

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on "the text of the measure [at issue] or other documents on the record", the Panel merely relied on one internal unpublished document and two press releases announcing the 2011 and 2013 additional testing requirements.⁵⁶⁸ Japan contends that these documents did not include the entire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

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

5.7.4 Conclusion

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

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

6 FINDINGS AND CONCLUSIONS

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

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

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

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

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

6.1 Article 5.6 of the SPS Agreement

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

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

6.2 Article 2.3 of the SPS Agreement

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

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

- a. We therefore find that the Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement in finding that similar conditions prevail between Japan and other Members.
- b. Consequently, we reverse the Panel's findings of inconsistency with Article 2.3 with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures.

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

6.3 Article 5.7 of the SPS Agreement

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

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

6.4 The Panel's treatment of evidence

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

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

6.5 The Panel's expert selection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.9 Recommendation

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

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

Shree Baboo Chekitan Servansing
Presiding Member

Ujal Singh Bhatia
Member

Thomas R. Graham
Member
