons, Korea requests the Appellate Body to reverse the Panel's findings under Article 7 and Annex B.<sup>72</sup>

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<sup>61</sup> Panel Report, paras. 7.492 and 7.494.

<sup>62</sup> Panel Report, para. 7.494.

<sup>63</sup> Panel Report, paras. 7.475, 7.486, and 7.498.

<sup>64</sup> Korea's first written submission, para. 388.

<sup>65</sup> Panel Report, paras. 7.474, 7.476, 7.485, and 7.497.

<sup>66</sup> Panel Report, paras. 7.474, 7.485, and 7.497.

<sup>67</sup> Panel Report, paras. 7.474, 7.485, and 7.497.

<sup>68</sup> Panel Report, paras. 7.475, 7.486, and 7.498.

<sup>69</sup> Panel Report, paras. 7.475, 7.486, and 7.498.

<sup>70</sup> Panel Report, para. 7.518.

<sup>71</sup> Panel Report, para. 7.518.

<sup>72</sup> Panel Report, para. 8.5.



## ANNEX B-2

## EXECUTIVE SUMMARY OF JAPAN'S OTHER APPELLANT'S SUBMISSION\*

**I. THE PANEL ERRED IN EXCLUDING EVIDENCE SPEAKING TO THE POST-ESTABLISHMENT FACTUAL SITUATION FROM ITS ASSESSMENT OF JAPAN'S *PRIMA FACIE* CASE**

1. This appeal concerns a "cut-off" date adopted by the Panel for its assessment of Japan's *prima facie* case that the maintenance of Korea's import bans and additional testing requirements are inconsistent with the continuing obligations in Articles 2.3 and 5.6 of the SPS Agreement. Specifically, Japan appeals the Panel's exclusion from its assessment of that *prima facie* case evidence speaking to the factual situation after the date of the Panel's establishment.<sup>1</sup>

2. At the same time, the Panel found that it was entitled to consider evidence speaking to the post-establishment facts if such evidence (i) *rebutted* the complainant's *prima facie* case, or (ii) *confirmed* the Panel's findings based on evidence speaking to the situation that existed at the time of establishment.<sup>2</sup>

3. The Panel's findings on the temporal scope of its assessment of Japan's *prima facie* case entail legal error in: (i) the interpretation and application of Articles 3.3, 3.4, 3.7 and 11 of the DSU, read in light of Articles 2.3 and 5.6 of the *SPS Agreement*; and (ii) the application of Articles 2.3 and 5.6 of the SPS Agreement.<sup>3</sup>

4. While the dispute settlement provisions of the SPS Agreement do not set forth any rules pertinent to the temporal scope of a panel's assessment of evidence, Articles 3.3, 3.4, 3.7 and 11 of the DSU require a panel, when faced with a claim that the *maintenance* of a measure is inconsistent with *continuing obligations*, to consider timely-submitted evidence relating to the factual situation after panel establishment.

5. Under Article 11 of the DSU, the features of the temporal scope of a panel's assessment of the facts must take into account *the temporal scope of the obligations at issue*.<sup>4</sup> In this sense, the temporal scope of a panel's assessment of the facts is similar to a panel's standard of review under Article 11 of the DSU. The Appellate Body has long recognized that the nature and intensity ("standard") of a panel's review of the facts, including of the measure, *depends on the particular WTO obligation at issue*.<sup>5</sup> In the words of the Appellate Body:

...an "objective assessment" under Article 11 of the DSU must be understood in the light of *the obligations of the particular covered agreement at issue* in order to derive the more specific contours of the appropriate standard of review.<sup>6</sup>

6. Thus, no single standard of review applies uniformly in each and every dispute. Instead, the "specific contours" of a panel's standard of review, under Article 11 of the DSU, are sensitive to the features of the particular matter: the objective assessment is "tailor made", and not "one size fits all".

7. The same is true with respect to the temporal scope of a panel's assessment of the facts. In determining which facts are properly subject to assessment, a panel must take account of the features of the particular matter. In particular, the relevant obligation may apply at a *particular point in time* (e.g. at the time of adoption of a measure); or it may impose *obligations that continue over*

\* Total word count: 2979

<sup>1</sup> Panel Report, *Korea – Radionuclides (Japan)* ("Panel Report"), para. 7.141.

<sup>2</sup> Panel Report, para. 7.142.

<sup>3</sup> The Panel's interpretation is set out in Panel Report, paras. 7.136 – 7.143.

<sup>4</sup> The Panel appears to have agreed, having noted that "Japan is correct that any temporal limitations on the scope of the Panel's analysis must be based on the nature of the claims". Panel Report, para. 7.141.

<sup>5</sup> Appellate Body Report, *US – DRAMs*, para. 184. See also Appellate Body Reports, *US – Lamb*, para. 105 and *US – Cotton Yarn*, paras. 74-76.

<sup>6</sup> Appellate Body Report, *US – DRAMs*, para. 184.

*time* (e.g. throughout the lifetime of a measure).<sup>7</sup> The "specific contours" of the temporal scope of a panel's assessment of the facts, under Article 11 of the DSU, must be sensitive to these features of the matter.

8. In the case of WTO obligations that apply at a particular moment in time, the evidence must relate to the consistency of the challenged measure *at that point in time*. For example, Article 5.7 of the SPS Agreement imposes certain obligations that apply at the time a measure is adopted. In addressing Article 5.7, the temporal scope of a panel's assessment of the facts must take account of this feature of the relevant obligation and assess the facts speaking to the situation at the time of the measure's adoption.

9. In contrast, there are many WTO obligations that apply continuously over time. For example, Article III:4 of the GATT 1994 imposes a continuing obligation whereby laws and regulations must not afford less favorable treatment to imported goods. A similar continuing obligation applies in Article 2.1 of the *TBT Agreement*. Article X:3(a) of the GATT 1994 imposes continuing obligations on ongoing administration.<sup>8</sup> Article X:3(b) of the GATT 1994 imposes continuing obligations on the prompt review and correction of administrative action relating to customs matters. Article XI of the GATT 1994 imposes continuing obligations regarding quantitative restrictions. Article 2.2 of the *TBT Agreement* imposes continuing obligations whereby regulations must not be more trade-restrictive than necessary. Article 5 of the *SCM Agreement* imposes continuing obligation whereby subsidies cannot cause adverse effects.

10. Each of these continuing obligations applies throughout the lifetime of a measure, from its adoption, to its withdrawal. A measure subject to one or more of these continuing obligations must be consistent with the obligation throughout its life. As a result, a complainant can show that the maintenance of a measure violates a continuing obligation based on current circumstances, irrespective of whether the measure violated the obligation earlier in its life.

11. When a claim is made that the *maintenance* of a measure violates a continuing obligation, a panel *cannot* be constrained to assess the facts as they stood at a particular point in time, such as at the adoption of the measure. The factual situation at adoption does not speak to whether the maintenance of the measure – until such time as it is withdrawn or modified – violates the continuing obligation. In examining whether the maintenance of a measure violates a continuing obligation, panels must assess all of the timely-submitted evidence that speaks to whether the maintenance of the measure, on an ongoing basis, violates the continuing obligation.

12. Japan's interpretive approach is supported by a long line of cases. As Japan shows in its other appellant's submission, in many disputes, under a wide range of covered agreements, panels and the Appellate Body have endorsed assessment of *post-establishment facts* in examining whether the maintenance of a measure violates a continuing obligation. To give one example here, the panel in *US – Upland Cotton* noted that "[o]ur duty to make an objective assessment of the matter before us under Article 11 of the DSU actually requires us to examine recent data, including that which relates to the period after the date of establishment of the panel".<sup>9</sup>

13. The claims at issue in this dispute are made under Articles 2.3 and 5.6 of the SPS Agreement. These two provisions establish obligations that apply on a *continuing* basis to the *maintenance* of an SPS measure throughout its lifetime.<sup>10</sup> Accordingly, under Article 11 of the DSU, when assessing whether the *maintenance* of a challenged measure is inconsistent with these *continuing obligations*, a panel must include in its assessment all timely-submitted evidence speaking to the continuing inconsistency.

14. A panel cannot *a priori* exclude from its assessment evidence, submitted in due time, that speaks to the most recent, post-establishment, factual situation. Excluding this entire category of evidence from assessment is inconsistent with the essential function of a panel, which is to make an objective assessment of the "matter" by considering all of "the facts of the case", pursuant to Article 11 of the DSU.

15. In this dispute, the Panel compounded its errors under Article 11 of the DSU in establishing the temporal scope of its assessment of the facts, because the Panel's assessment was one-sided.

<sup>7</sup> See Japan's Opening Statement at the Second Substantive Meeting, para. 13. Similarly, in *Russia – Pigs*, the panel noted that the temporal scope of the evidence subject to assessment varies depending on the substantive obligation at issue. Panel Report, *Russia – Pigs*, para. 7.178.

<sup>8</sup> See, e.g. Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>9</sup> Panel Report, *US – Upland Cotton*, para. 7.193 (emphasis added).

<sup>10</sup> Panel Report, para. 7.135.

Although the Panel decided to disregard Japan's evidence of post establishment facts in assessing Japan's *prima facie* case, the Panel did assess Korea's evidence of post establishment facts when provided to rebut Japan's *prima facie* case. This shocking asymmetry in the temporal scope of the Panel's assessment is not "objective".

16. Moreover, the exclusion by the Panel of evidence speaking to the most recent factual situation is inconsistent with the requirement to promote the "prompt", "satisfactory" and "positive" resolution of disputes, as set forth in Article 3 of the DSU. Article 3 emphasizes that the aim of dispute settlement is to provide a "prompt", "satisfactory" and "positive" resolution to a dispute, because this is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".<sup>11</sup>

17. The requirement to ensure "prompt", "satisfactory" and "positive" dispute resolution means that, in assessing claims regarding the maintenance of a measure with continuing obligations, a panel cannot exclude post-establishment facts pertinent to the maintenance of the measure. This is all the more so when the parties' disagreement – as in this dispute – relates to the measure's maintenance in the post-establishment period. In that case, if a panel fails to conduct its assessment of the facts, and of the measure's continuing inconsistency, in the light of the most recent disputed factual situation, the WTO dispute settlement system fails to deliver on the DSU's commitment to the "prompt", "satisfactory" and "positive" resolution of disputes.

18. Japan, therefore, requests that the Appellate Body reverse the Panel's erroneous decision to disregard evidence relating to post-establishment facts when assessing whether Japan had established a *prima facie* case that the maintenance of Korea's measures is inconsistent with Articles 2.3 and 5.6 of the SPS Agreement.

19. Despite excluding from its assessment of Japan's *prima facie* case any evidence speaking to the factual situation after the time of establishment, the Panel ultimately found that the maintenance of Korea's import bans and additional testing requirements is inconsistent with the continuing obligations in Articles 2.3 and 5.6 of the SPS Agreement.<sup>12</sup>

20. The Panel's errors in establishing an incorrect cut-off date for its assessment of Japan's *prima facie* case do not vitiate the Panel's ultimate findings under those provisions. In its findings under Articles 2.3 and 5.6, the Panel found that the evidence relating to *pre-establishment* facts was sufficient to make Japan's *prima facie* case. In making its findings on that *prima facie* case, the Panel also considered evidence relating to post-establishment facts, either because it confirmed Japan's *prima facie* case, or because it supported Korea's rebuttal.

21. Thus, the Panel's ultimate findings under Articles 2.3 and 5.6 of the SPS Agreement were made in light of all of this timely-submitted evidence. Accordingly, the Panel did not err in making its ultimate findings under Articles 2.3 and 5.6 of the SPS Agreement.

22. Should the Appellate Body nonetheless decide that the Panel erroneous "cut-off" date for its assessment of Japan's *prima facie* case vitiates the Panel's ultimate findings under Articles 2.3 and 5.6, Japan requests that the Appellate Body complete the analysis, and find that the maintenance of Korea's import bans and additional testing requirements violates the continuing obligations in Articles 2.3 and 5.6 of the SPS Agreement.

23. In so doing, the Appellate Body should rely on all of the relevant factual findings of the Panel, regardless of whether they related to: (1) pre-establishment facts that supported Japan's *prima facie* case; (2) pre- and post-establishment facts that supported Korea's rebuttal; or (3) post-establishment facts that confirmed Japan's *prima facie* case.

24. Finally, Japan wishes to emphasize that its appeal regarding the temporal scope of the Panel's assessment relates to the findings that Korea's measures are *maintained* contrary to Articles 2.3 and 5.6 of the SPS Agreement. Japan's appeal does not relate to the Panel's findings under those provisions regarding *adoption* of the challenged measures.<sup>13</sup>

## **II. THE PANEL ERRED IN THE ARTICULATION AND APPLICATION OF THE PRESUMPTION OF LIKENESS UNDER ARTICLE 8 AND ANNEX C(1)(A) OF THE SPS AGREEMENT**

25. This appeal relates to the conditions under which a panel may presume that domestic and imported products are "like" under Annex C(1)(a) of the SPS Agreement, on the basis that a

<sup>11</sup> DSU, Article 3.3.

<sup>12</sup> Panel Report, paras. 8.2(b), (c) and (e), and 8.3(b).

<sup>13</sup> See Panel Report, paras. 8.2(a), 8.2(c), 8.2(d), and 8.3(a).

respondent's measure distinguishes between the products using origin as the sole criterion of distinction.

26. Under Article 8 and Annex C(1)(a), Japan challenged Korea's pre-market additional testing requirements ("additional testing requirements").<sup>14</sup> Pursuant to this measure, Japanese food products that contain between 0.5 and 100 Bq/kg of caesium are subject to burdensome additional testing, but Korean food products containing between 0.5 and 100 Bq/kg of caesium are not subject to such testing.

27. According to long-standing case law, a presumption of likeness arises if a measure, by its terms, distinguishes between products using origin as the sole expressed criterion of distinction.<sup>15</sup> Given that the additional testing requirements use origin as the sole criterion to distinguish between identical Korean and Japanese products, Japan argued that likeness may be presumed.

28. The Panel agreed that "the challenged measures *only apply to Japanese products*".<sup>16</sup> The Panel did not find that the measure uses any criterion, other than origin, to distinguish between products.

29. Nonetheless, the Panel wrongly declined to presume the likeness of Korean and Japanese products that are identical in all respects, except origin.<sup>17</sup> The Panel declined to presume likeness because Korea asserted that its *justification or "rationale for adopting the measure"* included health concerns.<sup>18</sup> The Panel referred to "*concerns other than origin [that] underpin Korea's measures*".<sup>19</sup> The Panel "accept[ed] Korea's explanation that origin was not the sole ground *considered [by the regulator] when the distinction was drawn*".<sup>20</sup>

30. The Panel thereby strayed beyond consideration of whether *Korea's measure*, by its terms, expressed origin as the sole criterion for distinguishing between domestic and imported products. Instead, the Panel held that the legal standard required that it consider the Korean regulator's motivations and concerns – "grounds" and "rationale" – "underpin[ing]" its decision to adopt the measure. If the underlying "rationale" for an origin distinction includes factors other than origin, the Panel found that the presumption of likeness does not apply.

31. Thus, even though the challenged measure, by its terms, expressed origin as the sole criterion of distinction, the Panel refused to apply the presumption of likeness, because the "rationale for adopting the measure" included non-origin factors.

32. In so doing, the Panel erred in its interpretation and application of the term "like", and, in particular, the legal standard for presuming likeness. The pertinent considerations for deciding whether to apply the presumption of likeness are the *terms of the measure itself*, and whether the measure expresses origin as the sole criterion for distinguishing between domestic and imported products. If a measure – such as Korea's additional testing requirements – expresses origin as the sole criterion of distinction, likeness may be *prima facie* presumed.

33. When the motivations and concerns "considered" by a regulator in adopting a measure are not expressed in a criterion of distinction used in the measure, they do not prevent a presumption of likeness from arising on a *prima facie* basis. Rather, such motivations and concerns may be pertinent to other parts of the legal standard under the second clause of Annex C(1)(a). For example, at a subsequent step of the analysis, a regulator's health concerns may justify differential treatment arising from the measure's use of origin as the sole criterion for distinguishing between identical domestic and imported products.

34. Further, although the Panel entertained Korea's "explanation" that the Korean regulator considered the "health risks"<sup>21</sup> posed by Japanese products when it made its decision to distinguish them from Korean products, the Panel wrongly refused to address Japan's counter-argument that the products did not differ in terms of "health risks". The Panel had already found that Japanese products did not differ in terms of "health risks" under Articles 2.3 and 5.6. Under Article 2.3 of the SPS Agreement, the Panel found that "health risks" did not support the distinction drawn between

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<sup>14</sup> Panel Report, Table 9, p. 92, ("If caesium or iodine is more than 0.5 Bq/kg, additional testing for at least strontium and plutonium").

<sup>15</sup> Panel Report, para. 7.394.

<sup>16</sup> Panel Report, para. 7.397 (emphasis added).

<sup>17</sup> Panel Report, para. 7.397.

<sup>18</sup> Panel Report, para. 7.401 (emphasis added).

<sup>19</sup> Panel Report, para. 7.399, first sentence (emphasis added).

<sup>20</sup> Panel Report, para. 7.402 (emphasis added).

<sup>21</sup> See, e.g. Korea's second written submission, para. 385.

Japanese and Korean food products, and that this distinction amounted to arbitrary and unjustifiable discrimination and a disguised restriction on international trade.<sup>22</sup>

35. Yet, in declining to find that Korean and Japanese products were "like" under Annex C(1)(a), the Panel uncritically accepted Korea's assertion that health concerns motivated the distinction drawn between the products, without accounting for Japan's response.<sup>23</sup>

36. Accordingly, Japan requests the Appellate Body to: find that the Panel erred in interpreting and applying Annex C(1)(a) of the SPS Agreement; reverse the Panel's finding that Japan has failed to establish that Korea acted inconsistently with Annex C(1)(a); and reverse the Panel's consequential finding that Japan failed to establish that Korea acted inconsistently with Article 8 of the SPS Agreement.

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<sup>22</sup> Panel Report, paras. 7.351-355.

<sup>23</sup> Panel Report, paras. 7.399 and 7.402.

**ANNEX B-3**

## EXECUTIVE SUMMARY OF JAPAN'S APPELLEE'S SUBMISSION\*

**I. INTRODUCTION**

1. This dispute concerns a series of highly trade-restrictive and discriminatory import bans and testing requirements that Korea applies uniquely to Japanese food products. Korea took these measures ostensibly to address the health risks purportedly arising from the contamination of these products by radionuclides. The Panel found that these measures violate Articles 2.3 (discrimination), 5.6 (unnecessarily trade-restriction), and 7 (transparency) of the SPS Agreement, as well as Annex B(1) (publication) and B(3) (SPS enquiry point) of that *Agreement*.

2. In a sweeping appeal, Korea contests each of the Panel's adverse findings. Indeed, the only Panel findings that are exempt from Korea's appeal are those under Annex C of the SPS Agreement, which were favourable to Korea.

3. In essence, through this indiscriminate appellate strategy, Korea seeks to reargue the case, largely recycling the unsuccessful legal and factual arguments made to the Panel. In advancing these arguments, Korea consistently mischaracterizes Panel findings that were reached following a careful examination of all the issues.

4. Korea asserts that the Panel made errors in the interpretation and application of the law, and in its assessment of the facts. Here, again, Korea has been indiscriminate, often failing to make clear which arguments pertain, respectively, to interpretation, application, and assessment.

5. Indeed, a reader of Korea's appeal often struggles to discern whether a particular argument relates to the interpretation or application of the law, or to the assessment of the facts. In many instances, where Korea makes a claim of error in the application of the law, it presents arguments regarding the assessment of the facts, even using the language of an appeal under Article 11 of the DSU. An appellant chooses for itself how to categorize its claims on appeal. Those choices have consequences. Korea cannot evade the legal standard under Article 11 of the DSU by presenting a claim regarding the Panel's factual assessment as an error in the application of the law.

6. Korea's main grievance with the Panel's findings – which recurs throughout its appeals under Articles 2.3, 5.6, and 5.7 of the SPS Agreement – concerns the weight that the Panel attached to environmental conditions relating to Japan's territory. For Korea, its measures are justified because Japan suffered a major nuclear accident and, allegedly, there remain uncertainties relating to environmental contamination on Japan's territory, in particular near the FDNPP site.

7. Korea presents a string of uncertainties, regarding: the radionuclides that remain in the FDNPP reactors; the level of contamination in storage tanks, sea water and sea sediment near the FDNPP site; and, past, present, and future leaks of contaminated water from these storage tanks to the sea. Korea argues that the Panel erred as a matter of both law and fact, and in its factual assessment, because it did not attach more importance – indeed, decisive weight – to these environmental factors.

8. The reader of Korea's Appellant's Submission might form the mistaken impression that the Panel did not address these environmental factors. In fact, the Panel considered all of these factors, and many others.

9. Unlike Korea, the Panel did not do so on a haphazard basis. Instead, it did so in a principled manner, in light of the particular obligations at stake, as well as Korea's objectives and the SPS risks that its measures address. As Korea acknowledged, the objective of Korea's measures is *to protect*

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\* Total word count: 6571

*its consumers from the health risks arising from the consumption of food contaminated with man-made radionuclides.*

10. The fact that the SPS risk relates to food has consequences for the relevance of environmental conditions. The latter are *not* relevant in and of themselves. Take, for example, the radionuclide content of the nuclear reactors at the FDNPP site, or of sea sediment or sea water at the FDNPP port. In itself, evidence on these issues does not address the SPS risks facing Korean consumers of Japanese food. Japan does not, for example, export canned sea sediment or bottled sea water from the FDNPP port.

11. As a matter of both law and fact, the Panel correctly appreciated that the weight ascribed to environmental conditions in an exporting country depends on the extent to which they have a bearing on the importing country's particular SPS objectives.<sup>1</sup> In some cases, they may have more relevance and in others less. Further, whenever territorial conditions are examined, it is because they are relevant to "*addressing risks of products in international trade*".<sup>2</sup>

12. To that end, the Panel explored the weight to be ascribed to a variety of factors. The Panel emphasized that it would "*assess the totality of the evidence provided to the Panel, without any single element being dispositive*".<sup>3</sup> Across the Panel's reasoning, it assessed a range of factors relating to both the environment and food, and the relation between the two.

13. Although Korea wishes that the Panel had ascribed preponderant weight to environmental conditions in Japan, it has failed to identify any errors in the Panel's interpretation and application of the law, or in its factual assessment. Against this background, Japan now turns to summarize its arguments on Korea's specific claims of error.

## II. THE PANEL DID NOT ERR UNDER ARTICLE 11 OF THE DSU IN SELECTING EXPERT

14. Pursuant to Article 11.2 of the SPS Agreement, the Panel appointed five experts to provide advice on scientific issues. Of these five experts, Korea raises objections with regard to two, namely: Prof. Lynn Anspaugh and Dr. Patsy Thompson. Korea asserts that the Panel violated Korea's due process rights, under Article 11 of the DSU, by appointing these two experts, who were not, it says, "independent" and "impartial".<sup>4</sup>

15. Korea objected ten of the fifteen potential experts that the Panel proposed, including Prof. Anspaugh and Dr. Thompson. Further, although Korea requested that the Panel appoint experts in "radionuclides in marine environments",<sup>5</sup> it objected to *every* expert proposed in this field, including both Prof. Anspaugh and Dr. Thompson.<sup>6</sup>

16. Korea objected to the appointment of **Prof. Anspaugh** because he "participated in the preparation of the UNSCEAR report on the accident at Fukushima Dai-ichi".<sup>7</sup> Korea alleged that **Dr. Thompson** had "written articles in which she ha[d] provided her own assessment of the risk posed by the FDNPP".<sup>8</sup>

17. While the Panel accommodated Korea's desire to exclude a number of the proposed experts, it refused to exclude Prof. Anspaugh and Dr. Thompson.

18. Korea contends that the Panel erred. In its appeal, Korea recalls that it had "*questioned the impartiality and independence* of two of the experts that the Panel consulted".<sup>9</sup> It continues:

<sup>1</sup> See e.g. Panel Report, paras. 7.89 and 7.93.

<sup>2</sup> Panel Report, para. 7.270. (emphasis and underlining added)

<sup>3</sup> Panel Report, para. 7.289. (emphasis added)

<sup>4</sup> Korea's Appellant's Submission, Section III.

<sup>5</sup> Korea's Letter to the Panel dated 2 May 2016, p. 2.

<sup>6</sup> Panel Communication to the Parties dated 15 July 2016, p. 2. (emphasis added)

<sup>7</sup> Korea's Letter to the Panel dated 13 June 2016, p.5.

<sup>8</sup> Korea's Letter to the Panel dated 13 June 2016, p. 3.

<sup>9</sup> Korea's Appellant's Submission, para. 34. (emphasis added)

*Despite Korea raising such concerns, the Panel consulted these experts during the proceedings, and thus acted in violation of Korea's due process rights.*<sup>10</sup>

19. A panel does not, however, violate a respondent's due process rights simply by selecting an expert, "[d]espite" the respondent's objections. A panel cannot totally defer to a respondent's objections.<sup>11</sup> Indeed, such deference would allow a respondent to frustrate a panel's ability to appoint experts. Instead, a panel must reject an expert solely when there is an "objective basis" to entertain "justifiable doubts" as to the expert's independence or impartiality.<sup>12</sup>

20. The Appellate Body has held that a panel cannot select an expert who has previously authored an assessment of the SPS risk at issue in the dispute.<sup>13</sup> As regards Prof. Anspaugh, the Panel found that the 2013 UNSCEAR report "was not an assessment of the risks arising from human consumption of radionuclides in food products".<sup>14</sup> With respect to Dr. Thompson, Korea alleged that she had authored articles providing "her own assessment of the risk posed by the FDNPP".<sup>15</sup> However, Korea failed to "provide citations to such articles".<sup>16</sup> As regards two identified articles, the Panel found that neither assessed the SPS risks arising from consumption of Japanese food products. Korea has not explained why the Panel erred in making these findings.

### III. THE PANEL DID NOT ERR IN MAKING ITS FINDINGS UNDER ARTICLE 5.6 OF THE SPS AGREEMENT

21. Japan claimed under Article 5.6 that Korea's measures were more trade-restrictive than necessary to achieve Korea's "appropriate level of [SPS] protection" ("ALOP"). The Panel agreed.

22. Korea appeals the Panel's findings on the ALOP. It asserts that, although the Panel correctly formulated the ALOP, it misapplied the ALOP in finding that Japan's alternative measure achieves Korea's chosen level of protection. Korea argues that, "although the Panel initially accepted Korea's ALOP, it effectively substituted in its analysis Korea's ALOP with an incorrect quantitative standard of 1 mS/year".<sup>17</sup>

23. The Panel accepted and quoted Korea's own formulation of its ALOP:

to 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.<sup>18</sup>

24. Korea's formulation recognizes that its ALOP comprises three inter-related prongs: (1) the levels that exist in the ordinary environment; (2) the ALARA principle; and (3) the quantitative dose exposure threshold of 1 mSv/year.

25. In ascertaining Korea's ALOP, the Panel had to clarify the relationship between the three prongs, which Korea had not explained. In doing so, the Panel assessed the relevant evidence. On appeal, Korea contends that, in assessing the three prongs, the Panel misunderstood the role of the

<sup>10</sup> Korea's Appellant's Submission, para. 34. (emphasis added)

<sup>11</sup> See Appellate Body Report, *EC – Hormones*, para. 117. See also Appellate Body Report, *US/Canada – Continued Suspension*, paras. 439-446.

<sup>12</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 454. (emphasis added)

<sup>13</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 479.

<sup>14</sup> Panel Report, para. 1.26 (emphasis and underlining added).

<sup>15</sup> Panel Communication to the Parties dated 15 July 2016, pp. 2-3. (emphasis added) See also Panel Report, para. 1.27.

<sup>16</sup> Panel Communication to the Parties dated 15 July 2016, pp. 2-3. (emphasis added) See also Panel Report, para. 1.27.

<sup>17</sup> Korea's Appellant's Submission, para. 184.

<sup>18</sup> Panel Report, para. 7.172, quoting Korea's opening statement at the second panel meeting, para. 66. (underlining original)



ordinary environment and ALARA, and "focus[ed] solely on a quantitative threshold" of 1 mSv/year.<sup>19</sup> Korea errs.

26. The Panel found that the role of the first two prongs (ordinary environment/ALARA) was to inform Korea's determination of the third prong (dose exposure limit).

27. As regards the first prong, the dose exposure limit of 1 mSv/year was set in light of its relationship to levels of radiation in the "ordinary environment". The Panel found that 1 mSv/year constituted a "minor addition"<sup>20</sup> to levels of radiation in the "ordinary environment".

28. As to the second prong, the Panel found that ALARA is merely a "process" tool, and not an "end point". The Panel concluded that Korea had "used" ALARA as part of a "process" that led to the establishment of its dose exposure limit of 1 mSv/year.<sup>21</sup> Indeed, as a "process", ALARA was not apt to serve as an ALOP because it did not define a particular "level of protection".

29. Concerning the third prong, the Panel recorded that Korea "acknowledges" its adoption of a 1 mSv/year dose exposure limit for man-made radionuclides in food, and that the limit serves to "quantify" the exposure Korea "is willing to accept" "for the general public".<sup>22</sup>

30. The Panel also assessed the ALOP "*actually being applied*" in Korea's measures.<sup>23</sup> The Panel found that Korea "has established" a dose exposure limit of 1 mSv/year, which it used in its own measures. Logically, as the Panel held, this indicates that an alternative measure meets the ALOP if it also ensures that dose exposure from food remains below that same limit.<sup>24</sup>

31. Although Korea asserts that the Panel placed too much weight on Korea's 1 mSv/year dose exposure limit, and not enough on the "ordinary environment" and ALARA, it has failed to offer any explanation how the Panel erred in examining the relationship between these three prongs of the ALOP. Japan can see no error in the Panel's examination.

#### **IV. THE PANEL DID NOT ERR IN MAKING ITS FINDINGS UNDER ARTICLE 2.3 OF THE SPS AGREEMENT**

32. Japan claimed under Article 2.3 that Korea's measures involved arbitrary or unjustifiable discrimination and a disguised restriction on international trade. The Panel agreed.

33. Korea appeals the Panel's findings that: (1) "similar conditions" prevailed in respect of food products from Japan and elsewhere; (2) the discrimination against Japanese products is arbitrary and unjustifiable, and involves a disguised restriction on international trade.

##### **A. The Panel did not err in finding that "similar conditions" prevail**

34. As an interpretive matter, the Panel found that the relevant "conditions" under Article 2.3 must be identified in light of the *respondent's regulatory objectives* in the challenged measure and *the SPS risks it addresses*.

35. Korea does not seem to object. Indeed, it agrees that "the relevant conditions should be informed by the regulatory objective of the challenged measures".<sup>25</sup>

36. However, Korea alleges that the Panel erred by failing to interpret the word "conditions" to include all "potentially relevant" "factors facing a country".<sup>26</sup> This argument does not withstand scrutiny. The Panel's interpretation recognizes that *any* "conditions" may be relevant, depending on the measure's objectives and the SPS risk it addresses. No "conditions" are excluded.

<sup>19</sup> Korea's Appellant's Submission, para. 191.

<sup>20</sup> Panel Report, para. 7.170.

<sup>21</sup> See Panel Report, para. 7.166.

<sup>22</sup> Panel Report, paras. 7.161 and 7.165.

<sup>23</sup> Panel Report, para. 7.158. (emphasis added)

<sup>24</sup> Panel Report, para. 7.172.

<sup>25</sup> Korea's Appellant's Submission, para. 268.

<sup>26</sup> Korea's Appellant's Submission, paras. 249 and 250.

37. Korea's grievance is that the Panel did not attach preponderant weight to conditions relating to Japan's "territory". The Panel noted that this word in Article 2.3 is qualified by the word "including", which indicates that the "territory" is merely "*one example* of conditions that could be compared, but *it does not preclude that other conditions could be compared as well*".<sup>27</sup> The role of territorial conditions will vary, depending on "circumstances", in particular, the SPS risk "addressed by the challenged measures".<sup>28</sup>

38. Korea also takes issue with the Panel's reliance on Articles I:1, III:4, and XX of the GATT 1994 as context. Korea ignores that, in relying on this context, the Panel followed the Appellate Body.<sup>29</sup> Further, the Panel used this context to support the unremarkable proposition that the SPS Agreement and the GATT 1994 "focus" on "trade in goods".

39. Korea contends that the Panel allows "circumvention" of Article 4.1 of the SPS Agreement. Article 2.3 cannot, however, circumvent Article 4.1 because, as the Panel found, they address "different" issues. The former addresses the way in which *an importing Member applies its own SPS measures*, whereas the latter addresses whether *an exporting Member's SPS measures are "equivalent" to those of the importing Member*.

40. In applying the legal standard, the Panel found that the relevant "conditions" are "whether products from Japan and the rest of the world have a similar potential to be contaminated with the 20 Codex radionuclides" and whether these levels would be below Korea's respective threshold levels.<sup>30</sup> It then determined that similar conditions prevailed.<sup>31</sup>

41. Korea alleges that the Panel erred in application because, in identifying the relevant "conditions", it "focused exclusively on 'the risk present in the products'",<sup>32</sup> and treated environmental and ecological conditions as "irrelevant".<sup>33</sup> Korea is incorrect.

42. The Panel emphasized that it would "assess the *totality of the evidence* provided to the Panel, *without any single element being dispositive*".<sup>34</sup> The Panel found that food products from Japan and the rest of the world have the *same risk* of containing the relevant radionuclides at levels above Korea's thresholds. In so doing, the Panel explored a wide range of evidence in detail, considering it in light of the measure's objective of protecting consumers against risks from food contaminated with radionuclides. This evidence included factors relating to the environment, ecology, and food.<sup>35</sup>

43. The Panel did not, therefore, "focus[] exclusively on 'the risk present in the products'",<sup>36</sup> or treat environmental and ecological conditions as "irrelevant", as Korea says.<sup>37</sup> Korea may wish that the Panel had ascribed more weight to evidence relating these two conditions but it has not presented an appeal to that effect.

## **B. The Panel did not err in finding "arbitrary or unjustifiable discrimination" and a "disguised restriction on international trade"**

### **1. Arbitrary or unjustifiable discrimination**

44. The Panel found that Korea's measures entail "arbitrary or unjustifiable" discrimination against Japanese products, because the discrimination was not rationally connected to the measure's SPS objective.<sup>38</sup> Korea claims that the Panel erred both in interpreting and applying Article 2.3.

<sup>27</sup> Panel Report, para. 7.267 (emphasis added).

<sup>28</sup> Panel Report, para. 7.270.

<sup>29</sup> Appellate Body Report, *Australia – Salmon*, para. 251.

<sup>30</sup> Panel Report, para. 7.283.

<sup>31</sup> Panel Report, para. 7.322.

<sup>32</sup> Korea's Appellant's Submission, para. 268.

<sup>33</sup> Korea's Appellant's Submission, para. 269.

<sup>34</sup> Panel Report, para. 7.289. (emphasis added)

<sup>35</sup> See e.g. Panel Report, paras. 2.1-2.11, 7.183-7.190, 7.196-7.199, 7.205-7.209, 7.220-7.237, and 7.290-7.315.

<sup>36</sup> Korea's Appellant's Submission, para. 268.

<sup>37</sup> Korea's Appellant's Submission, para. 269.

<sup>38</sup> Panel Report, para. 7.355.

45. In one argument, Korea objects to the Panel's "rational connection" standard. Korea seems to believe that arbitrary and unjustifiable discrimination arises solely if there is "no rational connection". If there is some rational connection, discrimination is not, it says, arbitrary and unjustifiable.<sup>39</sup> Korea appears to believe that, if "some level of discrimination" might be justified, the *particular* level of discrimination *in the measures at issue* is *necessarily* justified.<sup>40</sup>

46. Korea errs. The particular level of discrimination under the measure at issue must be "*calibrated*"<sup>41</sup> or "*tailored*"<sup>42</sup> to the measure's objective. Thus, the mere fact that "some" discrimination might be justified does not mean that a Member can engage in any kind of discrimination. Rather, as the Panel found, the *particular* level of discrimination under the measure at issue must be rationally connected – calibrated or tailored – to the measure's objective.

47. The Panel also properly applied the rational connection test. For example, the Panel recalled the "very low levels" of radionuclides "detected in Japanese food".<sup>43</sup> Korea's import bans are "rigid and unbending" and take no account of "the risk profile of imported food".<sup>44</sup> Korea did not apply its measures to food from other sources with "a similar potential" for contamination,<sup>45</sup> or when "expected to be highly contaminated".<sup>46</sup> The application of the measures also relies on criteria that have nothing to do with the risk of contamination (e.g. fishing vessel flag; place of processing; or the 0.5 Bq/kg trigger condition for additional testing).<sup>47</sup>

48. Korea argues, though, that its measures are calibrated to the "risks existing inside and outside *Japan's territory*". Korea's argument, again, focuses incorrectly on "*Japan's territory*". The Panel found that Korea's objective concerned SPS risks arising from *food*.<sup>48</sup> Korea has not appealed the Panel's finding on the objective.

49. In another point, Korea contends that the Panel misunderstood *EC – Hormones*. In that case, the Appellate Body accepted that the EU could distinguish between: (1) the *natural occurrence* of growth hormones in meat; and, (2) the *intentional addition* by producers of growth hormones to meat. As the Panel found, the facts here are different.<sup>49</sup>

50. Unlike *EC – Hormones*, there are no man-made radionuclides that are intentionally added by producers to food. Rather, these man-made radionuclides are present in all food, from all over the world, *as a part of the natural growth process*. Further, there is no objective distinction that can be drawn between particular man-made radionuclides, such as caesium, depending on the release event. The health risks of a particular radionuclide do not vary depending on *where and how* it was released. Thus, the Panel correctly concluded that, unlike *EC – Hormones*, this dispute does not compare "*a man-made phenomenon to a naturally occurring one*", but involves "*the same man-made radionuclides released at different times from different events*".<sup>50</sup>

## 2. Disguised restriction on international trade

51. The Panel found that, because Korea's measures involve arbitrary or unjustifiable discrimination, they also involve a disguised restriction. Korea argues that the Panel was incorrect in finding that "arbitrary or unjustifiable discrimination" is a form of "disguised restriction on international trade".<sup>51</sup> However, as Korea itself argued before the Panel,<sup>52</sup> the Appellate Body has found that the term "disguised restriction on international trade" "embrac[es]" within it the concept

<sup>39</sup> Korea's Appellant's Submission, para. 302.

<sup>40</sup> Korea's Appellant's Submission, para. 301, citing Panel Report, para. 7.351. (emphasis added)

<sup>41</sup> Appellate Body Report, *US – Tuna (Article 21.5)*, para. 7.330. (emphasis added)

<sup>42</sup> Panel Report, para. 7.345.

<sup>43</sup> Panel Report, para. 7.343.

<sup>44</sup> Panel Report, para. 7.343.

<sup>45</sup> Panel Report, para. 7.351.

<sup>46</sup> Panel Report, para. 7.343.

<sup>47</sup> Panel Report, paras. 7.344 and 7.345.

<sup>48</sup> Panel Report, para. 7.283.

<sup>49</sup> Panel Report, para. 7.339.

<sup>50</sup> Panel Report, para. 7.339. (emphasis added)

<sup>51</sup> Korea's Appellant's Submission, para. 332.

<sup>52</sup> Korea's first written submission, para. 105.

of "arbitrary or unjustifiable discrimination".<sup>53</sup> Thus, because the Panel found that Korea's measures entail the latter, they also entail the former.

#### **V. THE PANEL DID NOT ERR IN THE TEMPORAL SCOPE OF ITS ASSESSMENT UNDER ARTICLE 11 OF THE DSU IN FINDING THAT KOREA'S MEASURES VIOLATE ARTICLES 2.3 AND 5.6 OF THE SPS AGREEMENT**

52. Throughout the Panel proceedings, there was profound disagreement between the parties as to whether the factual situation continuing after the date of Panel establishment justified the maintenance of Korea's SPS measures.

53. Japan asserted that Korea's SPS measures are inconsistent with Articles 2.3 and 5.6 of the SPS Agreement, at the time the measures were adopted, and to the present. It was a crucial tenet of Korea's position that the measures were justified in light of the "ongoing", "present" situation, which "continue[d]", "today",<sup>54</sup> and this remains a feature of its appeal.<sup>55</sup> Nonetheless, Korea asserted that the Panel was required to disregard evidence submitted by Japan that was either not "available to the Korean authorities when the measures were adopted"<sup>56</sup> ("post-adoption evidence") or, at a minimum, that speaks to the factual situation after the Panel's establishment ("post-establishment facts").

54. The Panel agreed that Articles 2.3 and 5.6 impose obligations "not only when the measures are adopted, but throughout the time they remain in force", i.e. "continuing obligations".<sup>57</sup> As regards Japan's claims regarding the consistency of Korea's measures with Articles 2.3 and 5.6 at the time of adoption, the Panel found that it was required to assess the factual situation existing up to the time of adoption.<sup>58</sup>

55. As regards Japan's claims regarding the continuing obligation on Korea to maintain its measures consistently with in Articles 2.3 and 5.6, the Panel considered that it was required to assess the factual situation between the time Korea's measures were adopted, until the date of establishment. Thus, the Panel decided that it would end its assessment of the facts supporting Japan's *prima facie* case that the measures were maintained inconsistently with Articles 2.3 and 5.6 at the date of Panel establishment.<sup>59</sup>

56. The Panel held that this cut-off date applied *exclusively* to evidence that Japan, as the complainant, relied on to establish its *prima facie* case. In contrast, the Panel found that: (i) Korea, as the respondent, could rely on evidence regarding post-establishment facts to *rebut* Japan's *prima facie* case; and (ii) the Panel could assess evidence of post-establishment facts to *confirm* its findings relating to the situation up to panel establishment.<sup>60</sup>

57. Like Japan, Korea appeals several elements of the Panel's approach to the temporal scope of its assessment as an error under Article 11 of the DSU.

#### **A. Reliance on evidence of post-establishment facts when assessing the maintenance of the challenged measures**

58. First, Korea argues that the Panel erred by relying on evidence of post-establishment facts when assessing whether Japan had demonstrated that the challenged measures were *maintained* inconsistently with the continuing obligations in Articles 2.3 and 5.6.

59. Korea argues that, under the guise of "confirming" of its findings, the Panel relied on evidence of post-establishment facts in assessing Japan's *prima facie* case. Korea argues that, in so doing, the Panel failed to undertake an objective assessment of the matter, under Article 11 of the DSU.

<sup>53</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>54</sup> See e.g. Korea's Second Written Submission, paras. 6, 9, 23, 28, 34, 35, 38, 40, 47, 50, 51, 68, etc.; and headings II.D, II.D.1, II.D.2, and II.F.

<sup>55</sup> Korea's Appellant's Submission, paras. 8, 12, 14, 15, 17, 18, 24, 25, and 285.

<sup>56</sup> Korea's Appellant's Submission, paras. 200 and 335.

<sup>57</sup> Panel Report, paras. 7.135 and 7.136.

<sup>58</sup> See e.g. Panel Report, paras. 7.253-7.256.

<sup>59</sup> Panel Report, para. 7.141.

<sup>60</sup> Panel Report, para. 7.142.

Korea also asserts that, by considering post-establishment facts, the Panel turned the case against Korea into a "moving target".

60. In its own appeal, Japan has demonstrated that the Panel *erred* in disregarding evidence of post-establishment facts in assessing whether Japan had established a *prima facie* case that Korea's measures are maintained inconsistently with Articles 2.3 and 5.6. Therefore, the crucial premise of Korea's appeal is wrong.

61. Should the Appellate Body reject Japan's other appeal, Japan demonstrates below that the Panel did not err in assessing evidence of post-establishment facts *to confirm* Japan's *prima facie* case in light of the most recent factual situation. Had the Panel declined entirely to consider timely-submitted evidence of post-establishment facts, it would have failed to give a resolve the parties' profound disagreement as to whether the measures were justified in the most recent factual situation. Moreover, it would be inconsistent with the due process requirements of Article 11 for the Appellate Body to reverse the Panel's reliance on evidence of post-establishment facts to confirm Japan's *prima facie* case, while at the same time upholding the Panel's reliance on such evidence when submitted by Korea in support of its rebuttal.

62. Moreover, Korea has failed to substantiate its allegations that the Panel failed to assess the facts objectively under Article 11. The Appellate Body has emphasized that it will not "interfere lightly" with a panel's fact-finding authority, and that, to do so, it "must be satisfied that the panel has exceeded its authority as the trier of facts".<sup>61</sup> As the Appellate Body noted, a party asserting that a panel has failed to make an objective assessment "bears the onus of explaining why the alleged error meets the standard of review under Article 11".<sup>62</sup> Korea fails, in its Appellant's Submission, to "explain[] why the alleged error meets the standard of review under Article 11".

63. Specifically, Korea does not assert, much less demonstrate, that the evidence of pre-establishment facts relied upon by the Panel provided an insufficient basis for the Panel's finding that Japan had successfully made a *prima facie* of inconsistency with Articles 2.3 and 5.6.<sup>63</sup> Nor does Korea assert, much less demonstrate, that the evidence of pre-establishment facts on which the Panel relied is *undermined by, and cannot be reconciled with,* the evidence of post-establishment facts on which Korea considers the Panel also relied.<sup>64</sup>

64. As a result, Korea has also failed to establish that the post-establishment evidence is so material to the Panel's findings that its alleged failure to disregard that evidence "has a bearing on the objectivity of the [P]anel's factual assessment".<sup>65</sup>

65. In support of its position, Korea lists a number of instances in which it asserts that the Panel failed to distinguish between, or parse, the relative roles played by pre- and post-establishment evidence in its assessment of Japan *prima facie* case. However, in merely listing these instances, Korea fails to "explain[] why the alleged error meets the standard of review under Article 11".<sup>66</sup>

66. For the sake of completeness, Japan nonetheless addresses each of the pieces of evidence addressed by Korea, and shows that Korea has failed to demonstrate that the Panel's approach to the evidence of pre- and post-establishment facts constitutes an error under Article 11.

67. Additionally, Korea also alleges that, by considering evidence of post-establishment facts, the Panel turned the case against Korea into a "moving target", and compromised Korea's due process rights. The Appellate Body has placed limits on the timing of the *introduction* of the evidence to ensure due process. In drawing the limits in any given case, panels must balance various interests, including the right of *each party* to be afforded a meaningful opportunity to comment on the

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<sup>61</sup> Appellate Body Report, *EC – Seal Products*, para. 5.150; Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>62</sup> Appellate Body Report, *EC – Seal Products*, para. 5.150; Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>63</sup> See Appellate Body Report, *US – Carbon Steel*, para. 142; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185; Appellate Body Report, *EC – Large Civil Aircraft*, para. 1317.

<sup>64</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5)*, para. 292.

<sup>65</sup> Appellate Body Report, *EC – Fasteners*, para. 442.

<sup>66</sup> Appellate Body Report, *EC – Seal Products*, para. 5.150; Appellate Body Report, *EC – Fasteners (China)*, para. 442.

arguments and evidence adduced by the other party.<sup>67</sup> In this case, neither Korea nor the Panel suggested that *any* of the evidence offered by Japan was not timely introduced, or that the Panel deprived it of the right to comment on any of the evidence ultimately considered by the Panel.

## **B. Reliance on post-adoption evidence when assessing the maintenance of the challenged measures**

68. Second, Korea argues that the Panel was required to assess whether the challenged measures were maintained inconsistently with Articles 2.3 and 5.6 of the SPS Agreement solely on the basis of evidence that was "available to the Korean authorities when the measures were adopted".<sup>68</sup>

69. According to Korea, this limitation flows from the Appellate Body Report in *US – Cotton Yarn*.<sup>69</sup> In that case, the panel had erred by reviewing a transitional safeguard measure on the basis of evidence that did not exist when the determination was made. *US – Cotton Yarn*, however, was a dispute about a trade remedy determination. The evidence was, therefore, limited to that which existed at the time the determination was made.

70. Determining which facts are properly subject to assessment under Article 11 of the DSU requires a panel to take into account the features of the particular matter at hand. In particular, the relevant obligation may apply at a particular point in time (e.g. at the time of adoption of a measure); or it may impose obligations that continue over time (e.g. throughout the lifetime of a measure).

71. The obligations imposed on trade remedy determinations are a subset of the obligations that apply at a particular moment in time. Specifically, they apply to a particular act at a particular point in time: they apply to a determination when it is made.

72. In contrast, the obligation to *maintain* SPS measures in a manner consistent with Articles 2.3 and 5.6 of the SPS Agreement belongs to another category of WTO obligation – namely, obligations that apply continuously over time.

73. There are many continuing obligations in WTO law, and a measure subject to one or more of these continuing obligations must be consistent with the obligation throughout the life of the measure. As a result, a complainant can show that the maintenance of a measure violates a continuing obligation based on current circumstances, an approach taken by panels and the Appellate Body in many disputes under a wide range of covered agreements.

## **C. Reliance on post-adoption evidence when assessing the adoption of the challenged measures**

74. Third, Korea argues that the Panel was required to limit its assessment of whether the challenged measures were *adopted* inconsistently with Articles 2.3 and 5.6 of the SPS Agreement to evidence that was "available to the Korean authorities when the measures were adopted".<sup>70</sup> Korea asserts that to do otherwise would give rise to an inconsistency with Article 11 of the DSU.

75. However, the Panel consistently heeded the temporal scope of the evidence in its assessment of Japan's Articles 2.3 and 5.6 claims regarding the consistency of the challenged measures *at the time of adoption*, and *as maintained*.

76. The Panel reached separate conclusions for the measures: at the time they were adopted; in different years; and as maintained.<sup>71</sup> The Panel did so on the basis of evidence matching precisely the temporal scope of its analysis, i.e. at the time the measures were adopted; in different years; or as the measures were maintained.

77. Therefore, Korea's allegation of error under Article 11 is groundless.

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<sup>67</sup> Appellate Body Report, *Thailand – Cigarettes*, para. 150.

<sup>68</sup> Korea's Appellant's Submission, paras. 200 and 335.

<sup>69</sup> Appellate Body Report, *US – Cotton Yarn*, para. 78.

<sup>70</sup> Korea's Appellant's Submission, paras. 200 and 335.

<sup>71</sup> Panel Report, paras. 7.253-7.256, and 8.2.



## VI. THE PANEL DID NOT ERR IN MAKING ITS FINDINGS UNDER ARTICLE 5.7 OF THE SPS AGREEMENT

78. Japan made no claim under Article 5.7 of the SPS Agreement. However, Korea sought to make Article 5.7 relevant to its defense, through a chain of presumptions that led from Article 5.7 to Articles 2.3 and 5.6:

- *First*, Korea asserted that the import bans and additional testing requirements were adopted pursuant to Article 5.7.<sup>72</sup>
- *Second*, Korea argued that, because Japan had not pursued a claim under Article 5.7, the Panel must presume that Korea's measures were consistent with that provision, including the factual propositions underlying Article 5.7.<sup>73</sup> In particular, the Panel must assume – without assessment – that the scientific evidence was *insufficient* to conduct an assessment of the risks from Japanese food.<sup>74</sup>
- *Third*, Korea sought to leverage this presumption in its defense under Articles 2.3 and 5.6. In short, under these two provisions, Korea asserted that the Panel must also presume that, because of uncertainties regarding Japan's territory, the scientific evidence was insufficient to assess the risk. This presumed insufficiency of uncertain scientific evidence was then a key argument in justifying the discrimination and trade-restrictions against Japanese food.

79. Although the Panel entertained Korea's arguments that its "measures fall within the scope of Article 5.7" (i.e. step 1 in the chain just described), it was not willing to do so using a *presumption* (i.e. step 2 in the chain just described). Instead, following the usual rules on burden of proof, Korea bore the burden as the party making assertions regarding the factual conditions under Article 5.7.<sup>75</sup> The Panel found that Korea had not demonstrated that its measures fell within the scope of Article 5.7.

80. On appeal, Korea asserts, *first*, that the Panel failed to respect its terms of reference by making findings under Article 5.7. However, even though a respondent's claims and arguments never feature in a panel request, a panel cannot make an "objective assessment of the matter", including of the "conformity" of the measures, without fully assessing them.

81. *Second*, Korea claims that the Panel applied an erroneous burden of proof under Article 5.7. Japan disagrees. The Panel expressly noted that Korea "*has asserted several factual premises underlying its arguments* – most importantly that there was insufficient scientific evidence to conduct an objective assessment of the risk".<sup>76</sup> The Panel found that "*the party asserting something bears the burden of proving it*", and that nothing in Article 5.7 "supersedes" this basic rule.<sup>77</sup>

82. *Third*, Korea makes numerous allegations of error regarding the Panel's findings as to the sufficiency of the evidence, the available pertinent information, and Korea's failure to review the measures. Korea does not clearly distinguish between errors of interpretation, application, and assessment. It also frequently mischaracterizes the Panel's findings in order to create strawmen it can then knock-down.

83. One argument merits mention. As outlined above, a recurring theme in Korea's appeal is the Panel's supposed failure to account for alleged uncertainties in the scientific evidence regarding the situation at the FDNPP site. Following past cases, the Panel correctly found that the nature of the SPS risk at stake determines which scientific evidence is "relevant" under Article 5.7. Here, that risk relates to food. Hence, the Panel found that the alleged uncertainties did not prevent an assessment

<sup>72</sup> See e.g. Korea's First Written Submission, para. 83; Korea's Second Written Submission, para. 298; Korea's Responses to Questions from the Panel after the First Substantive Meeting (Panel Question No. 106(a)), para. 173.

<sup>73</sup> See e.g. Korea's Opening Statement at the First Substantive Meeting, paras 42-43.

<sup>74</sup> See e.g. Korea's Responses to Questions from the Panel after the First Substantive Meeting (Panel Question No. 106(a)), para. 170.

<sup>75</sup> Panel Report, para. 7.75. See also para. 7.74.

<sup>76</sup> Panel Report, para. 7.75. (emphasis added)

<sup>77</sup> Panel Report, para. 7.75. (emphasis added)

of the risks arising from food. Korea may now disagree with the weight ascribed to environmental conditions but it has failed to show how the Panel committed any errors, as a matter of law or fact.

## VII. THE PANEL DID NOT ERR UNDER ANNEX B(1) AND B(3) OF THE SPS AGREEMENT

84. The Panel found that for each of the challenged measures, Korea had failed to comply with Annex B(1) and B(3). Korea appeals both findings.

85. Annex B(1) requires Members to publish SPS regulations such that interested Members can "become acquainted with" them. For Korea, the Panel erred in finding that publication must allow other Members to know the "conditions (including specific principles and methods) that apply to its goods".<sup>78</sup> Korea argues that the publication need not provide interested Members with the information they need to "comply with" a measure.<sup>79</sup>

86. Korea errs. As the panel in *EC – IT Products* held, publication must communicate "more or less complete" information on a measure's content, so that traders and governments "*know what conditions would apply to their goods*" when imported into a Member's territory".<sup>80</sup> This is confirmed by Annex B(2), which grants producers time, in light of the publication under Annex B(1), to "adapt their products and methods of production to the *requirements* of the importing Member". This is, of course, only possible if producers know, through publication, the "conditions" that constitute the relevant "requirements".

87. As regards application, Korea disagrees that the term "all fisheries products" is too "vague" to communicate the measure's product coverage.<sup>81</sup> The Panel found that this term was not based "commonly used sources for defining terms in international trade in fishery and other aquatic products", such as the Harmonized System definitions.<sup>82</sup> Common definitions of such products are more precise, e.g. addressing products such as algae. Although insisting that its term is not vague, Korea advances no arguments to explain why the Panel erred.

88. Annex B(3) requires the establishment of an enquiry point to respond to questions and provide documents. In one part of its appeal, Korea contests the Panel's finding that an enquiry point is obliged to answer reasonable questions.<sup>83</sup> However, in another part, it accepts that an enquiry point must answer questions.<sup>84</sup>

89. Korea's real grievance is that the Panel expected too much from an enquiry point, imposing a "strict liability" standard for any individual failure to respond.<sup>85</sup> Korea ignores that the Panel said that enquiry points are *not* held to a "standard of perfection".<sup>86</sup>

90. Korea asserts that, on the facts, "the Panel found a single failure to respond to a request to amount to a violation of Annex B(3)".<sup>87</sup> However, the Panel based its finding on a series of failures on the part of the Korean enquiry point.<sup>88</sup>

<sup>78</sup> Korea's Appellant's Submission, para. 357, citing Panel Report, para. 7.464.

<sup>79</sup> Korea's Appellant's Submission, para. 358.

<sup>80</sup> Panel Report, *EC – IT Products*, para. 7.1085. (emphasis added)

<sup>81</sup> Korea's Appellant's Submission, para. 366.

<sup>82</sup> Panel Report, para. 7.481.

<sup>83</sup> Korea's Appellant's Submission, para. 383.

<sup>84</sup> Korea's Appellant's Submission, para. 384.

<sup>85</sup> Korea's Appellant's Submission, para. 383.

<sup>86</sup> Panel Report, para. 7.507.

<sup>87</sup> Korea's Appellant's Submission, para. 385.

<sup>88</sup> Panel Report, para. 7.520.



**ANNEX B-4****EXECUTIVE SUMMARY OF KOREA'S APPELLEE'S SUBMISSION\***

1. Korea responds to Japan's claims in its other appellant's submission that the Panel erred in excluding post-establishment evidence and analysis from consideration of Japan's *prima facie case* under Articles 2.3 and 5.6 of the SPS Agreement, and that the Panel erred in its assessment of "likeness" under Article 8/Annex C(1)(a).

**A. THE PANEL WAS PRECLUDED FROM CONSIDERING POST-ESTABLISHMENT EVIDENCE IN ITS ASSESSMENT UNDER ARTICLES 2.3 AND 5.6**

2. The Panel was required to determine whether the challenged measures were in breach of the SPS Agreement at the time the Panel was established, i.e. on 28 September 2015 or earlier. The Panel was precluded from relying on post-establishment analyses and data to determine whether Japan had succeeded in establishing a violation of the SPS Agreement.

3. First, the dispute settlement provisions of the SPS Agreement are not silent on the temporal scope. Article 11.1 of the SPS Agreement refers to Articles XXII and XXIII of the GATT 1994, and to the DSU. Article XXIII indicates that the nullification or impairment must already be occurring when the representations are made. According to Article 7 of the DSU, the focus of a panel's inquiry is the "matter referred to the DSB" by the complaining party in its panel request. The "matter" must be a situation that is in existence prior to its referral to the DSB.

4. Second, the requirement to make "an objective assessment of the matter" precluded the Panel from considering post-establishment evidence. A panel reviewing an SPS measure must not make a *de novo* review and "must not substitute its own scientific judgment" for that of the domestic regulator.<sup>1</sup> Therefore, in assessing an SPS measure, the panel must consider only the information that was available to the domestic regulator. When a panel is established, a regulator could at most have available to it measurements taken up to that date. The same applies with respect to analyses based on those measurements. Assessing the consistency of an SPS measure against data not yet in existence at the time the panel is established would be to effectively impose a requirement on regulators to divine how the data will look in the future. If a panel were to consider this information, it would be substituting its own judgment for that of the domestic regulator, and thus engaging in *de novo* review.

5. Contrary to Japan's argument, a panel that considers the situation existing up to panel establishment is considering the "matter" in its entirety consistently with Articles 7 and 11 of the DSU. The fact that a complaining party raises claims relating to the maintenance of the SPS measure does not change this conclusion.

6. Third, the DSU's objectives to provide a prompt, satisfactory and positive resolution to the dispute under Articles 3.3, 3.4, and 3.7 do not mean that the Panel was required to consider post-establishment evidence. Prompt, satisfactory, and positive solution do not mean settlement in favor of the complaining party, as Japan seems to contend. In fact, allowing a complaining party to initiate litigation before a breach has actually materialized is precisely the type of litigious behavior that Article 3.10 seeks to discourage. In addition, an equally important objective of the WTO dispute settlement mechanism is to provide security and predictability. Japan's approach in which the materialization of the violation becomes a "moving target" that can occur at any time during the panel proceedings undermines security and predictability.

7. Fourth, Japan correctly draws a distinction between this case and cases involving the timing of the introduction of evidence. Korea agrees that the issue here is not the timing of the introduction of evidence, but that the evidence must demonstrate that the violation had materialized at the time

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\* Total word count: 1277

<sup>1</sup> Appellate Body Reports, *US / Canada – Continued Suspension*, para. 590 and *Australia – Apples*, para. 213.

the Panel was established. The evidence that Japan advances to support its claims reflect circumstances that post-date the Panel's establishment, and therefore, cannot be considered.

8. Lastly, the case law does not support Japan's position. The fact that prior panels took a different approach than the one preferred by Japan does not make it incorrect.

9. While Japan contests the Panel's decision not to consider post-establishment evidence, Japan claims that these errors do not vitiate the Panel's ultimate findings under Articles 2.3 and 5.6, and requests that the Appellate Body complete the analysis. However, the Appellate Body should reverse the Panel's determinations because, while it claimed to preclude post-establishment evidence, the Panel failed to properly distinguish between pre- and post-establishment evidence in its assessment under Articles 2.3 and 5.6. Furthermore, the Appellate Body should not complete the legal analysis as there are insufficient factual findings by the Panel and insufficient undisputed facts on the panel record to complete the analysis.

## **B. THE PANEL PROPERLY DECIDED NOT TO APPLY A PRESUMPTION OF LIKENESS UNDER ARTICLE 8 AND ANNEX C(1)(A)**

10. The Panel's findings that Japan failed to establish that the imported products can be presumed to be "like" the Korean products do not constitute legal error.

11. First, the Panel was not under an obligation to apply a presumption of likeness, but was permitted to conduct a likeness analysis using the traditional criteria.<sup>2</sup> While previous panels and the Appellate Body have *permitted* the application of a presumption in certain circumstances, there is no requirement that a panel is *obligated* to apply a presumption of likeness.

12. A presumption by nature is not absolute, and can be rebutted.<sup>3</sup> A presumption cannot stand in the face of evidence relating to the four traditional likeness criteria that have an impact on the competitive relationship between products. Thus, regardless of whether or not the Panel should have applied a presumption, the Panel was entitled to consider evidence on the traditional likeness factors.

13. Second, the Panel appropriately considered Korea's health concerns as a factor in its analysis of likeness. Japan provides no basis for its claim that a panel is permitted to examine only the terms of a measure when determining whether a measure makes a distinction solely based on origin. The determination of whether a distinction is based exclusively on origin will depend on the "nature, configuration, and operation of the measure at issue".<sup>4</sup> These factors do not limit the Panel's examination to the terms of a measure.

14. In addition, the application of a measure only to Japanese products cannot in itself demonstrate that origin was the *sole* distinction, if the basis for distinguishing Japanese products was *also* based on a factor other than the origin of the product. An SPS measure by nature makes a distinction based on health and safety risks associated with the product's origin, and thus public health concerns, as those demonstrated in the evidence submitted by Korea, are the most relevant factor in determining whether the measure makes a distinction solely based on the origin of the product.

15. Third, the Panel correctly found that Korea successfully rebutted Japan's presumption of likeness. Korea established the impact of the public health concerns in the marketplace and explained that consumers have continued to distinguish between Japanese and Korean food products and shown concern about the health risks that result from radionuclide contamination of Japanese food products, because of the accident and ongoing radiation from the nuclear plant.

16. For the foregoing reasons, Korea respectfully requests that the Appellate Body dismiss Japan's other appeal.

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<sup>2</sup> Report by the Working Party on Border Tax Adjustments, L/3464, para. 18.

<sup>3</sup> See Appellate Body Report, *Argentina – Financial Services*, para. 6.45.

<sup>4</sup> Japan's other appellant's submission, para. 421.

**ANNEX C**

ARGUMENTS OF THE THIRD PARTICIPANTS

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## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION**

1. In its Third Participant Submission before the Appellate Body, Brazil provides comments on three issues: (i) the terms of reference of the Panel; (ii) the burden of proof under Article 5.7 of the SPS Agreement; and (iii) Member's transparency obligations under Annex B(1) of the SPS Agreement.
2. Concerning the terms of reference of the Panel, Brazil notes that Korea cited Article 5.7 in its First Written Submission. Therefore, the provisions of Article 7.2 of the DSU should apply. Brazil understands, therefore, that Article 5.7 was within the terms of reference of the Panel.
3. In regard to the burden of proof under Article 5.7 of the SPS Agreement, Korea claims not to have based its defense on the "qualified right" or "qualified exemption" of Article 5.7, and that it only mentioned said Article as a "context" related to the insufficiency of relevant scientific evidence when Korea's SPS measures were adopted. Brazil submits that the general rule concerning the burden of proof – that it rests upon the party that presents a claim – should be followed in the present case.
4. Lastly, Brazil maintains that the proper interpretation of the Annex B(1) of the SPS Agreement should find that said provision establishes an obligation to make SPS measures public in a way that it is sufficiently thorough, in order to allow other Members to understand the means by which they can comply with them. Such assessment should be made on a case-by-case basis.

**ANNEX C-2**

## EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION\*

**1 KOREA'S AND JAPAN'S APPEALS RELATED TO THE PANEL'S USE OF POST-ESTABLISHMENT FACTS**

1. Regarding the first part of Korea's Article 11 appeals, the EU does not see how the Panel could have addressed claims dealing with *maintenance* if it restricted its findings to pre-adoption facts. Furthermore, the EU points out that the post-establishment facts in this dispute seem to be simply confirming the Panel's conclusion based on pre-establishment facts. Thus, the Panel's concern that complainants could challenge WTO-consistent measures in the hope that future facts might make them inconsistent did not arise here. The Panel's due process concerns could also be addressed by other means, such as temporal limits for the submission of evidence.

2. In principle, the EU agrees that the prompt, satisfactory and positive solution of disputes under Article 3 of the DSU is best served when panels make findings and recommendations on the basis of the most recent available facts, subject to due process constraints. The extent to which post-establishment facts are relevant varies depending on the relevant obligation. In the context of the SPS Agreement, the underlying facts may change significantly over time, and it seems artificial for a Panel to close its eyes completely to such evidence. It should, however, be kept in mind that regulators cannot be expected to react instantaneously to new factual developments.

3. On the other hand, the European Union does not consider that a Panel *necessarily* errs by adopting a "cut-off date" for its assessment, depending on the relevant obligations, the facts of the dispute, what the parties assert and what the evidence demonstrates.

**2 KOREA'S APPEALS IN RELATION TO ARTICLE 5.7 OF THE SPS AGREEMENT**

4. Regarding the alleged violations of the Panel's terms of reference, the EU notes that this question may depend, *inter alia*, on whether, and in what capacity, Korea validly invoked Article 5.7 and on the relationship between Article 5.7 and Articles 2.3 and 5.6. In the latter respect, the EU recalls its position that Articles 2.3 and 5.6 remain applicable also with respect to a provisional measure under Article 5.7 but that the respective obligations would have to be applied and interpreted also in light of Article 5.7 if the measure falls within its scope. For this purpose, a panel can consider whether a measure falls within the scope of Article 5.7 even if Article 5.7 is not cited in the panel request. However, a panel should not make findings of inconsistency with Article 5.7 (and particularly the conditions contained therein) absent a claim in the panel request.

5. Regarding the important systemic issue of which party bears the burden of proof under Article 5.7, the EU notes the jurisprudence by the Appellate Body in the *Continued Suspension* cases that the burden of proof for Article 5.7 falls on the complaining party. Therefore, in principle, it is for the complainant to demonstrate that the relevant scientific evidence is sufficient to conduct a risk assessment that supports the proposition that the product is safe. That said, a respondent seeking to shelter under Article 5.7 must ensure not only that the circumstances justify the applicability of that provision, but also that it has complied with the conditions set out therein. There must be some basis for a legitimate concern. The EU notes that the circumstances in which the parties invoked (or did not invoke) Article 5.7 are rather peculiar in the present case.

6. With respect to Korea's claim that there was not insufficient evidence, the EU takes the position that not every factor listed in Article 5.2 is equally relevant for a given risk assessment. While the EU does not opine on the facts of the present case, it considers that it is not excluded that in a case where food-related risks are at issue, the more general ecological and environmental conditions in a Member's territory may be of more limited or, potentially, even of no relevance.

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\* Total word count: 1222

### **3 KOREA'S APPEAL UNDER ARTICLE 5.6 OF THE SPS AGREEMENT: KOREA'S ALOP**

7. It is for each WTO Member to set its own ALOP. Since the ALOP is the starting point of a panel's analysis under Article 5.6, a panel errs if it sets the alternative measure against an ALOP that does not fully correspond to what it initially found the regulating Member's ALOP to be.

8. The EU agrees with Korea that, for all practical purposes, the Panel determined that the ALOP was "1 mSv/year". The key issue in this respect is the relationship between that benchmark and the qualitative elements of the ALOP: are the latter made operative by the quantitative benchmark, or are they additional to it? It was for Korea, as the regulating Member, to clarify this relationship in a way that enables a meaningful assessment under Article 5.6.

### **4 KOREA'S APPEALS UNDER ARTICLE 2.3 OF THE SPS AGREEMENT**

9. The EU takes the view, in line with previous case law, that the regulatory objective of a measure should inform the Panel's determination of the relevant conditions to be compared and that determining the relevant conditions in a particular dispute will be case-specific. The EU does not opine on the facts of the case but considers that the term "similar conditions" Article 2.3 does not exclude a comparison that would be product-focused and that the ecological and environmental conditions in a Member's territory must not necessarily be assessed in every case.

10. The EU agrees with Korea that under *US – Gasoline*, discrimination under the first sentence should only "be taken into account" under the second sentence.

### **5 KOREA'S APPEALS UNDER ARTICLE 7 AND ANNEX B OF THE SPS AGREEMENT**

11. The EU agrees that in certain circumstances a published SPS measure may not be understood without reference to other documents in which case the publication obligation under Annex B(1) may extend to such other documents (e.g. methods). The EU considers that the obligation to publish is an objective one and the fact that a responding Member somehow became acquainted with an SPS measure through other means would not eliminate the inconsistency regarding a measure that is not adequately published. The EU takes the view that individual instances of not replying to a question by an enquiry point will only lead to inconsistency with Annex B(3) in exceptional circumstances.

### **6 JAPAN'S APPEALS UNDER ARTICLE 8 AND ANNEX C(1)(A) OF THE SPS AGREEMENT**

12. The central non-discrimination provision in the SPS context, which should inform the likeness test, is Article 2.3 of the SPS Agreement. Annex C(1)(a) should be interpreted in the light of Article 2.3. It should not be read as introducing an additional and distinct non-discrimination discipline on SPS measures, even when such measures contain procedural elements.

13. The health risks that underlie the testing and control procedures at issue should be taken into account under Annex C(1)(a), for example as "factors or circumstances unrelated to the foreign origin of the product" that would explain why they are less favourable for the products of the importing Member, or as issues relevant in assessing whether the distinction made between domestic and like products is based exclusively on origin. This should not, however, amount to an analysis of the regulator's subjective motivation for adopting the Annex C measure.

**ANNEX C-3****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION****Introduction<sup>1</sup>**

1. The United States presents its views on certain issues raised on appeal by Korea and Japan. In this submission, the United States will address certain issues of legal interpretation concerning the *Agreement on Sanitary and Phytosanitary Measures* (the "SPS Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
2. In Section II, the United States explains why Korea's claims under Articles 6.2, 7.1, and 11 of the DSU that the Panel committed legal error in making findings under Article 5.7 must fail.
3. While the Panel's terms of reference under Articles 6.2 and 7.1 limit the scope of the "matter" before it, Article 7.2 requires panels to address all relevant provisions "cited by the parties to the dispute." The matter at issue, as identified in Japan's panel request, included claims under Articles 2.3, 5.5, and 5.6 of the SPS Agreement. Given Korea's reference to Article 5.7 in its written submissions, the Panel was within its authority to examine the applicability of Article 5.7.
4. Korea's claim under DSU Article 11 must fail because Articles 6.2 and 7.1 set out a panel's terms of reference and Article 11 does not provide an additional legal basis for the review of a panel's authority.
5. In Section III, the United States explains that the Panel acted consistently with its obligations under the DSU in limiting its reliance on post-panel establishment evidence to assess the consistency of Korea's measures with the relevant obligations at the time of the Panel's establishment.
6. Under the DSU, it is the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the Panel, that are properly within the Panel's terms of reference. The post-establishment evidence offered by Japan is therefore relevant to the extent that it relates to the legal situation that existed on that date.
7. Any later-in-time measures a Member may impose – whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel – would be addressed by the panel's recommendation under Article 19.1 of the DSU, which is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.
8. In Section IV, the United States explains that the Panel's elaboration of the "essential elements" to be included in the publication of a measure would appear to go further than the text of paragraph 1, Annex B warrants.
9. Based on its text, paragraph 1 requires publication of SPS *regulations*, including "laws, decrees or ordinances which are applicable generally." The SPS measure must be published "promptly" and "in such a manner as to enable interested Members to become acquainted with them." Thus, Members must be able to become acquainted with the relevant *SPS regulation* itself. The Panel's interpretation reads into the publication requirement additional requirements not set out in the text of paragraph 1.

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<sup>1</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 580 words, and this U.S. third participant submission (not including the text of the executive summary) contains 5,859 words (including footnotes).

10. Finally, in Section V, the United States shows that paragraph 3 of Annex B creates a procedural obligation to ensure that an enquiry point "exists" and that this enquiry point "is responsible for" providing certain information. It does not impose a substantive obligation to provide information or explain the reasons behind its measures, nor does it specify the nature of the enquiry point's response. Members' substantive obligations with respect to transparency and the provision of information regarding SPS measures are created by other provisions of the SPS Agreement.

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