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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS495/R.

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ADOPTED WORKING PROCEDURES OF THE PANEL

24 February 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any party, at the latest on the first substantive meeting, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures. Exceptions to this procedure shall be granted upon a showing of good cause.

4. Consistent with Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Panel may seek expert advice from experts and from international organizations and adopt additional procedures to this end, as appropriate.

5. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

6. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

7. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

8. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Based on the nature of the request the Panel will consider whether additional briefing is required and make changes to the timetable as necessary. This is without prejudice to any requests for rulings based on circumstances that arise later in the process. Requests for such rulings should be made as soon as possible after a party becomes aware of a potential issue.

9. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers

to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

10. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. Translations should include all germane portions of documents that the party seeks to rely upon. Germane portions include not only specific provisions of measures, but also relevant context. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. It is expected that Japan, as the complainant, will submit translations into English of the relevant measures with its first written submission. Should Korea have any objections to the translations provided by Japan, it shall identify those objections in writing no later than at the time of Korea's first written submission. Any objection as to the accuracy of a translation submitted by either party subsequent to the first written submissions should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of the objection and an alternative translation. The Panel may make an exception to these deadlines upon a showing of good cause.

11. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

12. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6.

Questions

13. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior or subsequent to each substantive meeting.

Substantive meetings

14. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. Geneva time three working days prior to the Panel meeting.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite Korea to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a

timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first.

e. The Panel may, after consultation with the parties, set time limits for the opening statements; such time limits would be informed to the parties before the first substantive meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Korea if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Korea to present its opening statement, followed by Japan. If Korea chooses not to avail itself of that right, the Panel shall invite Japan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. Geneva time of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

17. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

18. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation and whether it will be making an oral statement in advance of this session and no later than 5.00 p.m. (Geneva time) the previous working day.

19. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies for the

interpreters through the Panel Secretary. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. (Geneva time) of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

20. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. The Panel will not summarize in the descriptive part of its report, or annex to its report, the facts and arguments as presented to the Panel by the parties in the course of the proceedings. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

21. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. The executive summary shall not exceed 30 pages.

22. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 3 paper copies of all documents it submits to the Panel. Exhibits may be filed in 3 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute. However, any Excel format documents contained in exhibits which are not suitable for a printed version may be filed in an electronic form only and in that event the electronic version of such documents filed to the Panel shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party and third parties. Each party shall be required to serve on all third parties only those of its written submissions made in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, provided that the recipient party or third party has indicated its prior consent in writing to the submitting party or third party and the Panel Secretary is so notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties. The Panel will annex these procedures to its report.

ANNEX A-2

PANEL WORKING PROCEDURES FOR CONSULTATIONS WITH EXPERTS[1]

24 February 2016

28. In accordance with paragraph 4 of the Working Procedures, if in the course of the proceedings, the Panel shall determine that there is a need to seek expert advice[2] the procedures described below shall apply. In addressing matters concerning scientific and/or technical advice from experts, the Panel shall have regard to the provisions of the DSU and, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost.

29. After consultation with the parties, the Panel may ask any relevant institutions, as well as the parties, for suggestions of possible experts. Parties shall not engage in direct contact with the individuals suggested (whether by the parties or the international organizations) on any matter related to this dispute.

30. The Panel shall provide the parties with a list of possible experts, their *curricula vitae* and declarations of potential conflicts of interest. In this declaration, each potential expert will be instructed to disclose information which may include the following:

a. financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

b. professional interests (e.g. a past or present relationship with private clients or relevant industry, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

c. other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);

d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and

f. any other relevant information.

31. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.

32. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts whom the Panel considers to have a conflict of interest either after self-disclosure or otherwise. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

33. The Panel shall inform the parties of the experts and international organizations it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in

[1] These procedures are adopted in accordance with paragraph 4 of the Panel's Working Procedures adopted on 24 February 2016.

[2] For the purpose of these Working Procedures, the term "expert" may be used to refer to individuals, institutions, research bodies, or international organizations.

their personal capacities and not as representatives of any entity. However, should the Panel seek advice from an international organization, the advice received shall be deemed to be received from the international organization and not the individual staff members or representatives of the international organization. Moreover, any staff members of such international organization that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective international organization.

34. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

35. The Panel shall prepare written questions for the experts. The parties will be invited to suggest a limited number of questions that the Panel could include in its questions to the experts. The experts shall be requested to provide responses in writing to the Panel's questions within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The responses of experts shall be part of the Panel's record but shall not be attached to the Panel report as annexes. The Panel shall provide the parties with copies of the responses, in accordance with the adopted timetable. The parties shall have the opportunity to comment in writing on the responses from the experts. The parties shall also have the opportunity to pose written questions to the experts in advance of the meeting, to assist the experts in their preparation for the meeting. The parties are invited to pose these questions or any others at the meeting.

36. The Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel’s questions.

37. The Panel may schedule a meeting with the experts, in conjunction with the second substantive meeting with the parties. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

g. the parties' comments on the experts' responses are provided to all experts;

h. each expert is provided with the other experts' responses to the Panel's questions; and

i. each expert is provided with any advance questions from the parties to the experts.

38. The Panel's meeting with the experts would be conducted as follows:

j. The Panel shall invite each expert to make an opening statement. This statement may include, but is not limited to, any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel and the parties with written versions of their statements, before they take the floor. The Panel shall make available, to the other experts, and to the parties, a final "as delivered" version of each expert's written statement, no later than 5.00 p.m. on the first working day following the meeting.

k. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To facilitate this, each party may send in writing in advance of the meeting, within a timeframe to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the Panel's meeting with the experts. Each expert shall be invited to respond orally to the parties' questions, whether posed in advance or for the first time at the meeting, and to react to the parties' comments.

l. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions. The Panel may also give the other experts the opportunity to address any question or comment.

m. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement.

n. The Panel may pose additional written questions or schedule additional meetings with the experts if necessary.

39. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceeding. This transcript shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

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ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. In March 2011, a major earthquake and tsunami resulted in an accident at the Fukushima Dai-ichi nuclear power plant ("FDNPP"). The personal, societal, physical and emotional consequences of the earthquake, tsunami and FDNPP accident have been immense for Japanese society. The loss of life and severe injury caused by the earthquake and tsunami were devastating, and the consequences to Japanese society enduring.

2. One of the consequences of the FDNPP accident was the release of radioactive nuclides ("radionuclides") into the environment, and ultimately into food for human consumption. The ingestion of food containing radionuclides may have adverse health consequences. Japan fully recognizes Members' rights to take measures to protect their people from adverse health consequences. Indeed, Japan shares the same goal. In pursuit of that goal, Japan and other countries have taken measures to limit exposure to radionuclides in food, including the adoption of maximum threshold levels for radionuclides in food.

3. At the heart of this dispute, however, is the fact that the Republic of Korea ("Korea") has adopted measures that do not respond appropriately to concerns raised by the FDNPP accident. Instead, Korea's measures discriminate arbitrarily or unjustifiably between similarly situated Members, and are more trade restrictive than necessary to achieve Korea's desired level of protection of public health, in violation of Articles 2.3 and 5.6 of the *Agreement on Sanitary and Phytosanitary Measures* ("*SPS Agreement*"). Korea has also failed to observe the transparency obligations under Annex B to the *SPS Agreement*, and further disciplines under Annex C to the *Agreement*.

4. Korea's discriminatory and unnecessary measures include import bans for certain food products from Japan, and additional testing requirements on other food products from Japan that each contain radionuclides at levels well below the thresholds adopted by Korea. Korea itself described its import bans as preventing imports of Japanese fisheries products "regardless of their radioactive contamination". Korea also described its additional testing requirements as, "in effect", "a total import ban". Moreover, explaining the reasons for its measures, Korea cited, among others, the dismal economic condition of Korean fishermen, who, it said, were suffering losses.[1]

5. To assist with questions of a scientific nature, Japan submitted expert analyses prepared by Professor Brenner and Dr. Buesseler, two eminent experts in the scientific fields at issue in these proceedings. Similarly, to assist with questions concerning the scientific evidence of record in these proceedings, the Panel appointed five independent experts, each of which overwhelmingly supported the key factual propositions underlying Japan's claims. Japan will recall the experts' views throughout this executive summary.

II. MEASURES AT ISSUE

A. Korea's import bans on Japanese food products

6. Korea maintains two sets of import bans applicable to Japanese food products: (i) product-specific bans applicable to fisheries products and agricultural products from certain Japanese prefectures; and, (ii) a blanket import ban on all fisheries products from eight Japanese prefectures.[2] The product-specific bans were introduced incrementally by Korea after the FDNPP accident. The blanket import ban was introduced in September 2013. Japan's claims concern the import bans, as they apply to 28 species of fisheries products from the eight prefectures subject to

[1] Japan's FWS, paras. 1-8. Japan's references to its submissions include references to the exhibits cited therein.

[2] Japan's SWS, para. 19. See also Japan's FWS, paras. 115-120.

the blanket import ban. In each instance, Korea asserts that the measures take the form of a press release. These press releases do not contain all relevant details regarding these measures.

B. Korea's pre-market additional testing requirements for food products from Japan

7. Korea applies different pre-market testing requirements to Japanese food and food imported from other countries. Specifically, Korean pre-export testing requirements apply solely to Japanese food products, and do not apply to food product from other countries.[3] For Japanese food products, pre-export testing for cesium is required; and, if more than 0.5 Bq/kg of cesium is detected, additional testing for 17 other radionuclides is also required. Although at-the-border testing in Korea applies to imports from all countries, the requirements differ for Japanese food products and for food products from other countries.

8. *First*, with respect to at-the-border cesium testing, Korea subjects every consignment of *Japanese* food to cesium testing.[4] At-the-border cesium testing applies to Japanese food products irrespective of whether the consignment has already undergone pre-export cesium testing. For food products imported from countries *other than Japan*, at-the-border cesium testing is conducted based on a random selection of consignments for testing.

9. *Second*, if cesium is detected in *Japanese* food imports, the consignment is subject to at-the-border additional testing for 17 other radionuclides.[5] Like pre-export additional testing, *non-Japanese* food imports are not subject to at-the-border additional testing.

10. Korea asserts that its measures take the form of press releases. The press releases announcing the introduction of Korea's *pre-export* cesium testing and additional testing requirements, which apply *solely to Japan*, and the press releases announcing the introduction of Korea's at-the-border cesium testing and additional testing requirements, do not specify all relevant detail regarding these measures.[6]

C. Korea's point-of-sale testing scheme, which is not at issue in these proceedings

11. Korea also conducts random point-of-sale testing on "the 150 most frequently-consumed food products distributed in the Korean market".[7] Point-of-sale testing, which is conducted by taking samples from shops at the retail level, applies to products of all origins. Point-of-sale testing involves cesium testing and, if cesium is detected, additional testing for certain other radionuclides. Thus, point-of-sale testing applies to randomly-selected food products that are already in free circulation in the Korean market.

12. Point-of-sale testing allows Korea to verify the assumptions on which its approach to regulating SPS risks arising from the presence of man-made radionuclides in food is based, in a manner that is neither discriminatory nor trade restrictive. Japan does not challenge Korea's point-of-sale testing in these proceedings.

III. FACTUAL BACKGROUND TO THE DISPUTE

A. Japan's approach to regulating exposure to radionuclides in food

13. Since the FDNPP accident, Japan has put in place comprehensive food safety measures covering food production, distribution and export. To secure compliance with its appropriate level of protection ("ALOP") for radionuclides in food of 1 mSv/year – a measure that represents the maximum annual dose exposure for consumers from radionuclides in food – Japan has adopted: (i) Bq/kg thresholds for cesium in food products; (ii) a regime for the monitoring of radionuclides in food products; and (iii) area-specific distribution restrictions on certain food products, where thresholds are exceeded. The effectiveness of Japan's measures is illustrated by the fact that, in

[3] Japan's SWS, para. 28.
[4] Japan's FWS, paras. 127-137; Japan's SWS, para. 30.
[5] Japan's FWS, para. 129; Japan's SWS, para. 31.
[6] Japan's FWS, paras. 165-178; Japan's SWS, paras. 32-38.
[7] Japan's SWS, para. 45.

more than 233,000 consignments of Japanese food products imported into Korea, each tested for cesium, Korea has not found a single consignment with cesium in excess of its 100 Bq/kg threshold.[8] The IAEA and FAO found "that the measures taken to monitor and respond to issues regarding radionuclide contamination of food are appropriate, and that the food supply chain is under control".[9] Similarly, the Panel-appointed experts confirmed the adequacy of Japan's regulatory approach and its sampling practices.[10]

14. Central to Japan's regulatory regime is its derivation of a cesium threshold that takes into account dose contributions from other radionuclides. Japan's adoption of a cesium threshold reflects the dominant role of cesium in releases and contamination from the FDNPP accident, both in terms of activity levels and dose contribution. Based on measurements of the relationship between cesium and the other radionuclides, Japan calculated a cesium threshold that ensures that the combined exposure from cesium *and* the additional radionuclides does not exceed 1 mSv/year, in accordance with Codex Stan 193-1995. In deriving the cesium threshold, Japan started with (i) its 1 mSv/year ALOP, and (ii) an assumption of the percentage of food that would be contaminated. Japan then took into account, (iii) for various population subgroups, (iv) the types and quantities of food consumed per year, and (v) the ingestion-dose coefficient for each radionuclide.

15. In undertaking its calculation, Japan used a formula provided by Codex, with the addition of a number of assumptions that are far more conservative than dictated by Codex. First, it assumed that *50 percent* of food contains the relevant radionuclides at the threshold level, whereas Codex assumes just 10 percent; second, compared to Codex's assumption, Japan assumed that larger amounts of foods are consumed per year; and, third, rather than regulating groups of radionuclides in isolation, Japan took into account the quantitative relationships (or ratios) between the relevant radionuclides. Japan thereby calculated a threshold for cesium that ensures that the *combined* exposure from all relevant radionuclides does not exceed 1 mSv/year. Whereas Codex's cesium threshold is 1000 Bq/kg, Japan calculated a 100 Bq/kg cesium threshold.[11] The Panel-appointed experts unequivocally confirmed the appropriateness and conservativeness of Japan's calculations.[12]

16. Contrary to Korea's assertions, Japan's calculations of its 100 Bq/kg cesium threshold take into account the contribution from cesium *and other relevant radionuclides*. The calculations estimated that cesium and these other radionuclides would contribute to the overall radiation dose in an annual *average* ratio of 88:12 (50:50, in the case of marine products). Korea characterizes the use of this ratio as involving an assumption of a "scaling factor" between cesium and the other radionuclides that is fixed and unchanging. This is wrong; the estimated relationship is simply an *average* spread over *an entire year's worth of food*, during which each meal could have a very different Cs:Sr ratio, without that variability calling into question Japan's conservative calculations.

17. This conclusion is confirmed by actual test results under Japan's monitoring schemes,[13] and was confirmed by the Panel-appointed experts.[14]

B. Japan's food monitoring program and testing schemes for radionuclides

18. Following the FDNPP accident, Japan implemented a comprehensive monitoring program for the environment and food, and has taken regulatory decisions, including food distribution

[8] Japan's FWS, para. 359; Japan's response to Panel Question 8, para. 37; Japan's comment on Korea's response to Panel Question 120, para. 162; Korea's response to Panel Question 120, para. 51.

[9] Japan's FWS, paras. 57-60.

[10] Transcript of Panel meeting with the experts, para. 3.70. See also Id., paras. 1.199, 1.201, 3.88, 3.89, 3.91, 3.138, 3.152, 3.155, 3.186, 3.219, 4.136; Japan's response to Panel Question 123, paras. 187, 188.

[11] Japan's FWS, para. 346-375; Japan's SWS, paras. 238-240; Japan's comments on experts' responses, para. 36; Japan's comments on Korea's comments on experts' responses, paras. 93-106; Japan's response to Panel Questions 123 and 148, paras. 179-183, 322-331.

[12] Transcript of Panel meeting with the experts, paras. 1.129, 1.136, 1.137, 1.147, 1.240, 3.15, 3.55, 4.1, 4.2; Compilation of experts' replies, experts' responses to Panel Questions 77, 78 and 81.

[13] Japan's FWS, paras. 376-394; Japan's SWS, paras. 241-244, 253-289; Japan's response to Panel Question 148, paras. 332-342.

[14] Transcript of Panel meeting with the experts, paras. 4.58-4.59; Compilation of experts' replies, experts' responses to Panel Questions 82 and 83.

restrictions, based on information gathered through that program. Japan's monitoring program ensures that the overall committed dose exposure of Japan's population from the ingestion of food remains below 1 mSv/year, by ensuring that levels of cesium in sampled food products do not exceed 100 Bq/kg. Between April 2012 and March 2016, more than 1.2 million samples were tested for cesium under this program.

19. Japan has designated 17 of its 47 prefectures for mandatory monitoring, and monitoring extends to food products from all categories of food.[15] Japan targets food products that are expected, based on scientific understanding and available information, to contribute the highest committed dose level from radionuclides in food. Such products are subjected to increased testing. Monitoring activities are continuously informed and refined on the basis of past results.[16] The Panel-appointed experts confirmed that Japan's approach represents a widely-accepted food safety sampling technique.[17]

20. On the basis of cesium test results under Japan's monitoring program, Japan has also imposed (and, where warranted by testing results, lifted) distribution restrictions for various food products.[18]

21. In addition to its cesium monitoring program, Japan maintains a number of testing schemes that cover cesium and additional radionuclides. These schemes include: nationwide market-basket surveys; nationwide and Fukushima prefecture duplicate diet surveys; strontium testing of fisheries products; testing of fish and shellfish by Japan's Ministry of the Environment; testing of fisheries products close to the FDNPP site by TEPCO; joint testing by Japan and Korea; test results included in the Environmental Radioactivity database, for both fisheries and non-fisheries products; and a FY 2014 study of various fisheries and non-fisheries products.[19]

22. Test results under these programs reveal that contamination levels for fisheries and non-fisheries products from Japan are, with rare exceptions, significantly below Japan's (and Korea's) cesium threshold of 100 Bq/kg, such that there is no risk that dose exposures for Japanese consumers from radionuclides in food will exceed 1 mSv/year. For the additional radionuclides, contamination levels of Japanese fisheries and non-fisheries products are also significantly below the Codex thresholds adopted by Korea. Since Japanese products represent only 0.37 percent of the Korean diet, there is no risk that consumption of Japanese food products results in dose exposure for Korean consumers in excess of 1 mSv/year.[20]

23. The Panel-appointed experts have confirmed the adequacy of Japan's test results, and in particular that there are sufficient test results to support the above conclusions.[21] With respect to the number of test results for each of the 28 species at issue, specifically, there are a sufficient number of cesium test results for each species across the prefectures at issue; with respect to strontium test results, there are test results for each of the 28 species at issue, and additional test results from representative species. In light of the low contamination levels, in particular for strontium, these test results are representative, and sufficient to support Japan's factual propositions, as the Panel-appointed experts have, once again, confirmed.

C. Korea's references to subsequent releases at the FDNPP site

24. Korea asserts that its measures are justified by the release of contaminated water from the FDNPP site subsequent to the accident. To begin, any post-accident release events that have occurred are 1000 times smaller than the initial releases, such that they have no impact on the factual propositions advanced by Japan. Moreover, monitoring around the FDNPP site continues on a daily and even hourly basis, including through a real-time radioactivity detection system for

[15] These are: grains, vegetables, fruits, cultivated edible fungi, marine products, freshwater fisheries products, cattle meat, other livestock products, game meat, wild plants and wild edible fungi, milk for infant use, tea and drinking water and processed foods

[16] Japan's FWS, paras. 63-73; Japan's response to Panel Question 7, paras. 16-27; Japan's response to Panel Question 123, paras. 166-177.

[17] Transcript of Panel meeting with the experts, paras. 3.88, 3.89, 3.91, 3.138; Compilation of experts' replies, experts' responses to Panel Questions 15 and 63.

[18] Japan's FWS, paras. 74-77; Japan's response to Panel Question 19, paras. 102-104.

[19] Japan's FWS, paras. 63-73; Japan's response to Panel Question 123, paras. 184-186.

[20] Japan's SWS, para. 243.

[21] Compilation of experts' replies, experts' responses to Panel Questions 44, 46, 57, 62, 89.

seawater at the mouth of the FDNPP port that measures levels of cesium and total beta emitters, including strontium.[22]

25. The Panel-appointed experts confirmed that any ongoing releases do not undermine Japan's factual propositions. The experts also emphasized the importance of Japan's ongoing monitoring of the seawater near the FDNPP site, and the value of real-time public access to the data recording that monitoring activity.

IV. STANDARD OF REVIEW

26. Korea contends that, in reviewing Japan's claims, the Panel must defer to the assessments made by the domestic regulator in adopting the challenged measures. Korea asserts that the Panel may not undertake a *de novo* review of those measures.

27. Korea's approach is inconsistent with the Panel's duty under Article 11 of the DSU, and Articles 2.3 and 5.6 of the *SPS Agreement*, which together shape the Panel's standard of review. Rather than accept Korea's partisan "judgment" about its measures, the Panel must make its own *objective* assessment of the matter, including by scrutinizing the scientific evidence of record.[23]

28. Non-discrimination, as embodied in Article 2.3, is a cornerstone principle of WTO law.[24] In assessing compliance with this principle under Article 2.3, or otherwise, WTO adjudicators do not simply defer to the judgment of domestic regulators.[25] Likewise, in assessing the "necessity" of a measure under Article 5.6, panels never simply defer to the judgment of the domestic regulator. To the contrary, and as expressly stated by the Appellate Body, in reviewing claims under Article 5.6, panels must make an objective assessment of the matter, and scrutinize all relevant evidence.[26]

29. Even assuming that deference were required, Korea has pointed to *no* formal process or explanation that preceded the adoption of its measures to which the Panel could defer.

V. TEMPORAL SCOPE OF EVIDENCE

30. Japan challenges the continuing inconsistency of the import bans and the additional testing requirements with continuing obligations under the *SPS Agreement*, on the basis of evidence speaking to the factual situation at the time of, and subsequent to, Panel establishment on 28 September 2015.[27]

31. Nonetheless, Korea contends that the Panel cannot consider evidence that did not exist on: (i) 6 September 2013, when Korea adopted the blanket import ban and additional testing requirements; or (ii) 28 September 2015, the date of Panel establishment.

32. In any dispute, the temporal scope of the evidence is influenced by whether a claim is made regarding the adoption or the maintenance of a measure (or both), and by the temporal scope of the obligations at issue – that is, do the obligations serving as the legal basis for the complainant's claim apply at a specific time (e.g., at the time of adoption of the measure), or do they impose continuing obligations (e.g., on the maintenance of the measure).[28]

33. Articles 2.3 and 5.6 of the *SPS Agreement* impose a continuing obligation with respect to the maintenance of a measure: similar to Article 6.1 of the *SPS Agreement*, which the Appellate Body found to impose a continuing obligation, these provisions use the present tense in conjunction with "ensure", and contain no language limiting the temporal scope.[29] Furthermore, Article 5.6 applies "when establishing or maintaining" SPS measures. The ordinary meaning of the verbs used

[22] Japan's FOS, para. 32; Japan's response to Panel Question 9, paras. 42-49; Japan's SWS, paras. 506-508; Japan's comment on Korea's response to Panel Question 117, para. 131.
[23] Japan's SOS, para. 30.
[24] Japan's SOS, para. 34.
[25] Japan's SOS, para. 34.
[26] Japan's SOS, paras. 29-43.
[27] Japan's response to Panel Question 115, paras. 46-47.
[28] Japan's response to Panel Question 115, paras. 42-43.
[29] Japan's SOS, paras. 17, 20.

indicates that these provisions impose an obligation at all times. Article 7, Annex B, Article 8 and Annex C similarly impose continuing obligations.

34. In these circumstances, the Panel is required to consider the most up-to-date evidence available to determine whether, in light of the latest available facts, Korea is engaged in a *continuing* violation of its *continuing* obligations.

35. Indeed, Article 11 of the DSU requires a panel to make an objective assessment of the matter, including an objective assessment of the evidence of record. This means that where a complainant claims that a measure is being maintained after panel establishment in a manner that is inconsistent with a continuing obligation, the panel must assess the present WTO-consistency of the measure on the basis of the most up-to-date evidence available, subject to due process considerations.[30]

36. This allows the DSB to make *timely and relevant* recommendations and rulings in accordance with Article 3.3 of the DSU, which states that the "prompt" settlement of disputes is "essential"; with Article 3.4 of the DSU, which requires the DSB's recommendations and ruling to "be aimed at achieving a satisfactory settlement of the matter"; and with Article 3.7 of the DSU, which states that the objective of dispute settlement is "to secure a positive solution to a dispute". In contrast, if a panel fails to consider the most recent evidence, resolution of the dispute may be delayed, and a "satisfactory settlement" and "prompt" and "positive" solution thwarted, because the parties may disagree whether, in view of recent evidence, the measure continues to be WTO-inconsistent.

37. The long-standing and consistent case law under a range of covered agreements – including the *SPS Agreement*, GATT 1994, *Agreement on Agriculture*, *Anti-Dumping Agreement*, *SCM Agreement*, *TBT Agreement*, and *TRIPS Agreement* – supports an assessment of continuing inconsistency with continuing obligations on the basis of up-to-date post-establishment evidence.[31] Indeed, under the *SPS Agreement* itself, the panels in *Australia – Salmon*, *Japan – Apples*, *Australia – Apples*, and *Russia – Pigs* all relied on evidence post-dating establishment.[32] Similarly, the Panel in this dispute must assess the consistency of Korea's measures on the basis of the latest available evidence, including the post-establishment evidence on which Korea itself relies.

38. In any event, were the Panel to decide, erroneously, that the consistency of Korea's measures must be assessed solely against the factual situation existing at the time of establishment, the Panel should rely on any evidence, whenever submitted or prepared, that speaks to the situation at the time of establishment. In this regard, Japan recalls that it has submitted evidence that establishes violations of the relevant SPS provisions both at the time of, and after, Panel establishment.[33]

39. Should the Panel decide that it is appropriate to limit its assessment of the consistency of Korea's measures to evidence pertaining to the situation at the time of establishment, Japan urges the Panel to make alternative findings based on all evidence before it. Such findings would enable the Appellate Body to complete the legal analysis, were it to decide that the Panel erred in failing to assess post-establishment evidence.

VI. KOREA'S ARGUMENTS UNDER ARTICLE 5.7 OF THE *SPS AGREEMENT*

40. Throughout the proceedings, Korea has argued that its measures are "provisional", within the meaning of Article 5.7 of the *SPS Agreement*, because it considers the scientific evidence concerning the situation at the FDNPP to be insufficient, and the number of strontium test results for fisheries products to be similarly insufficient.

41. While any relevant insufficiencies in the scientific evidence must be taken into account in the objective assessment by a panel of claims brought under Articles 2.3, 5.6, 7 and 8, Korea itself has acknowledged that the status of a measure as "provisional" does *not* alter the scope of

[30] Japan's response to Panel Question 115, para. 48.
[31] Japan's response to Panel Question 115, paras. 57-143.
[32] Japan's response to Panel Question 115, paras. 78-81.
[33] Japan's comments on Korea's response to Panel Question 115, paras. 91-121, and references cited therein.

application of those provisions.[34] In any event, as the Panel-appointed experts have confirmed, no relevant uncertainties or insufficiencies in the evidence exist.[35]

42. Separately, Japan has also established Korea's failure to comply with the requirements of Article 5.7, including to seek information necessary to *review* its allegedly provisional measures. Since imposition, in September 2013, of the last of the measures at issue in these proceedings, Korea has ceased trying to obtain and review additional information. The only exception concerns the activities of the government-mandated and -organized "Korean Group", which suspended its activities in May 2015 following Japan's request for consultations. Therefore, even were Article 5.7 directly applicable to claims brought under Articles 2.3, 5.6, 7 and 8, Korea has not observed the requirement, under Article 5.7, to seek continuously to obtain additional information.[36]

VII. KOREA'S IMPORT BANS AND PRE-MARKET ADDITIONAL TESTING REQUIREMENTS ARE INCONSISTENT WITH ARTICLE 2.3 OF THE *SPS AGREEMENT*

A. Interpretation of Article 2.3

1. Article 2.3, first sentence

43. A panel's assessment under the first sentence of Article 2.3 involves three cumulative steps.[37] *First*, the panel identifies the SPS risks that a respondent seeks to regulate, in order to determine the group of products that gives rise to those risks. *Second*, the panel looks to the regulatory treatment afforded to those products to determine whether products of some origins are treated less favourably – i.e., whether there is discrimination. *Third*, the panel considers whether this discrimination is arbitrary or unjustifiable.

a. Identical or similar conditions prevail

44. To ensure an apples-to-apples comparison of similar conditions, a panel must begin by identifying the *basket of products* of different origins that present the *same or similar SPS risks* that are regulated by the SPS measures at issue.

45. To undertake the appropriate apples-to-apples comparison, a panel must begin by identifying the conditions relevant to the dispute.[38] The starting point is the *respondent's own regulatory framework*.[39] The respondent's measure is important, because it reveals the SPS risks that the respondent seeks to regulate and, in turn, the products that are potentially subject to discriminatory regulatory treatment. The relevance of the measure to identifying the SPS risks at issue is confirmed by the definition of the term "SPS measure" as set out in Annex A(1) of the *SPS Agreement*, which includes measures that "protect human or animal life or health…from risks arising from additives, contaminants, toxins or disease-causing organism in foods, beverages or feedstuffs".[40] These SPS risks are a central part of the identification of the relevant conditions that ensure an apples-to-apples comparison and, ultimately, of the overall enquiry under Article 2.3.

46. To assess whether conditions are similar, a panel must begin by identifying, based on the SPS measures at issue, the *basket of products* of different origins that present the *same or similar SPS risks*.[41] To be included in the basket, a product must present the SPS risk that the *respondent itself* has chosen to regulate through the challenged measure. This process ensures an assessment that connects the SPS risk regulated by the measure at issue with the basket of products presenting that risk. The assessment is designed to review whether the respondent is distorting consumer choice in the marketplace by imposing discriminatory restrictions on products of some origins that present the regulated SPS risk, when it does not impose the same restrictions

[34] Japan's response to Panel Question 108, paras. 453-503; Japan's SWS, paras. 53-69.
[35] Compilation of experts' replies, experts' responses to Panel Questions 26, 44, 46, 57, 59, 62, 89, and 92. Transcript of the Panel meeting with the experts, paras. 4.1, 4.2, 4.133, 4.139, 4.143.
[36] Japan's FWS, paras. 102-108; Japan's SWS, paras. 65-67, 481-492; Japan's comments on Korea's responses to Panel Questions 150 and 151, paras. 293-305.
[37] Japan's FWS, paras. 200-202; Japan's SWS, para. 74.
[38] Japan's FWS, paras. 203-207; Japan's SWS, para. 83.
[39] Japan's FWS, paras. 203-204; Japan's SWS, para. 83.
[40] Japan's SWS, para. 84.
[41] Japan's SWS, para. 86.

on products of other origins that present the same or similar SPS risks. This approach has been taken by previous panels.[42]

47. Article 5.5 of the *SPS Agreement*, along with the SPS Committee's *Guidelines to Further the Practical Implementation of Article 5.5*, confirm Japan's interpretation.[43] Article 5.5 involves "different" yet comparable "situations", where distinctions in the ALOP may result in discrimination that is arbitrary and/or unjustifiable. The Guidelines confirm that discrimination comparisons must be made between situations that involve "sufficient common elements to render them comparable". The Guidelines further underscore that the comparability turns on *the types of SPS risk at stake*, with the relevant conditions differing depending on whether the SPS risks pertain to the spread of pests or diseases, or to "food-borne risks". In the case of "food-borne risks", the Guidelines confirm that "situations involving the same type of substance or pathogen" are comparable.

48. Japan's product-based interpretation of Article 2.3 is consistent with, and supported by, the origins of that provision in the GATT 1994, and with the context provided by the parallel provisions under the GATT 1994.[44] Starting with the discrimination element, Article 2.3 embodies disciplines against discrimination on both national treatment (i.e., products from the Member's "own territory and that of other Members") and most-favoured nation ("between Members") grounds.[45] Article 2.3 of the *SPS Agreement*, therefore, reflects both the national treatment and most-favoured nation disciplines also enshrined in Articles III:4 and I:1 of the GATT 1994. Specifically, Articles III:4 and I:1 discipline discrimination between ***products*** of different origins.[46] The origin of Article 2.3 in the non-discrimination provisions of Articles III:4 and I:1, therefore, confirms that Article 2.3 ultimately also concerns discrimination between ***products***.

49. In contrast, Korea argues that a panel's assessment of "similar conditions" does not allow for a product-based comparison. Instead, Korea interprets Article 2.3 to permit solely a comparison of the environmental conditions prevailing in the territories of two or more Members.[47] Along with ignoring the text and the context of Article 2.3, Korea's interpretation would erroneously exclude certain types of SPS measures, such as measures regulating additives or contaminants in products, from the scope of a provision that was expressly drafted to impose "basic … obligations" that apply to *all* SPS measures.[48]

b. Discrimination

50. Having established that products from different sources are similarly-situated based on relevant conditions, such that they are comparable, a complainant must next show that the challenged measure "discriminate[s] between Members" in respect of the regulatory treatment afforded to the comparable products. This element of the analysis is satisfied when comparable products from different Members are treated "differently", based on origin.[49]

c. Discrimination is arbitrary or unjustifiable

51. If comparable products of different origins are afforded different treatment, a panel must consider whether the difference in treatment is arbitrary or unjustifiable. This may be the case where, e.g.: (i) the reasons for the discrimination are not rationally connected to the measure's objective; (ii) a measure leaves no scope for taking into account conditions in the exporting country; or (iii) a Member restricts products from some sources in response to a particular risk, but does not verify whether products from other sources pose the same risk. Panels have held that the same facts may underlie both a finding that conditions are identical or similar, and a finding that discrimination is arbitrary or unjustifiable.[50]

[42] Japan's FWS, paras. 204-205.
[43] Japan's SWS, paras. 88-89.
[44] Japan's response to Panel Question 133, para. 232.
[45] Japan's response to Panel Question 133, para. 235.
[46] Japan's response to Panel Question 133, para. 236.
[47] Japan's SWS, para. 94.
[48] Japan's comment to Korea's response to Panel Question 134, para. 233.
[49] Japan's FWS, para. 208.
[50] Japan's FWS, para. 211.

2. Article 2.3, second sentence

52. SPS measures that arbitrarily or unjustifiably discriminate also constitute a "disguised restriction", under the second sentence of Article 2.3, although the latter may additionally extend to measures that do not arbitrarily or unjustifiably discriminate. Other factors may, therefore, also establish the existence of a disguised restriction.[51]

B. Korea's import bans and pre-market additional testing requirements are inconsistent with the first sentence of Article 2.3 of the *SPS Agreement*

1. Similar conditions prevail with respect to food products of Japanese origin and those of Korean or third country origins

53. As reflected in its regulatory framework, Korea seeks to protect its consumers from adverse health consequences arising from exposure to radionuclides in food. Thus, Korea has adopted thresholds (in Bq/kg) to ensure that dose exposure for Korean consumers from the consumption of food products does not exceed 1 mSv/year. In particular, Korea has adopted the same 100 Bq/kg cesium threshold adopted by Japan. In addition, Korea has adopted Codex thresholds for the additional radionuclides. Korea has implicitly confirmed the particular relevance it attaches to cesium as an indication of the presence of the additional radionuclides; under its regulatory regime, Korea requires testing for the additional radionuclides where cesium contamination in a food product exceeds 0.5 Bq/kg.

54. In establishing the similarity of conditions with respect to food products of Japanese and non-Japanese origin, Japan has, therefore, focused on the particular SPS risks regulated by Korea, and has identified two relevant conditions for ensuring a relevant apples-to-apples comparison between food products of Japanese and non-Japanese origin. Specifically, Korea's regulatory regime demonstrates that the two relevant conditions relate to (i) the presence of cesium and the additional radionuclides, and (ii) the risk that cesium and the additional radionuclides exceed Korea's thresholds.[52]

55. Japan has, in turn, provided evidence demonstrating two factual propositions relevant to its claims under Article 2.3: (i) that food products of all origins contain cesium and the additional radionuclides; and, (ii) that food products of all origins pose a similar – and similarly low – risk of containing cesium and the additional radionuclides in excess of Korea's thresholds. Japan has demonstrated these factual propositions based on evidence pertaining to the situation at the time of Panel establishment on 28 September 2015, as well as during the pendency of the Panel proceedings.[53]

a. Food products of all origins contain cesium and other radionuclides

56. With respect to the first factual proposition, Japan has demonstrated that food products of all origins contain cesium and the additional radionuclides.[54]

57. Beginning with cesium data for Japanese food products, Japan notes that, in the months immediately following the FDNPP accident, cesium (^{134}Cs and ^{137}Cs) levels in food products from the most affected areas of Japan increased considerably. However, the cesium dispersed rapidly in the environment, which has been reflected in reduced cesium levels in Japanese food products, as established by test results. In addition, the quantity of cesium has decreased due to physical decay. In particular, ^{134}Cs has largely decayed away since 2011, due to its half-life of two years. Since the two cesium isotopes were initially present in equal proportions, almost half of the cesium

[51] Japan's FWS, para. 221.

[52] Japan's FWS, paras. 228-239; Japan's FOS, para. 20; Japan's SWS, para. 109.

[53] Japan's FWS, paras. 240-291; Japan's response to Panel Questions 38 and 45, paras. 147-155, 183-196; Japan's SWS, paras. 109-144; Japan's comments on experts' responses, paras. 9-28; Japan's response to Panel Question 136, paras. 254-282; Japan's comments on Korea's response to Panel Question 115, paras. 98-109.

[54] Japan's FWS, paras. 240-291; Japan's responses to Panel Questions 38 and 45, paras. 147-155, 183-196; Japan's SWS, paras. 109-144; Japan's comments on experts' responses, paras. 9-28; Japan's response to Panel Question 136, paras. 254-263; Japan's comments on Korea's response to Panel Question 115, paras. 98-102.

has decayed away. Nonetheless, food products from Japan continue to contain cesium at low levels.

58. Turning to cesium data for non-Japanese food products, at-the-border testing by both Korea and Japan, as well as Korea's point-of-sale testing, show what Professor Brenner and Dr. Buesseler demonstrated based on general scientific knowledge about the impact of prior release events, such as nuclear weapons testing and Chernobyl: food of non-Japanese origin also contains cesium. While Korea does *not* test *all* non-Japanese products for cesium, between March 2011 and July 2016, it nonetheless detected cesium in excess of 1 Bq/kg but below its threshold of 100 Bq/kg in 281 samples from Korea and the rest of the world. In contrast, Korea tests *all* imports from Japan for cesium. Having tested all Japanese food imports for cesium *during the period March 2011 to July 2016*, Korea detected cesium between 1 Bq/kg and 100 Bq/kg in 333 samples, which is not many more than it detected as a result of mere *random sampling* of food from non-Japanese sources. Importantly, for both Japanese and non-Japanese food, Korea has detected cesium in samples across all food categories. Similarly, Japan's at-the-border testing identified a large number of samples of food from the rest of the world with cesium below 100 Bq/kg.

59. Moreover, test results from Japanese testing schemes covering the additional radionuclides show that Japanese food products contain the additional radionuclides. Similarly, non-Japanese food products also contain the additional radionuclides. For instance, point-of-sale test results submitted by Korea indicate that a number of Korean and non-Japanese food products for which cesium was detected also contained strontium or plutonium. This evidence is confirmed by what is known about the radionuclides released during various release events, as explained by Professor Brenner and Dr. Buesseler, and by test results for Japanese food products prior to the FDNPP accident.

60. To recall, Japan has established the factual proposition that food of Japanese and non-Japanese origin contains cesium and the additional radionuclides both as of 28 September 2015, and during the pendency of the Panel proceedings.

61. The Panel-appointed experts confirmed the accuracy of Japan's conclusions.[55]

b. Food products of all origins pose a similar – and similarly low – risk of containing cesium, strontium, and other radionuclides in excess of Korea's thresholds

62. Moreover, food of Japanese and non-Japanese origin pose similar – and similarly low – risks of containing cesium, strontium and the other radionuclides in excess of Korea's thresholds. This conclusion is confirmed by evidence compiled on a food category-by-food category basis.[56]

63. Data from Japan's food monitoring program show that, for fiscal year ("FY") 2015, *more than 99% of all cesium test results, across all food categories,* are at the lowest level (0-25 Bq/kg), and thus significantly below Korea's threshold of 100 Bq/kg. The evidence for FY 2015 demonstrates that there are only five food categories for which cesium test results in Japanese food products tested in Japan, have, on occasion, exceeded Korea's 100 Bq/kg threshold. These are: (i) wild plants and edible fungi (which includes blueberries and mushrooms); (ii) processed foods; (iii) game meat; (iv) grains; (v) freshwater fisheries products. These food categories are the same categories for which higher cesium levels are expected based on general scientific knowledge. Indeed, Korea's and Japan's at-the-border cesium testing and Korea's point-of-sale cesium testing reveal that food of non-Japanese origin in these categories also, on occasion, exceeds Korea's 100 Bq/kg cesium threshold.

64. Moreover, Japan has demonstrated, on the basis of data from Japanese testing schemes covering the additional radionuclides, that Japanese food products do *not* exceed Korea's thresholds for the additional radionuclides. Japan has also demonstrated that Japanese fisheries products with cesium below 100 Bq/kg do *not* exceed Korea's thresholds for the additional

[55] Compilation of experts' replies, responses to Panel Questions 19, 49 and 52.

[56] Japan's FWS, paras. 240-291; Japan's responses to Panel Questions 38 and 45, paras. 147-155, 183-196; Japan's SWS, paras. 109-144; Japan's comments on experts' responses, paras. 9-28; Japan's response to Panel Question 136, paras. 264-282; Japan's comments on Korea's response to Panel Question 115, paras. 103-109.

radionuclides. Similarly, non-Japanese food products do *not* exceed Korea's thresholds for the additional radionuclides. For instance, point-of-sale test results submitted by Korea indicate that a number of Korean and other non-Japanese food products for which cesium was detected contained strontium or plutonium below their respective thresholds. This evidence is confirmed by what is known about the radionuclides released during various release events, as explained by Professor Brenner and Dr. Buesseler, and by test results for Japanese food products prior to the FDNPP accident.

65. As noted, Japan has established the factual proposition that food of Japanese and non-Japanese origins pose a similar – and a similarly low – risk of containing cesium and the additional radionuclides in excess of Korea's thresholds both as of 28 September 2015, and during the pendency of the Panel proceedings.

66. The Panel-appointed experts confirmed the accuracy of Japan's conclusion.[57]

2. Korea's measures discriminate between Japanese and non-Japanese products

a. Korea's import bans discriminate between the banned Japanese products and non-Japanese products

67. Korea treats differently comparable products from countries where the same or similar conditions prevail. Specifically, the Japanese products that are the subject of Japan's claim are simply banned, regardless of the radiation level. Korea itself described its import bans as preventing imports of Japanese fisheries products "regardless of their radioactive contamination". In contrast, food products from Korea and third countries are granted market access if cesium testing of random samples demonstrate the presence of no more than 100 Bq/kg of cesium.[58]

68. As a result, Korea discriminates against Japanese food products. Specifically, the banned Japanese products are treated "differently" than food products of Korean and third country origin; the import bans alter the conditions of competition to the detriment of the banned products, by denying any opportunity to compete in the Korean market.

b. Korea's pre-market additional testing requirements discriminate between Japanese and non-Japanese products

69. Korea's pre-market additional testing requirements likewise discriminate against Japanese products. For Japanese food products, additional radionuclide testing is required if more than 1 Bq/kg of cesium is detected. In contrast, for food products from other sources, no pre-market additional testing requirements apply; rather, products from other sources are subject solely to random cesium testing.[59]

70. Korea argues that, by virtue of its point-of-sale testing scheme, *all* products, regardless of origin, are subject to additional testing for other radionuclides, if 1 Bq/kg of cesium is detected. However – and regardless whether point-of-sale testing for additional radionuclides is mandatory[60] – Korea's assertions about point-of-sale testing do not resolve the discriminatory treatment afforded Japanese food products under Korea's pre-market additional testing requirements, for at least five reasons.[61]

71. *First*, Japanese food products are subject to *both* pre-market and point-of-sale additional testing, whereas non-Japanese food products are never subject to pre-market additional testing.[62] *Second*, point-of-sale additional testing is conducted solely for strontium and plutonium, whereas pre-market additional testing is conducted for ^{90}Sr, ^{238}Pu, ^{239}Pu, ^{240}Pu and 13 other radionuclides.[63] *Third*, point-of-sale additional testing applies to 150 food products, whereas pre-

[57] Compilation of experts' replies, responses to Panel Questions 43, 44 and 49.
[58] Japan's FWS, para. 292; Japan's SWS, para. 145.
[59] Japan's SWS, para. 146.
[60] Japan's response to Panel Question 136, paras. 244-253.
[61] Japan's SWS, paras. 47-51.
[62] Japan's SWS, paras. 47-51.
[63] Japan's SWS, paras. 47-51; Japan's response to Panel Question 136, para. 248.

market additional testing applies to all Japanese food products.[64] *Fourth,* point-of-sale additional testing applies only to randomly-selected samples of food found to contain at least 1 Bq/kg of cesium, whereas pre-market additional testing applies to all consignments of Japanese food found to contain at least 1 Bq/kg of cesium.[65]

72. *Fifth*, pre-market additional testing is highly trade restrictive. To begin, compliance with pre-market additional testing is a condition precedent for Japanese imports to secure market access in Korea. That is, where an imported Japanese food item is found to contain at least 1 Bq/kg of cesium in pre-market cesium testing, market access for the entire consignment from which that item was drawn is withheld until pre-market additional testing is completed. In contrast, food randomly selected for point-of-sale testing is already circulating freely in the Korean market, and where a randomly-selected food item is found to contain at least 1 Bq/kg of cesium in point-of-sale testing, the consignment from which that food item originated remains in free circulation, unaffected by point-of-sale additional testing on the particular food item at issue.[66]

73. Moreover, the costs of pre-market additional testing are borne by the exporter, which substantially increases the costs of exporting to Korea – a fact acknowledged by Korea itself. In contrast, the costs of point-of-sale additional testing appear to be borne by Korea, which undertakes the testing.[67]

74. Accordingly, the treatment afforded to Japanese goods under Korea's pre-market additional testing requirements in no way mirrors the treatment afforded to all goods under Korea's point-of-sale testing regime. This conclusion applies, whether or not point-of-sale additional testing is mandatory. Thus, that Korea's point-of-sale testing regime is applicable to all food products does not level the playing field for Japanese food.

3. Korea's import bans and pre-market additional testing requirements discriminate arbitrarily and unjustifiably

a. Similarity of conditions shows unjustifiable discrimination

75. Korea treats differently comparable products from countries where the same or similar conditions prevail. There exists no rational SPS-related explanation for the difference in regulatory treatment Korea affords products from Japan, and products from elsewhere.[68]

76. Korea's regulatory framework seeks to ensure that Korean consumers are not exposed to radiation in excess of 1 mSv/year from the presence of radionuclides in food; to achieve this objective, Korea has adopted a cesium threshold of 100 Bq/kg. The low risk that Japanese products exceed Korea's 100 Bq/kg threshold for cesium is similar to the low risk that products from other sources exceed Korea's regulatory threshold. In particular, products of *all* origins have contamination levels that fall well *within Korea's chosen tolerance limits*.[69]

77. Thus, given that products from Japan and of non-Japanese origins have similar levels of cesium and additional radionuclides – both in absolute levels and in relation to Korea's tolerance limits – they present similar SPS risks. Accordingly, there is no SPS-related rationale to justify the discriminatory imposition of the import bans and the pre-market additional testing requirements on Japanese food products that are found to have cesium levels below 100 Bq/kg.

78. The arbitrary and unjustifiable nature of Korea's measures is further confirmed by the fact that the decision whether to subject two fish caught *in the same fishing area* to Korea's at-the-border additional testing requirements turns on the *flag flown* by the vessel that caught the fish, or the place where the fish is *processed and/or packed* – rather than by the area in which the fish was caught.[70]

[64] Japan's SWS, paras. 47-51.
[65] Japan's response to Panel Question 136, para. 250.
[66] Japan's response to Panel Question 136, para. 251.
[67] Japan's response to Panel Question 136, para. 252.
[68] Japan's SWS, para. 157.
[69] Japan's SWS, para. 160.
[70] Japan's SWS, para. 163.

79. Finally, a variety of statements made by Korea further confirm that there exists no rational SPS-related explanation for the difference in regulatory treatment Korea affords products from Japan, and products from other sources.[71] An adjudicator should consider statements made by government officials, in their official capacity, which shed light on the explanation or rationale for discrimination.[72]

b. Alleged uncertainties do not justify discriminatory treatment

80. Korea seeks to justify the discrimination of Japanese food products by alleging a number of uncertainties and insufficiencies in the evidence: (i) uncertainty about the levels of radionuclides released during and since the FDNPP accident; (ii) uncertainty regarding the continued and future release of radionuclides at the accident site; and, (iii) uncertainty regarding the relationship between cesium and other radionuclides.[73]

81. None of these alleged claims of uncertainty or insufficiency in the evidence justifies the discrimination.[74] Alleged uncertainty regarding the levels of contamination in Japanese seawater, sediment, soil and air and alleged uncertainty with respect to continuing and future releases of radionuclides are irrelevant, because the regulated SPS risks associated with Japanese *food* are not only knowable, but known, and they do not justify any discrimination. More specifically, given that (i) testing is available and reliable, (ii) the testing results are known, and (iii) the testing results indicate that more than 99 percent of products from Japan are within Korea's regulatory threshold of 100 Bq/kg, there is no basis on which any alleged uncertainties in *general environmental conditions* in Japan would justify the discrimination. This has also been confirmed by the Panel-appointed experts.[75]

82. Korea's assertion regarding lack of certainty about the relationship between cesium and other radionuclides must likewise be dismissed. As confirmed by the Panel-appointed experts,[76] and Professor Brenner and Dr. Buesseler,[77] any uncertainty that may exist regarding this relationship exists similarly for food products from all origins, and does not undermine Japan's factual propositions.

c. Radioactivity from both the FDNPP accident and other release events is part of the "ordinary environment"

83. Korea asserts that the challenged measures are designed to ensure that exposure to radiation from food consumed by Korean consumers remains at a level that exists *in the "ordinary environment".*[78] To Korea, the contribution to radionuclide contamination levels made by the Chernobyl accident and by weapons testing is part of the "ordinary environment"; in contrast, the contribution to radionuclide contamination levels made by the FDNPP accident is not.[79]

84. Japan recalls that the "ordinary environment", i.e., a world without man-made radionuclides, ceased to exist in the 1940s. Radiation release events since the 1940s have dispersed radionuclides widely. All of these man-made radionuclides are now a "given" in the environment – until such time as they undergo radioactive decay. Thus, the "ordinary environment" to which Korea refers has long ceased to exist.[80]

85. Moreover, these events have, in general terms, released the same main group of man-made radionuclides into the environment. In this respect, there exists no scientific basis to consider

[71] Japan's SWS, paras. 168-172; Japan's FWS, para. 305.
[72] Japan's SWS, para. 207.
[73] Japan's SWS, para. 178.
[74] Japan's SWS, paras. 181-182.
[75] Compilation of experts' replies, responses to Panel Questions 12, 15, 26, 44, 59, 91, 92.
[76] Compilation of experts' replies, responses to Panel Questions 44, 57, 89; Transcript of the meeting with the Parties, paras. 3.176, 3.180.
[77] Japan's SWS, para. 188.
[78] Japan's SWS, paras. 190-191.
[79] Japan's SWS, para. 192.
[80] Japan's SWS, para. 193.

radionuclides from the FDNPP accident to be any less part of the "ordinary environment" than other nuclear releases.[81]

C. Korea's import bans and pre-market additional testing requirements are inconsistent with the second sentence of Article 2.3 of the *SPS Agreement*

86. All arguments and evidence demonstrating the inconsistency of the import bans and the pre-market additional testing requirements with the first sentence of Article 2.3 also establish that Korea's import bans and pre-market additional testing requirements amount to a disguised restriction on international trade. Moreover, both measures are prohibitive and – as has been admitted by Korea – aim to exclude Japanese products from the Korean market.[82]

VIII. KOREA'S IMPORT BANS AND PRE-MARKET ADDITIONAL TESTING REQUIREMENTS ARE INCONSISTENT WITH ARTICLE 5.6 OF THE *SPS AGREEMENT*

A. Interpretation of Article 5.6 of the *SPS Agreement*

87. Article 5.6, read with footnote 3, sets out a three-pronged test. To establish that an SPS measure is more trade-restrictive than required, a complainant must demonstrate that there is an alternative measure that: (i) achieves the regulating Member's ALOP; (ii) is significantly less trade-restrictive than the challenged SPS measure; and (iii) is reasonably available, taking into account technical and economic feasibility.[83]

88. The proposed alternative must, first, achieve the regulating Member's ALOP. Demonstrating this element of Article 5.6 involves the following three conceptual steps: (i) identifying the regulating Member's ALOP; (ii) determining what level of protection would be achieved by the proposed alternative measure; and (iii) comparing the two, to verify that the alternative measure achieves the regulating Member's ALOP.[84]

B. Korea's import bans and pre-market additional testing requirements are inconsistent with Article 5.6 of the *SPS Agreement*

89. Japan has demonstrated that Korea's import bans and pre-market additional testing requirements are inconsistent with Article 5.6 because cesium testing achieves Korea's ALOP and is significantly less trade-restrictive.

1. Japan's alternative measures achieve Korea's ALOP

a. Korea's ALOP for radionuclide contamination in food is 1 mSv/year

90. Korea's ALOP aims to ensure that the dose exposure of Korean consumers from radionuclides in food remains below 1 mSv/year.[85] In September 2013, Korea provided Japan with a document that describes 1 mSv as the "[l]imit of annual radiation dose that is allowed through food for the public". In September 2014, Korea informed Japan that its ALOP for exposure to radiation from the ingestion of food contaminated with radionuclides is "based on the Codex Standards". Codex, in turn, sets out exposure guidelines for food "based on an intervention exemption level of 1 mSv in a year". In 2015 and 2016, Korea issued explanatory materials that describe the "dose limit for general public (except for medical purposes)" as 1 mSv/year. Finally, in its submissions to the Panel, Korea has clarified that "[t]he *1 mSv/year radiation exposure limit* is a Codex benchmark that *Korea has adopted*, in order to *quantify the highest radiation exposure it is willing to accept*". Korea's characterization echoes the *SPS Agreement*, which defines an ALOP as a Member's "*acceptable* level of risk".

[81] Japan's SWS, para. 194.
[82] Japan's SWS, paras. 211-212.
[83] Japan's FWS, para. 61.
[84] Japan's FWS, paras. 318-328.
[85] Japan's FWS, paras. 337-339; Japan's FOS, paras. 56-57; Japan's SWS, paras. 220-234; Japan's SOS, paras. 53-65; Japan's comments on Korea's response to Panel Questions 140 144, paras. 249-263, 271-276.

91. The Appellate Body has explained that a Member's consistent expression of its ALOP, made outside the context of dispute settlement proceedings, should be accorded significant weight. Thus, Korea's repeated statements, over several years prior to this dispute, to the effect that its ALOP is 1 mSv/year, deserve significant weight.

92. Nonetheless, Korea argues before the Panel that its ALOP is *not* 1 mSv/year, but is instead "as low as reasonably achievable" ("ALARA").

93. In response to Panel questions, the ICRP clarified that ALARA "is a *process*, rather than an endpoint", and that it refers to a "culture … a reference framework, a state of mind, and attitude". The ALARA principle, therefore, cannot be an ALOP. Annex A(5) to the *SPS Agreement* defines an ALOP as a "*level* of protection". The word "level" indicates a "position" on a "scale" in respect of an extent or amount. ALARA does not identify a particular "level" of protection, but describes a "process" for "optimization" of protection.

94. Moreover, under Article 5.6, the "level" of protection – whether expressed qualitatively or quantitatively – must be capable of serving as a *benchmark* or *point of comparison* for assessing necessity. According to the Appellate Body, an ALOP cannot be determined "with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement … becomes impossible". Thus, while Members can set their own ALOP, it cannot be so imprecise that it is unable to serve as a benchmark.

95. While ALARA cannot be an ALOP, Japan does not question that, in Korea, the ALARA principle serves its intended purpose as a process for optimizing protection. Korea's commitment to the ALARA principle does not, however, alter its maximum exposure level of 1 mSv/year, which it has explicitly identified as "*the highest radiation exposure it is willing to accept*", or its ALOP.

96. Finally, Korea also argues that its ALOP is to maintain radionuclides in food at levels that exist in the "ordinary environment". The Panel-appointed experts confirmed that the notion of "ordinary" background radiation levels is not a recognized scientific concept. Indeed, "ordinary" background radiation levels differ significantly even within a country, making the concept arbitrary, variable, and unsuited to serve as an ALOP. In any event, the experts confirmed that an annual dose limit of 1 mSv/year for exposure to man-made radiation in food does not add meaningfully to the background doses received.[86]

b. Cesium testing is a less trade-restrictive alternative

97. As a less trade-restrictive alternative ("LTRA") to both Korea's import bans for the 28 fisheries products and Korea's at-the-border additional testing for Japanese food products, Japan has proposed that Korea test for cesium to ensure that Japanese food products contain no more than 100 Bq/kg of cesium.[87]

98. Korea disputes that cesium testing alone could constitute a proper "alternative" to the at-the-border additional testing requirements; to Korea, cesium testing is not an "alternative" to, or "different" from, the measure currently applied.[88]

99. Korea errs. To understand whether an LTRA is "alternative" to, and "different" from, a challenged measure, it is necessary to identify the *features of* the challenged measure, and to compare them with the features of the LTRA. In Korea, the requirement to test for additional radionuclides is triggered where cesium levels are between 0.5 Bq/kg and 100 Bq/kg. As a result, cesium testing is an integral element of additional testing, because the requirement to undertake additional testing depends on the results of a prior cesium test. Replacing a measure that combines, in an integrated fashion, cesium testing and additional testing, with one part of that measure – cesium testing alone – is, by virtue of the omission of additional testing, an LTRA that is "alternative" to, and "different" from, the existing measure. Put simply, a measure comprising element A is different from a measure comprising elements A *and* B.

[86] Compilation of experts' replies, paras. 3.12, 3.15; Transcript of Panel meeting with the experts, paras. 2.7, 2.30, 2.33.

[87] Japan's FWS, paras. 314, 333, 450; Japan's SWS, para. 219.

[88] Korea does not dispute that cesium testing is properly an alternative measure to its import bans.

100. Korea's reliance on the Appellate Body Report in *Brazil – Tyres* is inapposite. In that dispute, the EC challenged an element of a set of measures that *each contributed independently* to the achievement of the policy objective at issue. The EC proposed eliminating some elements of the set of measures, without replacing them with other measures that made an *equivalent independent contribution to the objective*. Removing a single element of *this* set of measures necessarily reduced the overall contribution from the remaining measures to the policy objective, since each element contributed independently.

101. In contrast, and as discussed in the next section, when cesium levels in Japanese food products are below 100 Bq/kg, additional testing makes *no independent contribution* to Korea's ALOP, and is, thus, redundant; additional testing is simply not needed to protect the public health objective underlying Korea's ALOP of 1 mSv/year. Unlike in *Brazil – Tyres*, proposing to remove additional testing does not undermine the achievement of Korea's ALOP, because it removes a redundant element of the measure.

102. As a practical matter, the fact that cesium testing alone is "different" from the existing measure is evident to Japan's fishermen and farmers, because elimination of the additional testing requirements would significantly enhance competitive opportunities for their products.

103. The Panel should, therefore, reject this attempt by Korea to evade scrutiny of its measures, and find that cesium testing properly constitutes "another measure", within the meaning of Article 5.6.[89]

c. Testing to ensure that cesium levels remain below 100 Bq/kg is an alternative measure that achieves Korea's ALOP

104. As just alluded to, cesium testing alone achieves Korea's ALOP of ensuring that the dose exposure of Korean consumers from radionuclides in food remains below 1 mSv/year. Indeed, food products from Japan, with cesium levels below 100 Bq/kg, pose no risk that dose exposure of Korean consumers would exceed Korea's ALOP of 1 mSv/year.[90]

105. Japan's evidence for this factual proposition rests on two main approaches. *First*, Japan has relied on evidence from the derivation of its own 100 Bq/kg cesium threshold, which is designed to ensure, based on conservative assumptions, that exposure of Japan's population to radionuclides in food remains below 1 mSv/year. *Second*, numerous test results for cesium and other radionuclides (in particular strontium, the only other radionuclide that makes more than a negligible contribution to the overall dose) show that, where cesium is below 100 Bq/kg, Japanese food products pose no risk that dose exposure for consumers from cesium and other radionuclides in food would exceed 1 mSv/year.

106. Concerning the *first* of these approaches, Japan's calculations of its 100 Bq/kg threshold follow a standard methodology, and are scientifically sound. Japan's adoption of a cesium threshold reflects the dominant role of cesium in releases and contamination from the FDNPP accident, both in terms of activity levels and dose contribution. Based on measurements of the relationship between cesium and the other radionuclides, Japan calculated a cesium threshold designed to ensure that the combined exposure from cesium *and* the additional radionuclides would not exceed 1 mSv/year. In undertaking its calculation, Japan used a formula provided by Codex, with the addition of a number of assumptions that are far more conservative than dictated by Codex: (i) Japan assumed that *50 percent* of food contains the relevant radionuclides at the threshold level, whereas Codex assumes just 10 percent; (ii) compared to Codex's assumption, Japan assumed that larger amounts of foods are consumed per year; and, (iii) rather than regulating groups of radionuclides in isolation, Japan took into account the quantitative relationships (or ratios) between the relevant radionuclides. Japan thereby calculated a threshold for cesium that ensures that the *combined* exposure from all relevant radionuclides does not exceed 1 mSv/year. Whereas Codex's cesium threshold is 1000 Bq/kg, Japan calculated a 100 Bq/kg cesium threshold.

[89] Japan's SCS, paras. 23-27; Japan's response to Panel Question 146, paras. 295-320.

[90] Japan's FWS, paras. 340-394, 451-452; Japan's FOS, paras. 58-68; Japan's responses to Panel Questions 54, 61, paras. 244-277, 285-300; Japan's SWS, paras. 235-289; Japan's comments on experts' responses, paras. 29-65; Japan's response to Panel Question 148, paras. 321-342; Japan's comments on Korea's response to Panel Question 115, paras. 110-113.

107. The Panel-appointed experts unequivocally confirmed Japan's calculations as supporting the proposition that food products from Japan, with cesium levels below 100 Bq/kg, pose no risk that dose exposure of Korean consumers would exceed Korea's ALOP of 1 mSv/year. The experts described Japan's calculation and the conclusions drawn as "standard", "straightforward", "appropriate", "adequate", and "scientifically supported".[91]

108. Although Korea disagrees, and argues that *Japan's* calculation of *Japan's* cesium threshold is flawed, Korea has steadfastly declined to provide *Korea's* calculation of *Korea's* own thresholds for cesium and other radionuclides. In any event, Japan has demonstrated that Korea is wrong in asserting that Japan erroneously relied on a fixed ratio of cesium to the additional radionuclides, and applied a so-called "scaling factor method". Instead, Japan appropriately relied on estimated relationships that reflect an *average* spread, over *an entire year's worth of food*, during which each meal could have a very different Cs:Sr ratio, without that variability calling into question Japan's conservative calculation.

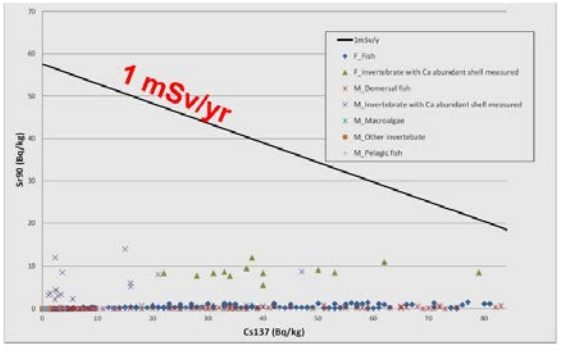
109. Concerning the *second* approach identified in paragraph 105, Japan relied on data from actual measurements of radionuclide activity levels in food and resulting dose exposure to demonstrate that food products from Japan, with cesium levels below 100 Bq/kg, pose no risk that dose exposure of Korean consumers could exceed Korea's ALOP of 1 mSv/year.

110. Japan, and its experts Professor Brenner and Dr. Buesseler, adopted an approach that considered (i) the source term (i.e., the radioactivity released from the FDNPP); (ii) contamination levels in the environment, including in seawater and sea sediment; (iii) contamination levels in food products, including fisheries products; and (iv) resulting dose exposure for humans from the consumption of Japanese food products. Japan and its experts also considered available scientific knowledge regarding the behaviour of radionuclides in the environment and in food. The Panel-appointed experts confirmed this holistic approach.[92]

111. Adopting a framework developed by Merz et al (2015), and proposed by Korea, Professor Brenner and Dr. Buesseler initially demonstrated compliance of Japanese food products with Korea's ALOP by plotting cesium levels in individual samples against a strontium-to-cesium ratio from the same sample. Following criticism from Korea, and suggestions from the Panel-appointed experts, Japan's experts then established the same conclusions, using a modified Merz plot based on *absolute* cesium and strontium levels.

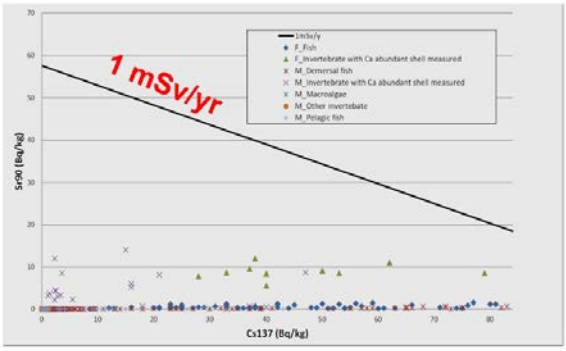
112. As shown below, Professor Brenner and Dr. Buesseler analysed, on the basis of these modified Merz plots, (i) fisheries products caught largely in Fukushima prefecture, and (ii) duplicate meals collected from consumers in Fukushima prefecture. Professor Brenner and Dr. Buesseler did so based on evidence (i) pertaining to the situation at Panel establishment on 28 September 2015, and (ii) during the pendency of the Panel proceedings. At either point in time, and *even if that same fish or meal were eaten for an entire year*, the graphs show no test results where exposure levels would be anywhere close to 1 mSv/year.

"Merz Plot" for Fishery Products
All data publicly available before and after 28 Sept 2015



1

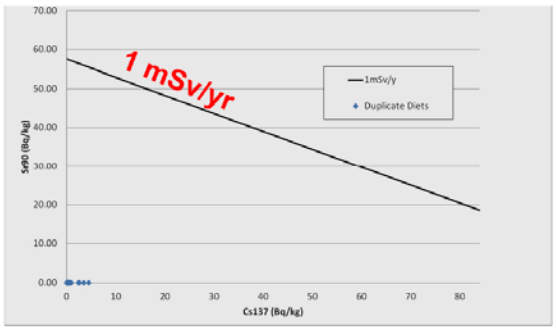
"Merz Plot" for Fishery Products
All data publicly available before 28 Sept 2015



2

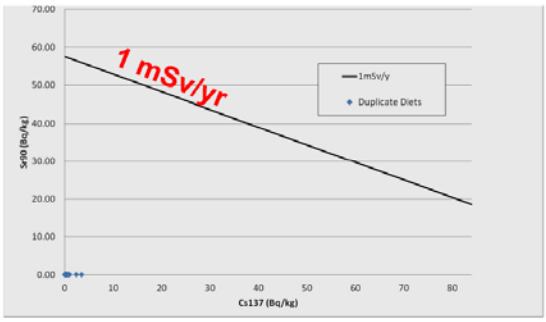
[91] Compilation of Panel experts' replies, paras. 5.27, 5.36, 5.18. 5.15, 5.21 and 5.26.
[92] Transcript of Panel meeting with experts, paras. 1.148, 1.151, 3.176, 3.177, 3.180.

Duplicate Diet "Merz Plot" for Fukushima Food Products
All data publicly available before and after 28 Sept 2015



3

Duplicate Diet "Merz Plot" for Fukushima Food Products
All data publicly available before 28 Sept 2015



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113. Professor Brenner and Dr. Buesseler also performed the same analyses for every other dataset relating to Japan's cesium and strontium testing schemes, *with identical conclusions*.

114. Moreover, Japan's experts calculated total annual dose exposure, using every available data set. For example, they determined that the dose exposure from average meals consumed in Fukushima prefecture in 2015 was 0.004 mSv, significantly below 1 mSv/year. Given that only 0.37 percent of Korean food consumption is of Japanese origin, dose exposure for Korean consumers would be 1/250th of 0.004 mSv/year, and thus negligible.

115. While Korea has highlighted small differences between Japanese and Korean diets – including the consumption in Korea of whole fish, including bones and shells – these differences are not meaningful enough to affect Japan's conclusions. Indeed, with respect to fisheries products, Japan calculated dose exposure, assuming, conservatively, that *all* ^{90}Sr contained in bones and shells is consumed. Japan, thereby, overestimated dose exposure from strontium bound in bones and shells that are *not* consumed.

116. The Panel-appointed experts supported not only the holistic approach adopted by Japan and its experts, but also the adequacy of the methodologies employed and the sufficiency of the evidence, including the number of test results. Moreover, the Panel-appointed experts provided independent calculations, using the evidence submitted by Japan. Like Japan, the Panel-appointed experts concluded that food products from Japan, with cesium levels below 100 Bq/kg, pose no risk that dose exposure of Korean consumers could exceed Korea's ALOP of 1 mSv/year.[93]

2. Japan's alternative measure is significantly less trade restrictive

a. *Cesium testing is significantly less trade-restrictive than Korea's import ban*

117. The challenged measures involve bans on the import of fisheries products. The alternative measure – i.e., testing to verify that cesium levels do not exceed Korea's 100 Bq/kg threshold – is significantly less trade restrictive than an outright ban.[94]

b. *Cesium testing is significantly less trade restrictive than Korea's pre-market additional testing requirements*

118. Korea's pre-market additional testing requirements are trade restrictive because: (i) the duration of pre-market additional testing for the other Codex radionuclides means that exporting to Korea takes *additional time* beyond the time required for cesium testing; (ii) the conduct of pre-market additional testing for the additional radionuclides imposes *increased costs* on export to Korea, beyond the costs incurred for cesium testing; and, (iii) pre-market additional testing must be conducted *in Japan*. The time and cost factors are each sufficient, *on their own*, to demonstrate that cesium testing is significantly less trade restrictive than the pre-market

[93] Compilation of Panel experts' replies, responses to Panel Questions 37, 77, 90.
[94] Japan's FWS, para. 395; Japan's SWS, para. 290.

additional testing requirements.[95] It is not surprising that Korea itself describes its additional testing requirements as, "in effect", "a total import ban".

119. In contrast to Korea's pre-market additional testing requirements, cesium testing can be completed in a short period of time, is inexpensive, and *is already routinely carried out by Korea* at the border on all food imported from Japan. Thus, none of the increased time and expense associated with Korea's additional testing would arise under Japan's alternative measure.[96]

i. Time required for pre-market additional testing

120. Testing for additional radionuclides such as strontium pursuant to Korea's pre-market additional testing requirements involves a complex laboratory procedure that takes considerable time.[97] For example, cesium and strontium testing differ because cesium is a Gamma emitter, and strontium is a Beta emitter. With Gamma emitters, little or no sample preparation is required for cesium testing. In contrast, testing for Beta emitters requires a two-step process: *first*, the radionuclide must be extracted into a form that can be measured; and, *second*, the measurement must be performed.[98]

121. Korea acknowledges that "[t]esting for other radionuclides takes more than 6 weeks", and concedes that more time is required to carry out strontium testing as compared to cesium testing.[99] The Panel-appointed experts agree that strontium testing is more complex and time consuming than cesium testing.[100]

ii. Costs involved in pre-market additional testing

122. Undertaking the pre-market additional testing is also more costly than cesium testing. The costs of Korea's additional testing amount to *roughly half of the average consignment value of fisheries products* (USD 16,000) exported from Japan to Korea.[101] This is equivalent to an additional 50% tariff on Japanese food products.

iii. Shipping products back to Japan

123. In the only affirmative indication of the required location for at-the-border additional testing, Korea states that it requires additional testing to take place *in Japan*.[102] Requiring that food be shipped back to Japan for at-the-border additional testing lengthens the time for the testing, as well as the costs associated with that testing.[103]

124. Without support, Korea asserts that pre-market additional testing can be conducted in Korea by testing institutes authorized by Japan to ensure consistency with *Japanese* food safety regulations. Japan is not aware of any provision of Korean law that would permit *Japan* to authorize testing institutes to ensure consistency with *Korean* regulations on radionuclide content in food; nor is Japan aware of the process to follow under Korean law for Japan to deliver such authorizations.[104]

3. Japan's alternative measure is available and feasible

125. Korea already undertakes routine cesium testing on all Japanese imports. Thus, Japan's alternative measure is self-evidently reasonably available and technically and economically feasible.

[95] Japan's SOS, para. 71.
[96] Japan's SWS, para. 293.
[97] Japan's SOS, para. 69.
[98] Compilation of Panel experts' replies, paras. 5.85 and 5.86.
[99] Japan's SOS, para. 69.
[100] Compilation of experts' replies, response to Panel Question 87.
[101] Japan's SWS, para. 299; Japan's SOS, para. 69.
[102] Japan's SWS, para. 301.
[103] Japan's SWS, paras. 301-302.
[104] Japan's SWS, para. 303.

IX. ARTICLE 7 AND ANNEX B OF THE *SPS AGREEMENT*

A. Korea's failure to publish the import bans and the pre-market additional testing requirements, in violation of Article 7 and Annex B(1)

1. A Member must promptly publish its SPS regulations, and Korea has failed to do so

126. Annex B(1) requires the publication of SPS regulations in their entirety. To begin, Annex B(1) explicitly states that a Member must publish its SPS "*regulations*". Footnote 5 clarifies that SPS "regulations" are "sanitary and phytosanitary measures such as laws, decrees or ordinances". As such, it is the *regulation* itself that must be published, and not a summary, synopsis, or other description of the text.

127. This understanding is supported by relevant context, including the contrast between Annex B(1) and Annex B(5)(a). Whereas the former requires the publication of the SPS regulation itself, the latter merely requires the publication of a "notice" detailing a proposed SPS measure. Once the SPS measure is "adopted", and the final measure is available, Annex B(1) states that the SPS "regulation" must be published. The drafters' choice of the word "regulation" in Annex B(1), as opposed to "notice" or "summary", must be given effect.

128. Other terms in Annex B(1) provide further context for this interpretation. Annex B(1) requires that publication be sufficient to enable Members to become "acquainted" with the SPS regulation. Without publication of the SPS regulation itself, Members are unable to determine whether they are, in fact, acquainted with the regulation, since they are unable to ascertain if pertinent information from the SPS regulation has been omitted in the publication.

129. Korea has published a number of press releases announcing the introduction of its import bans and its additional testing requirements. However, the *content* of these press releases is inadequate, as they fail to provide a vast amount of important information. Since Korea's press releases do not publish the full text of the measures, Korea has acted inconsistently with Article 7 and Annex B(1).[105]

2. The publication must enable a Member to become "acquainted with" the SPS regulation, and Korea's press releases fail to do so

130. Even if Annex B(1) did not require the publication by Members of the full text of an SPS regulation, Korea's press releases do not allow interested Members to become "acquainted" with its SPS regulations. The phrase "acquainted with" means "familiar *with* a matter, state, etc., esp. to an extensive degree". As such, publication must be accomplished in a manner that allows interested Members to become "familiar" to "an *extensive* degree" with the regulatory treatment to which their goods will be subject under the SPS regulation.

131. The word "*extensive*" highlights that the required degree of familiarity is considerable. Based on the publication, an interested Member must be able to grasp: in what circumstances the regulation applies, including the product scope and trigger conditions (e.g., rules of origin or contamination thresholds governing whether the rules apply); how its goods will be treated when the rules apply; what substantive and procedural requirements its exports and exporters are required to meet; and, how its exporters may meet those requirements. The case law considering similar obligations under Article X:1 of the GATT 1994 confirms that, to become acquainted with a measure, publication must allow interested parties to gain "more or less complete" knowledge of what is required for goods to enter the relevant market.

132. The press releases announcing the challenged Korean measures fall far short of providing sufficiently detailed and comprehensive information to allow interested Members to gain "extensive" or "more or less complete" familiarity and knowledge of what is required for their goods to enter the Korean market. Specifically, the press releases introducing the measures fail to specify information about, inter alia: product scope; applicable rules of origin; applicable thresholds to trigger additional testing; the additional radionuclides for which additional testing is

[105] Japan's FWS, paras. 164-178; Japan's SWS, paras. 310-321.

required; where the additional testing should take place; and, the methodology or conditions for the testing. The press releases do not even provide the degree of information required by Annex B(5) for *proposed* SPS regulations.

133. Korea admits that the press releases do not provide sufficient information to enable interested parties to become acquainted with its regulations. Korea has said that Korean enforcement authorities are provided with additional information – not published in the press releases – so that they can understand what is required under the measures, and how they are to be applied. Regrettably, Japan and its exporters were not provided with this additional information so that they could also become acquainted with the measures.

134. Korea argues that it should be exempted from the requirement to publish sufficient details about its SPS regulations because of the emergency situation arising from the FDNPP accident. However, nothing in Annex B absolves a Member from the obligation to *publish* an emergency measure. In any event, Korea has failed, in the many years since the FDNPP accident and the adoption of its measures, to offer publication that is sufficiently detailed and comprehensive to enable Members to become acquainted with the regulation.[106]

3. An SPS regulation must be published through a medium that allows an interested Member to locate it, both on adoption, and through the life of the regulation, and Korea has failed to do so

135. Annex B(1) requires publication of an SPS measure through a medium that permits Members readily to locate and identify the measure, when first published, and over the lifetime of the measure. Members and their economic operators cannot be expected to trawl through archives of press releases, across any number of government ministry websites, in search of SPS measures.

136. Korea has published multiple press releases concerning the same measure, on multiple government websites, in varying locations on each website, and with each press release offering different, but always very limited, information about the measure. While use of the internet to publish a measure in a *specifically designated location* could encourage transparency, the mere fact of publishing *anywhere and anyhow* on the internet does not exhaust the obligation under Annex B(1). Korea's approach reduces Annex B(1) to inutility, by relieving Korea of the publication requirement under Annex B(1), and instead placing the burden on other Members and their economic operators to search for scattered information on government websites, in hopes of becoming acquainted with the measure.[107]

B. Korea's SPS Enquiry Point failed to provide Japan with copies of Korea's measures and to respond fully to the reasonable questions posed by Japan, in contravention of Article 7 and Annex B(3)

1. An SPS enquiry point is required to provide full responses to all reasonable questions, and Korea's Enquiry Point failed to do so

137. Annex B(3) requires the provision, by an SPS enquiry point, of meaningful responses to reasonable questions posed by another Member. A meaningful response is a response that is both substantively adequate, and that addresses the question in its entirety. Annex B(3) also requires a Member to provide any "relevant" documents regarding, inter alia, the SPS regulations it has adopted. The word "relevant" means "legally sufficient, adequate, or pertinent"; "connected with the matter in hand; closely relating to the subject at hand". Thus, like any documents provided, responses to reasonable questions must be adequate in light of the question posed. An interpretation that reduces Annex B(3) to a *procedural* obligation to provide *a* or *some* response, irrespective of the *substantive content* of its response, would allow Members to circumvent their obligations under Annex B(3).

[106] Japan's FWS, paras. 163-178; Japan's SWS, paras. 322-342; Japan's response to Panel Question 156, paras. 346-361.

[107] Japan's SWS, paras. 343-353; Japan's comment to Korea's response to Panel Question 114, paras. 56-62.

138. Japan posed a series of questions to Korea's SPS Enquiry Point; for all but one of its questions, Japan either received no response, or a substantively inadequate response. As such, Korea acted inconsistently with Annex B(3).

139. Korea argues that a single instance in which an SPS enquiry point fails to provide a (substantively adequate) response does not trigger a violation of Annex B(3). Korea errs. Annex B(3) requires that an SPS enquiry point provide a substantively adequate and complete response to "*all*" reasonable questions posed by interested Members. An SPS enquiry point cannot pick and choose to which questions it wishes to respond. In any event, Japan has demonstrated much more than "a single instance" of an inadequate response.[108]

2. An SPS enquiry point is required to provide relevant documents, and Korea's Enquiry Point failed to do so

140. Annex B(3) requires a Member to provide any "relevant" documents regarding, inter alia, SPS regulations it has adopted and that are the focus of questions from another Member. The word "relevant" clarifies that Annex B(3) requires a Member to provide documents that are pertinent and relate to matters raised in reasonable questions posed. While the refusal to provide relevant documents is inconsistent with Article B(3), so, too, is the provision of documents that are *not* pertinent or relating to the matters raised in those questions. Burying documents that *are* relevant to the question posed, amongst voluminous documents that are *not* relevant, is inconsistent with Annex B(3), because the receiving Member is *unable to determine* which of the documents *are* relevant to its questions, and which are *not*.

141. Japan requested a number of different categories of documents from Korea. In response, Korea's Enquiry Point provided 10,000 pages of documents in Korean language, without indicating which parts of those 10,000 pages were relevant to Japan's requests, and failed to provide certain categories of documents altogether. Japan subsequently asked Korea's Enquiry Point to indicate which parts of the 10,000 pages were relevant, and also reiterated its request for documents not provided. Korea's Enquiry Point declined to respond. Korea has, therefore, acted inconsistently with Annex B(3).[109]

X. THE ADDITIONAL TESTING REQUIREMENTS ARE INCONSISTENT WITH ARTICLE 8 AND ANNEX C OF THE *SPS AGREEMENT*

142. Japan raises a series of claims under Article 8 and Annex C, which apply to "control, inspection and approval procedures". Japan first addresses the proper scope of the phrase "control, inspection and approval procedures", before turning to its claims under paragraphs 1(a), (c), (e) and (g) of Annex C.

A. The pre-market additional testing requirements are subject to Article 8 and Annex C(1) of the *SPS Agreement*

143. Article 8 provides that "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures". Annex C is, in turn, entitled "Control, Inspection and Approval Procedures", and the *chapeau* to Annex C(1) states that Annex C applies to "any procedure to check and ensure the fulfillment of [SPS] measures". A threshold issue under Article 8 and Annex C is, therefore, establishing that the measures at issue involve "*procedures*" that are for "*control, inspection and approval*".

144. *First*, a "procedure" is defined as "[t]he fact or manner of proceeding with *any* action, or in *any* circumstance or situation". Thus, a "procedure" refers to the way or manner in which an action or situation is processed. The *chapeau* to Annex C states that Annex C(1) applies to "*any* procedure". The breadth of the provision is confirmed by Article 8 and footnote 7 to Annex C, which both state that control, inspection and approval procedures "*includ[e]*" a variety of measures, thus confirming that the scope of the obligations is not confined to the measures specifically enumerated.

[108] Japan's FWS, paras. 183-193; Japan's SWS, paras. 355-371.
[109] Japan's SWS, paras. 372-385; Japan's response to Panel Question 18, paras. 98-101.

145. Thus, Korea errs in arguing that the scope of Article 8 and Annex C is limited to those "procedures" that "prescribe a 'specific course of action' or dictate a process" for how the procedure at issue is to be pursued. Nothing in the definition of "procedures", or the text of Article 8 and Annex C, sets out a minimum requirement of *specificity* or *formality* for a measure to qualify as a "procedure".

146. *Second*, for procedures to be covered by Article 8 and Annex C, they must be *control, inspection or approval* procedures, i.e., they must be procedures that "check and verify"; "look closely or carefully [into]", or "corroborate" or "confirm", in this case the conformity of goods with SPS measures. Footnote 7 to Annex C clarifies that this includes procedures for *sampling*, *testing* and *certification*. Annex C(1) confirms that the "control, inspection or approval procedures" covered by Article 8 and Annex C are those that "check and ensure the fulfillment of" an SPS measure.[110]

147. On the facts, Korea's additional testing requirements fall within the scope of Article 8 and Annex C. Korea's pre-market additional testing and certification requirements are explicitly covered, under footnote 7 to Annex C, as "*procedures for … testing and certification*". Moreover, the pre-market additional testing requirements are "procedures", within the ordinary meaning of the term, as they address the way or manner in which an action or situation is processed, namely the testing and certification requirement that must be met before food from Japan can access the Korean market. Finally, the pre-market additional testing requirements are procedures ostensibly taken by Korea to check fulfillment of its thresholds for radionuclide content in food and, hence, its ALOP of 1 mSv/year.[111]

B. Annex C(1) permits of "as such" challenges

148. Korea erroneously suggests that Annex C(1) admits solely of "as applied" challenges against "specific instances" in which procedures are implemented. Korea errs. Annex C(1) imposes obligations on a general "procedure to check and ensure the fulfilment of sanitary or phytosanitary measures" – i.e., on a measure "as such" – as well as on individual applications of that procedure. Nothing in Annex C(1) suggests that the obligations are limited to the application of a "procedure" in an individual instance.[112]

C. The pre-market additional testing requirements are undertaken in a less favourable manner for imported products than for like domestic products, in violation of Annex C(1)(a)

149. Annex C(1)(a) imposes a non-discrimination obligation, providing that control, inspection, and approval procedures must be undertaken "in no less favourable manner for imported products than for like domestic products". Korea's pre-market additional testing requirements fail to comply with this obligation.

1. Interpretation of Annex C(1)(a)

150. To establish an inconsistency with Annex C(1)(a), a complaining Member must establish that: (i) imported products and domestic products are "like"; and (ii) that the challenged procedures are undertaken in a "less favourable manner" for imported products than for domestic products.

151. It is well established that the "likeness" of imported and domestic products can be presumed where a measure distinguishes between products solely on the basis of origin, without the need to examine the criteria typically reviewed in a likeness assessment. To determine whether the challenged procedure is undertaken in a manner less favourable to imported products, context from Article III of GATT 1994 suggests that the relevant question is whether the procedures are

[110] Japan's SWS, paras. 388-400.
[111] Japan's SWS, paras. 401-408.
[112] Japan's response to Panel Question 157; Japan's comment on Korea's response to Panel Question 157.

undertaken in a manner that "modifies the conditions of competition" to the detriment of imported products.[113]

2. Factual arguments that Korea's pre-market additional testing requirements are inconsistent with Annex C(1)(a)

152. Korea acknowledges that the pre-market additional testing requirements apply exclusively to Japanese products. Accordingly, Japanese products subject to the pre-market additional testing requirements are presumed to be "like" domestic Korean products.

153. Moreover, the pre-market additional testing requirements significantly impair competitive opportunities for Japanese products by, inter alia, imposing increased testing, storage and transportation costs, in addition to considerably delaying market access. Korea has acknowledged that these consequences make the pre-market additional testing requirements tantamount to a ban. Although Korea contends that Japanese products are not treated less favourably than Korean products because Korean products are subject to point-of-sale additional testing, Japan has elsewhere demonstrated that Korea's point-of-sale additional testing is different from the pre-market additional testing requirements in important respects. Finally, in stating its Article 2.3 claim, Japan has established that the additional testing requirements involve arbitrary and unjustifiable discrimination.[114]

D. The pre-market additional testing requirements are information requirements not limited to what is necessary for appropriate control, inspection and approval procedures, in violation of Annex C(1)(c)

154. Korea's pre-market additional testing requirements and the associated certification requirements are information requirements not limited to what is necessary for appropriate control, inspection and approval procedures, in violation of Annex C(1)(c).

1. Interpretation of Annex C(1)(c)

155. An "information requirement", under Annex C(1)(c), is a demand for knowledge pertinent to the application of an SPS measure. Korea agrees, stating that an information requirement is "a requirement to produce information that helps ensure compliance or 'ensure the fulfillment' of an SPS measure".

156. Article 5.6 of the *SPS Agreement* offers relevant context for the interpretation of the word "necessary". A procedure is not necessary for purposes of Annex C(1)(c) if there is an alternative measure that also achieves a Member's ALOP and that is significantly less trade restrictive and economically and technically feasible.[115]

2. Factual arguments that Korea's pre-market additional testing requirements are inconsistent with Annex C(1)(c)

157. Korea's pre-market additional testing requirements require that certain facts be certified and communicated, namely the presence and levels of certain man-made radionuclides in food from Japan. This information is sought in connection with the control, inspection and approval of Japanese food for entry to the Korean market.

158. Moreover, the information requirement is not "necessary". Japan has demonstrated that testing Japanese food products to ensure that cesium activity levels are under 100 Bq/kg ensures that Korean consumers' exposure to man-made radionuclides does not exceed Korea's ALOP of 1 mSv/year. That the information requirement is not "necessary" is also confirmed by the fact that Korea requests the additional information solely for Japanese food; were the information

[113] Japan's SWS, paras. 411-422.
[114] Japan's FWS, paras. 469-470; Japan's SWS, paras. 423-436.
[115] Japan's SWS, paras. 438-440.

necessary, Korea would impose similar requirements on food of other origins, which Japan has demonstrated pose similar risks of containing radionuclides.[116]

E. The pre-market additional testing of individual specimens is not limited to what is reasonable and necessary, in violation of Annex C(1)(e)

159. Korea's pre-market additional testing of individual specimens is not limited to what is reasonable and necessary, in contravention of Annex C(1)(e).

1. Interpretation of Annex C(1)(e)

160. The word "requirements" refers to "[s]omething called for or demanded; a condition which must be complied with". An individual "specimen" is a *sample* taken from a larger consignment, such that Annex C(1)(e) covers measures imposing control, inspection and approval procedures on *samples*, rather than on an entire consignment.

161. The examination whether requirements are "necessary" requires a panel to assess whether there is an alternative measure that would also achieve the responding Member's ALOP, and that is significantly less trade restrictive and economically and technically feasible. Moreover, the word "reasonable" has been interpreted to mean "something [that] is 'not irrational, absurd or ridiculous'", and that "is appropriate or suitable to the circumstances or purpose". Requirements for control, inspection and approval of individual specimens must be *both* "reasonable and necessary".[117]

2. Factual arguments that Korea's pre-market additional testing requirements are inconsistent with Annex C(1)(e)

162. Every consignment of Japanese food exported to Korea is sampled and subject to at-the-border cesium testing. Every sample in which cesium is detected is then subjected to at-the-border additional testing for the other radionuclides. As such, *all* "individual specimens" in which cesium is detected are subjected to the at-the-border additional testing requirements, ostensibly to control compliance with Korea's tolerance limits for radionuclides in food. In contrast, non-Japanese food imports are subject only to random at-the-border sampling for cesium, and no at-the-border additional testing.

163. As established above with respect to Annex C(1)(c), Korea's pre-market additional testing requirements are not "necessary" to secure compliance with Korea's 1 mSv/year ALOP. Moreover, at-the-border additional testing must be undertaken in Japan, which requires storage of the consignment at the border while a sample is shipped back to Japan to undergo additional testing. Even if testing were to take place in Korea, the delays and costs attendant to the additional testing requirements are unreasonable, particularly in the circumstance of perishable products. Accordingly, the pre-market additional testing requirements are not appropriate to the circumstances, and are, therefore, not "reasonable".[118]

F. The pre-market additional testing requirements do not use the same criteria for the siting of facilities and the selection of samples for imported products as are used for domestic products, in violation of Annex C(1)(g)

164. Korea's pre-market additional testing requirements do not apply the same criteria for the siting of test facilities and the selection of samples for imported products as they do for domestic products, in contravention of Annex C(1)(g).

1. Interpretation of Annex C(1)(g)

165. The term "siting of facilities" refers to the location of the facilities where pre-market additional testing is performed; the term "selection of samples", in turn, refers to a process whereby authorities select, for testing, a sub-part of a larger group of products (e.g., a

[116] Japan's SWS, paras. 441-448.
[117] Japan's FWS, para. 479; Japan's SWS, paras. 450-456.
[118] Japan's FWS, para. 480; Japan's SWS, paras. 452, 457-464.

consignment), for the purpose of enabling or verifying conclusions about relevant SPS-related qualities of the larger groups of products. While Members are, under Annex C(1)(g), in principle free to choose the sampling criteria and the criteria for the siting of testing facilities they consider appropriate, in so doing, they are required to use "the same criteria" for imported products as they use for domestic products.[119]

2. Japan's arguments that Korea's pre-market additional testing requirements are inconsistent with Annex C(1)(g)

166. Korea does not apply the same *sample selection criteria* for Japanese and Korean products. Indeed, Korea's pre-market additional testing requirements are applied exclusively to Japanese products, and do not apply to Korean products at all. Japan accepts that Korea applies the same sampling criteria for *point-of-sale* additional testing, regardless of origin. However, while domestic food products are potentially subject to additional testing only *once*, at point-of-sale, Japanese food products are subject to additional testing *twice* – pre-market and potentially at point-of-sale. This difference in treatment amounts to the application of different sampling criteria.

167. In any event, even were the Panel to compare sampling criteria under Korea's pre-market and point-of-sale schemes, the applicable sampling criteria remain dissimilar. The requirement that additional testing take place for food products in which cesium at or above 1 Bq/kg is found applies, under the pre-market additional testing measure, *to all consignments of all Japanese food imports*, while additional testing under the point-of-sale measure applies *only to those products that happen to be randomly sampled, from the sub-categories of products that Korea subjects to point-of-sale sampling in the first place*.

168. Moreover, under pre-market additional testing, Korea imposes more burdensome *siting requirements* on Japanese products than are imposed on Korean products, because Japanese products must be returned to Japan to conduct additional testing. To the extent that Korean food products are subject to point-of-sale additional testing, they are tested in the country of destination for sale, not in another country. Thus, Korea does not impose the "same criteria" for siting requirements on imported and domestic products, because point-of-sale additional testing can take place without shipping the product to another country.[120]

XI. CONCLUSION AND REQUEST FOR RELIEF

169. Japan respectfully requests the Panel to find that:

- with respect to the import bans and the additional testing requirements, Korea failed to comply with the transparency requirements in Article 7 and paragraphs 1 and 3 of Annex B to the *SPS Agreement*;
- Korea's import bans on the 28 fisheries products and Korea's additional testing requirements are inconsistent with Articles 2.3 and 5.6 of the *SPS Agreement*.
- Korea's additional testing requirements are inconsistent with Article 8 and paragraphs 1(a), 1(c), 1(e) and 1(g) of Annex C to the *SPS Agreement*.

170. Japan respectfully requests the Panel to recommend to the Dispute Settlement Body that Korea be required to bring its import bans and additional testing requirements into conformity with the covered agreements.

[119] Japan's SWS, paras. 466-471.

[120] Japan's FWS, paras. 485-489; Japan's SWS, paras. 472-478; Japan's comments on Korea's response to Panel Question 159.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

I. INTRODUCTION

1. Korea is justified in taking provisional measures under Article 5.7 of the SPS Agreement in response to one of the most severe environmental disasters of the century, which is continuing to cause significant contamination of the environment. As Korea's submissions in this dispute have demonstrated, Japan has failed to sustain its burden of proof with respect to all of its claims. Specifically, Japan has not shown that Korea's targeted SPS measures taken in response to the radioactive contamination stemming from the Fukushima Dai-ichi Nuclear Power Plant (FDNPP) are inconsistent with Article 2.3, Article 5.6, Article 7 / Annex B, and Article 8 / Annex C of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

2. A fundamental aspect of the SPS Agreement is to maintain the sovereign right of the regulating Member to determine its own level of protection and to conduct its own risk assessments. Moreover, the SPS Agreement allows a government to take temporary, precautionary measures when it considers that the scientific evidence is not sufficient to determine whether a product is safe, and in particular, to conduct a risk assessment. Korea notes that Japan has not challenged Korea's SPS measures under Article 5.7 of the SPS Agreement.

3. Japan has the burden of establishing each of its claims. With respect to Article 2.3 of the SPS Agreement, the Appellate Body recently clarified that "notwithstanding certain similarities between its language and that of the chapeau of Article XX of the GATT 1994, Article 2.3, first sentence, of the SPS Agreement, sets out an obligation and is not expressed in the form of an exception. Thus, a complainant raising a claim that a Member's SPS measure is inconsistent with Article 2.3, first sentence, bears the overall burden of establishing its *prima facie* case of inconsistency."[1]

4. In the case of Article 5.6 of the SPS Agreement, Japan must adduce sufficient evidence to raise a presumption that its proposed alternative measures would achieve Korea's appropriate level of protection.[2] With respect to the role of experts in the assessment under Article 5.6, the Appellate Body has held that "[e]xperts may assist a panel in assessing the level of risk associated with SPS measures and potential alternative measures, but whether or not an alternative measure's level of risk achieves a Member's appropriate level of protection is a question of legal characterization, the answer to which will determine the consistency or inconsistency of a Member's measure with its obligation under Article 5.6."[3] Thus, "[a]nswering this question is not a task that can be delegated to scientific experts".[4]

II. FACTUAL BACKGROUND

5. There is no dispute that the FDNPP accident constitutes the most significant release of radionuclides from a nuclear accident into the marine environment, and the releases continue. Scientific information about the accident and subsequent releases, as well as about the impact on the environment, remains limited.

A. The Significant Release of Radionuclides from the FDNPP Accident

6. Japan understates the extent of the release of radionuclides from the FDNPP accident. While scientific knowledge on the amount and types of radionuclides released and continuing to be released from the FDNPP remains insufficient, there is no dispute among the scientific community that vast amounts of radionuclides were released from the FDNPP accident.

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[1] Appellate Body Report, *India – Agricultural Products*, para. 5.260. (footnote omitted)
[2] Appellate Body Report, *Australia – Apples*, para. 404.
[3] Appellate Body Report, *Australia – Apples*, para. 384.
[4] Appellate Body Report, *Australia – Apples*, para. 384.

7. Estimates tend to converge to between 15 and 20 PBq for the combined FDNPP inputs of Cs-137 from atmospheric fallout and direct discharge to the North Pacific. This represents an additional input of approximately 25 per cent more Cs-137 than existed in the North Pacific prior to the FDNPP event from nuclear weapons testing. Moreover, approximately 1.0-2.4 x 10^9 Bq of Pu-239, 240 was released into the environment from the FDNPP reactors. Most of the Sr-90 released from the FDNPP was directly discharged to the North Pacific, with estimates of total inventories ranging from 0.04 to 1.0 PBq. There have also been ongoing spills of liquid radioactive waste from the FDNPP into the ocean causing Sr-90 activities to exceed those of Cs-137 in the ocean near the FDNPP. However, strontium remains one of the most understudied radionuclides from the FDNPP accident.

8. In all, the FDNPP accident caused about 30,000 km^2 of Japanese territory to be contaminated with different types of radionuclides from the nuclear fallout, in addition to the contamination of sea sediments. Given the relatively long half-life of Cs-134 and Cs-137, these isotopes are still a significant source of radioactive contamination in the environment, particularly in forests that cover 75 percent of the contaminated territory.

B. Elevated Levels of Cesium Continue to be Detected

9. Japan also downplays elevated levels of cesium that are still found in the environment surrounding the FDNPP and in food products. The levels of cesium contained in soil particles on the flood plains in the downstream areas of Fukushima's rivers have been found to be significant and to potentially increase the local radiation dose.

10. Japan also disregards scientific data that continue to show elevated levels of cesium in fish samples. Fishery species caught near the FDNPP still show high levels of contamination. The cesium monitoring results of fishery products caught within the port near the FDNPP, which Japan did not provide to the Panel, show measurements up to 223,000 Bq/kg of cesium.

C. The FDNPP is an Active and Ongoing Source of Contamination

11. The FDNPP presents an active and ongoing situation with no long-term solution. Highly contaminated water continues to build up at the FDNPP site and water continues to inadvertently leak into the sea. This in and of itself distinguishes the FDNPP incident from prior events, such as the Chernobyl accident and nuclear weapons testing, and heightens the food safety risks stemming from contaminated Japanese food products.

12. Given the gravity of the situation, Tokyo Electric Power Company (TEPCO) has attempted to construct a large ice wall surrounding the FDNPP to stem the flow of groundwater into the plant. While specific information about the operation of the ice wall has been lacking, reports indicate that the ice wall effort has largely failed.

13. Moreover, Japan continues to maintain distribution bans and restrictions itself and has in this past year continued to impose new bans and restrictions on certain food products.[5] Japan cannot expect that Korea would respond any differently. Thus, Japan itself recognizes that bans, and not just cesium testing, are required.

III. INSUFFICIENCIES IN JAPAN'S FOOD MONITORING PROGRAM

14. Japan has asserted in this dispute that it has maintained a comprehensive national food monitoring program, which covers all categories of food products. Korea notes, however, that the Ministry of Health, Labour, and Welfare of Japan's (MHLW) "Cesium Monitoring Data of Food Products" (April 2012-July 2016) mainly consist of livestock products, which account for 72.4 percent (835,741) of the total number of samples (1,154,025). Agricultural products only accounted for 14.0 percent (161,798) and fishery products accounted for 7.6 percent (87,638) of the total samples. Japan's cesium monitoring data is disproportionately weighted towards livestock products that are not imported into Korea, which undermines the representativeness of the data.

[5] Please see Japan's domestic restrictions at http://www.mhlw.go.jp/english/topics/2011eq/index_food_press.html.

15. Moreover, the data sets presented by Japan in this dispute actually highlight the lack of sufficient testing for other radionuclides, as follows:

a. Ministry of Agriculture, Forestry and Fishers of Japan (MAFF) data do not present strontium measurements for 16 of the 28 types of fishery products subject to Japan's challenges. Moreover, for the 12 types of fishery products with strontium data, only a total of 50 samples were taken.

b. The Ministry of Environment of Japan (MOE) provided strontium results for only 3 of the 28 fishery products subject to Japan's claims, and only a total of 6 samples were analysed. Also, there were no strontium test results for any of the 28 fishery products at issue in the data provided by TEPCO. There are no testing results for plutonium in the data provided by MOE or TEPCO.

c. Japan's Environmental Radioactivity Database (ERD) data (Exhibit JPN-130) also provides limited strontium and plutonium measurements, especially for the most commercially important fish species from key prefectures.

16. It is inappropriate to draw conclusions regarding concentration levels or factors of non-cesium radionuclides from such small samples, which do not account for varying factors, including the size of the fish, living area and conditions, and feed. Sampling for non-cesium radionuclides has been extremely limited and haphazard at best. There has been no quality assurance and quality control (QAQC) program outlined for these other radionuclides.

17. As Korea's expert confirmed during the Second Substantive Meeting, currently the samples for non-cesium radionuclides do not nearly reflect the range or depth of samples required to characterize the movement or transfer of radionuclides through the food chain. Orders of magnitude more samples – likely amounting to approximately thousands more samples of strontium and other radionuclides – are required. This is especially true now that fishing activities are openly resuming in Fukushima coastal regions.

18. At a minimum, multiple samples of each important species should be tested from all key locations of production at several times throughout the year to assess species, geographic, and temporal sources of variability in contaminant levels. In addition, an attempt to assess detection probabilities should also be assessed at some subset of test sites. However, the effort exerted by Japan to address QAQC issues to date has been vastly insufficient.

IV. METHODOLOGICAL FLAWS IN JAPAN'S EVIDENCE

19. The Exhibit JPN-11 and JPN-148 statements by Japan's consultants unsuccessfully attempt to provide an analytical framework for Japan's incorrect premise that measuring for cesium only will ensure that the 1 mSv/year radiation dose will not be exceeded. These statements contain significant methodological flaws that undermine Japan's analytical framework and the conclusions drawn from applying that framework to specific data sets provided by Japan.

20. First, the 419 data points of Sr-90 and Cs-137 concentration activity in fishery product analysed by Japan's consultants, spanning the period 2011-2016, are insufficient.

21. Second, according to Exhibits JPN-11 and JPN-148, Japan claims that through the use of a "Scaling Factor" it can identify a statistical correlation between cesium and other radionuclides such that it can determine that fish containing less than 100 Bq/kg of cesium will not contain significant amounts of other radionuclides, making them safe for human consumption. In Exhibit KOR-213, Korea's experts have demonstrated that Japan's analysis is scientifically invalid because (i) there are no acceptable grounds for the use of a Scaling Factor and (ii) there is no evidence of any correlation between cesium and other radionuclides for the purposes of assessing food safety.

22. Moreover, Exhibit KOR-213 explains that Japan's application of the "Scaling Factor" in a case like the one before the Panel is unprecedented. To Korea's knowledge, the Scaling Factor "*has never been used for an accident of this sort*" nor has it ever been used "*for the prediction of radionuclides in the context of complex biological community analysis*." As Korea's experts

explained, the Scaling Factor method is unsuited to making predictions in a complex and evolving situation where food safety and public health are concerned.

V. STANDARD OF REVIEW

23. Japan asks the Panel to apply an incorrect standard of review. The standard of review applicable in SPS disputes is that articulated in Article 11 of the DSU, which provides that a panel must make an objective assessment of the matter, including an objective assessment of the facts.[6] The Appellate Body has held that the standard of review must respect the allocation of jurisdictional competences in the SPS Agreement.[7]

24. The Appellate Body has also held that the assessment of risk is a matter that is of exclusive competence of each Member and that panels are not authorized, under the applicable standard of review, to perform their own risk assessment.[8]

25. When a panel is established, a regulator could at most have available to it measurements undertaken until that date. In fact, in such circumstances, one cannot reasonably expect the regulator to have had the opportunity to review and validate the most recent measurements. This practical reality was recently acknowledged in *Russia – Pigs (EU)* where the panel and the Appellate Body both held that the regulating Member is entitled to a period of time to process and evaluate detailed and complex information.[9]

26. Thus, in assessing Korea's SPS measures, the Panel must consider only the information that was available to the domestic regulator. Consideration by the Panel of information that was not available to the domestic regulator means that the Panel would be substituting its own judgment for that of the domestic regulator. Moreover, the Panel cannot fault Korea's regulator for not taking into account what it could not have known. If it does so, the Panel would, in effect, be conducting a *de novo* review.[10]

27. Yet, this is precisely what Japan asks the Panel to do in this case. Exhibits JPN-11, JPN-148, JPN-238 and JPN-239 did not exist prior to this dispute. Thus, these documents could not have been available to Korea's regulator before these dates. Moreover, much of the data relied on for the analysis in these Exhibits also did not exist when the Panel was established. For instance, Exhibit JPN-148 indicates that it analysed a total of 419 data points covering the period from April 2011 to March 2016. Of these 419 data points, 66 data points correspond to measurements taken after 28 September 2015, which was when this Panel was established. Similarly, Exhibits JPN-238 and JPN-239 contain data through 5 December 2016 and 16 September 2016, respectively.

28. Given that these data did not exist prior to panel establishment, they were obviously not available to Korea's regulator, and therefore it is impossible for Korea's regulator to have taken these data into account. If the Panel were to consider this information, the Panel would essentially be engaging in its own risk assessment as it would be determining SPS risks on the basis of information Korea's regulator could not have even considered. As a result, the Panel would be substituting its own judgement for that of Korea's regulator, thereby acting inconsistently with Article 11 of the DSU.

29. Unfortunately, the Panel's experts have already expressed their views on the basis of Exhibits JPN-11, JPN-148, JPN-238 and JPN-239. Again, it is not possible to reconcile the experts' use of analyses and data not in existence at the time the dispute was initiated with the standard of review applicable in this dispute. The Panel's experts also cannot "second-guess" Korea's regulator or substitute their own *post-hoc* evaluations for that of the regulator, under the SPS Agreement and the DSU. Thus, consideration of the experts' views that take into account such analyses and data would also violate the applicable standard of review.

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[6] Appellate Body Report, Australia – Apples, para. 211.
[7] Appellate Body Report, *EC – Hormones*, para. 115.
[8] Appellate Body Report, *US/Canada – Continued Suspension*, para. 590.
[9] Panel Report, *Russia – Pigs (EU)*, para. 7.705; Appellate Body Report, *Russia – Pigs (EU)*, para. 5.80.
[10] Appellate Body Report, *US – Cotton Yarn*, para. 78.

VI. TERMS OF REFERENCE

30. The breach of a relevant WTO provision must have materialized at the time the Panel was established. This conclusion holds irrespective of whether Japan's claims are on the adoption or maintenance of the measures. Pursuant to the Panel's terms of reference, the Panel must determine whether Korea's measures were inconsistent with Articles 2.3, 5.6, and 8 at the time the Panel was established. The inconsistency must have existed at this time; otherwise the claim would have been purely speculative.

31. Under Article 7 of the DSU, the Panel is responsible for examining the matter referred to the Dispute Settlement Body (DSB) by Japan in document WT/DS495/3.[11] The "matter" is, in turn, comprised of the measures challenged and the claims set out by Japan in its panel request. The measures are those in existence at the time of the panel request. The Appellate Body has said that the specific measures identified in the panel request are the measures "alleged to be causing the violation of an obligation contained in a covered agreement".[12] Thus, the violation caused by the challenged measures must already exist when the panel is established.

32. Japan's panel request does not allege that Korea's SPS measures will be in breach of the SPS Agreement at some point during the Panel proceedings. Instead, Japan's panel request describes Korea's SPS measures as being in breach of the SPS Agreement at the time of the Panel request. Thus, the Panel's terms of reference preclude it from determining the consistency of Korea's SPS measures on the basis of analyses and data that did not exist at the time the Panel was established. Consequently, consideration of Exhibits JPN-11, JPN-148, JPN-238 and JPN-239 in the Panel's assessment of Japan's claims under Articles 2.3, 5.6, and 8 would violate the Panel's terms of reference.

33. As noted during the Second Substantive Meeting, and as acknowledged by Japan, Korea's position is consistent with the view of the panel in *EC – Biotech*, which found that it had to examine "whether, on the date of establishment of this Panel, each safeguard measure was based on an assessment of risks which was appropriate to the circumstances existing at that time."[13] Korea notes that the panel in that case was referring to a claim concerning the maintenance of the measure and, even in those circumstances, the panel found that the reference point was the date of establishment.

VII. KOREA'S SPS MEASURES ARE PROVISIONAL MEASURES UNDER ARTICLE 5.7

34. As the complaining party, Japan has the burden of proof with respect to each of its claims.[14] Had Japan brought a claim against the import bans and the additional testing requirements under Article 5.7 of the SPS Agreement, the burden of proving the measures' inconsistency with this provision would have fallen on Japan.[15] In the absence of a challenge by Japan under Article 5.7, Korea is entitled to the presumption that the import bans and additional testing requirements are consistent with the requirements of Article 5.7. The Appellate Body has held, in this regard, that a respondent Member's measures must be treated "as WTO-*consistent* until proven otherwise".[16]

35. Korea notes, in any event, that there is no burden of proof to Korea that attaches with respect to the interpretation of a provision of the WTO agreements. Thus, there is no burden of proof that Korea must overcome in arguing that Article 5.7 is relevant for purposes of the interpretation of Articles 2.3, 5.6, 7 (Annex B) and 8 (Annex C) of the SPS Agreement.

VIII. KOREA'S SPS MEASURES ARE CONSISTENT WITH ARTICLE 2.3

36. Japan has failed to establish that Korea's SPS measures are inconsistent with Article 2.3 of the SPS Agreement.

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[11] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[12] Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (underlining added)
[13] Panel Report, *EC – Biotech*, para. 7.3034. (underlining added)
[14] Appellate Body Report, *US – Wool Shirts and Blouses,* p. 14.
[15] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2976 and 7.2979.
[16] Appellate Body Report, *US – Carbon Steel*, para. 157. (original emphasis)

A. Japan Applies a Novel Product-Based Test under Article 2.3

37. Japan's claim is based on an erroneous interpretation of Article 2.3. In particular, Japan applies a novel, product-based test that is not reflected in the text of Article 2.3. The text of Article 2.3 refers to "conditions" and does not refer to "products." This is a deliberate choice of the drafters that must be given effect. The term "conditions" in Article 2.3 refers to such factors as the state of the atmosphere, the land, and the marine environment. This understanding of "conditions" fits coherently with the rest of Article 2.3 and with its context.

38. Japan's interpretation is completely divorced from the text of that provision. Indeed, Japan's interpretative exercise begins far from the SPS Agreement, in Annex 1A of the WTO Agreement. The general scope of coverage of the agreements in Annex 1A cannot mean that every provision in every agreement in Annex 1A is about differential treatment of goods. The text of Article 2.3 specifically calls for a comparison of "conditions" existing in Members' territories; products are simply not mentioned in Article 2.3.

39. The starting point of the analysis under Article 2.3 is an assessment of whether "identical or similar conditions prevail" in the territories of the Members concerned. Following Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention), an interpretation of Article 2.3 must begin with the ordinary meaning of the terms used in the provision. This ordinary meaning is supported by the link made in Article 2.3 between "conditions" and "territory". The latter term is referring to the area under the jurisdiction of the relevant Member. Thus, the link between "conditions" and "territory" in Article 2.3 supports Korea's view that the subjects of comparison are the environmental conditions prevailing in the relevant Members.

40. Further contextual support for this interpretation is found in Article 5.2 of the SPS Agreement, which expressly includes "the relevant ecological and environmental conditions" among the factors that must be taken into account in the assessment of risks.

41. The evidence on record demonstrates that the conditions in Japan were not similar to the conditions in the rest of the world. On 28 September 2015, there continued to be an active source of contamination on Japanese territory. The FDNPP continued to be in an unstable situation: leaks continued to be reported, contaminated groundwater continued to flow through the plant and into the ocean, and large amounts of contaminated water continued to be stored in precarious conditions at the plant. Even the limited estimates of strontium release that exist are complicated by the ongoing spills of liquid radioactive waste at the FDNPP site. In addition, insufficient scientific information regarding the amount and types of radionuclides released, as well as the lack of sampling in particular regions and for specific commercially important species also render conditions in Japan not identical or similar to conditions prevailing in Korea and the rest of the world.

42. As discussed in Korea's submissions, high levels of cesium contained in soil particles have been found on the flood plains in the downstream areas of Fukushima's rivers. These rivers, whose banks have high levels of cesium contamination, ultimately enter the sea. Studies have also found that a significant portion of mineral-bound radiocesium is discharged into marine estuaries. Thus, the river catchments will be a longer-term, ongoing source of radiocesium to estuaries and coastal areas, which can easily accumulate in marine biota. Dams, lakes and reservoirs in Fukushima-impacted watersheds also have been shown to be both sinks for radiocesium and potential sources of significant downstream cesium deposition. Forests too have been found to be deposits of significant levels of radionuclides, including Cs-137. Finally, there are risks from contamination of the seabed, as even Japan's consultant has cautioned that nearshore sediments off Japan will remain a significant long-term source of radiocesium for years to decades.

43. Indeed, Japan itself acknowledges through its own regulations the uniqueness of the conditions prevailing in its territory. Japan itself has imposed marketing bans on fishery and agricultural products, some of which were still in place up until the date of Panel establishment. Moreover, Japan has repeatedly referred to the fact that fish from the FDNPP port and from the area within a 20 km radius of the FDNPP are not marketed in Japan. This area is within Japanese territory and the decision not to allow the marketing of fish in this area is necessarily recognition of the particular nature of the conditions in Japanese territory. Thus, Japan's own marketing ban is based on environmental conditions in Japan. If the measurement of contamination levels in the

products were the only relevant criterion, as argued by Japan under Article 2.3, then Japan itself could test all fishery products marketed instead of imposing a ban over an entire area.

44. In sum, the Panel must reject Japan's erroneous claim that conditions in Japanese territory and conditions in Korea and the rest of the world are similar. Because Japan fails to establish a necessary element of its Article 2.3 claim, the Panel need not proceed further.

B. Even If the Panel Concludes That Conditions Are Similar, Japan Has Failed to Establish That Korea's SPS Measures "Arbitrarily or Unjustifiably Discriminate"

45. Even on the *arguendo* assumption that conditions were similar, Japan has failed to demonstrate that Korea's SPS measures arbitrarily or unjustifiably discriminate. Japan's argument is premised on its position that Japanese products and products from non-Japanese origins have similar levels of cesium and additional radionuclides in absolute terms. This element of Japan's claim is also premised on an incorrect interpretation of Article 2.3.

46. As Korea has explained, the focus of Article 2.3 is on the conditions prevailing in Members' territories. Even if the Panel were to conclude that conditions in Japan and the rest of the world are similar, its subsequent analysis would have to proceed on the basis of the conditions identified by the Panel. Japan's attempt to disregard consideration of the conditions in its territory must therefore be rejected by the Panel.

47. In addition, Japan has explained that its Article 2.3 claim depends on the proposition that Japanese food products and food products of other origins pose "a similar risk of containing cesium and other radionuclides in excess of Korea's respective thresholds". However, the Panel could only accept Japan's argument by conducting a risk assessment, which the Panel is not permitted to do. Indeed, Japan's approach would require the Panel to undertake not one, but two, risk assessments. The Panel would first have to assess the risks posed by Japanese products. It would then have to assess the risks posed by products from Korea and by products from the rest of the world. And, finally, it would have to compare those risks. However, under the applicable standard of review, the Panel is not authorized to conduct such risk assessments.

48. Moreover, by focusing on the risks posed by the products concerned, Japan is effectively converting the analysis of Article 2.3 into a question of whether the measures are properly based on a risk assessment. However, that is a matter to be evaluated under Article 5.1, and Japan has not brought a claim under that provision.

49. Nor has Japan brought a claim under Article 5.7. Korea's SPS measures seek to protect Korean citizens from the additive effects of the radionuclides stemming from the FDNPP. Given the relatively few measurements for radioactive strontium that have been generated to date, and the much fewer measurements for other radionuclides of potential significance, this testing is a prudential measure in response to the insufficiency of data. In the circumstances, continued monitoring for cesium, strontium, and other radionuclides is required to properly assess risk.

50. Japan's argument also introduces the appropriate level of protection (ALOP) into the assessment of Article 2.3 as Japan is asking the Panel to find that Japanese and non-Japanese food products pose identical or similar risks of exceeding Korea's ALOP. However, the text of Article 2.3 does not frame the ALOP as a benchmark to determine whether there is any discrimination.

51. The Panel-appointed experts confirmed that radionuclides have additive effects and that any additional amount of radiation increases the risks of adverse effects. They also confirmed that there is evidence that radiation can have effects even at very low doses. There is no dispute that the FDNPP added to levels of radionuclides present in Japan's territory before the accident. Therefore, even under Japan's erroneous products-based test, Korea's regulator has a legitimate right to be concerned about the consumption of products with radionuclide contamination stemming from the FDNPP.

52. Even accepting *arguendo* Japan's approach, Japan has emphasized that a key factual proposition underlying its claims is that the overall exposure to Korean consumers from cesium

and all other radionuclides will remain below 1 mSv/year if cesium levels in Japanese food are within Korea's 100 Bq/kg threshold. Japan's proposition is based on an incorrect characterization of Korea's ALOP.

53. In any event, even under an erroneous product-based approach, food products from one origin posing a risk of exposure should not be deemed "identical or similar" within the meaning of Article 2.3 to the food products from another origin posing a risk of exposure. As asserted above, the ALOP has no bearing on the application of Article 2.3.

54. Thus, even assuming Japan's product-based test were correct and Japan succeeded in establishing this factual proposition, it would not demonstrate that products from Japan and products from the rest of the world pose similar risks. This is because Japan's definition of Korea's ALOP is incorrect. Likewise, Japan's criterion for similarity, which is exclusively based on whether an overall dose of 1 mSv/year is exceeded, is not an appropriate criterion for similarity under Article 2.3.

55. As discussed in Korea's submissions, Korea also conducts additional testing on Korean and third-country products. When cesium or iodine is detected, the samples are subject to further analysis for additional radionuclides. The alleged differences that Japan identifies are in the frequency and location of testing. However, these differences are rationally related to the different conditions prevailing in Japan. The additional testing requirements provide information on the levels of strontium and other additional radionuclides in fisheries and agricultural products imported from Japan. Large amounts of strontium and other radionuclides were released and continue to be released from the FDNPP. As explained by Korea's expert, there have been only limited measurements of strontium and other non-cesium radionuclides such that the information about these radionuclides in Japanese territory is insufficient to draw robust conclusions. Thus, the need to test fisheries and agricultural products from Japan more frequently, and the need to require the test prior to entry into the market, are both rationally related to the conditions prevailing in Japan. As such, any differences in frequency and location, which reflect different conditions, cannot constitute arbitrary or unjustifiable discrimination for purposes of Article 2.3.

56. Korea further notes that the import ban on fishery products is circumscribed to products from the Fukushima prefecture and the seven surrounding prefectures. Thus, the import bans are rationally related to the conditions prevailing in those prefectures.

57. Finally, Japan's argument under the second sentence of Article 2.3 is premised on its claim under the first sentence. Because Japan has failed to substantiate its claim under the first sentence of Article 2.3, the claim under the second sentence must also be rejected.

IX. KOREA'S SPS MEASURES ARE CONSISTENT WITH ARTICLE 5.6

58. The arguments and evidence put forward by Japan are insufficient to establish a violation of Article 5.6 of the SPS Agreement.

A. The Flaws in Japan's Article 5.6 Claim

1. Japan's Claim Is Premised on an Incorrect Characterization of Korea's ALOP

59. Japan continues to claim that Korea's ALOP for exposure to man-made radionuclide contamination in food is 1 mSv/year, and that Japan's proposed alternative measure (i.e., cesium testing) achieves this dose limit. This is incorrect.

60. As previously noted, the Appellate Body has held that the determination of the ALOP "is a *prerogative* of the Member concerned."[17] An Article 5.6 analysis thus requires an examination of whether possible alternative SPS measures meet the ALOP "*as determined by the Member*

[17] Appellate Body Report, *Australia – Salmon*, para. 199. (original emphasis)

concerned."[18] The Appellate Body has held that the panel is charged with "identifying the level of protection of the Member whose SPS measure is challenged."[19]

61. As Korea has repeatedly shown, its ALOP is 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.

62. Korea's ALOP is not a fixed quantitative threshold but instead aims to achieve a high to very high level of protection below the 1 mSv/year dose limit. It is incorrect for Japan to characterize Korea's ALOP as 1 mSv/year when Korea has made clear that its "acceptable" level of radiation exposure is below the 1 mSv/year dose limit. Korea maintains a highly prudent approach to the management of radionuclides from external sources, and therefore aims to control the additional radiation exposure from Japanese imports to be as low as possible below 1 mSv/year.

63. Korea maintains an ALOP that is high, conservative, and consistently applied across all categories of such risk. To do this, it establishes a range of measures that contribute to the ALOP. The measures that are under dispute are such measures. The nature of the measures and their method of determination will vary according to the substance concerned and the nature of its human health effect. In this case, Korea uses the ALARA approach to establish quantitative thresholds from which exposure would result in a level as far as possible below 1 mSv/year. The use of the ALARA principle is a well-known part of the Codex standards and is applied to establish maximum levels (MLs) for contaminants in food necessary to protect consumers. Notably, the application of the ALARA principle in food safety differs from its application in the radiological protection context.

64. The ALARA principle is articulated in Article 1(34) of the Korea Food Code. In addition, Korea has consistently expressed its ALOP with sufficient precision. As a result, the Panel should accord significant weight to Korea's articulation of its ALOP.

65. Korea reiterates that it is well-established that there is no obligation for an importing Member to set its ALOP in "quantitative terms."[20] In fact, in *Australia – Apples*, the Appellate Body confirmed that Australia's ALOP was "providing a high level of sanitary or phytosanitary protection aimed at reducing risk to a very low level, but not to zero."[21] The Appellate Body found that Australia's ALOP makes clear that Australia's acceptance of "very low" risk is a standard that is stricter than standards that would accept "moderate", "high", or "extreme" risk, but not as strict as standards that would accept only "negligible" risk. While there were no "upper bounds" or numerical thresholds provided in Australia's ALOP, the Appellate Body still found that the ALOP made clear Australia's acceptable level of risk and could be applied in international trade.

66. As shown in Exhibit KOR-143, the 1 mSv/year dose limit is the upper bound of the "tolerable" level of risk, but Korea's ALOP, or "acceptable level of risk", is a level below that dose limit, which reflects the ALARA principle. Ultimately, while Korea's ALOP is not defined in quantitative terms, it is not vague or equivocating.[22] In fact, Korea's ALOP is notably more precise than Australia's ALOP in *Australia – Apples*. Japan attempts to confuse Korea's clear standards by arguing that "tolerable" is synonymous with "acceptable" and therefore everything below the "upper bound" of 1 mSv/year is "acceptable." In doing so, Japan has continued to avoid engaging with the information submitted in Exhibit KOR-143 and other authoritative sources explaining the ALARA principle.

2. Japan's Claim Is Also Premised on an Incorrect Characterization of Cesium Testing As "Another Measure" Under Article 5.6

67. Japan also fails to make a valid claim under Article 5.6 because cesium testing does not constitute "another measure" under footnote 3 to Article 5.6. A Member invoking Article 5.6 must establish the existence of "another measure" that achieves the ALOP of the respondent Member.

[18] Appellate Body Report, *Australia – Salmon*, para. 204. (original emphasis)
[19] Appellate Body Report, *India – Agricultural Products*, paras. 5.220-5.221.
[20] Appellate Body Report, *Australia – Apples*, para. 343. Korea's second written submission, para. 268.
[21] Appellate Body Report, *Australia – Apples*, para. 369.
[22] See Appellate Body Report, *Australia – Salmon*, para. 206.

The term "another" is "[u]sed to refer to a different person or thing from one already mentioned or known about". The Appellate Body confirmed this in *India – Agricultural Products*, where it stated that "[i]n order to succeed in a claim under Article 5.6, a complainant must establish that there is an *alternative* measure…."[23] The term "alternative" indicates that the measure is different to the measure currently being applied by the respondent Member.

68. Japan errs when it states that cesium testing is an "alternative" measure that is "different" from the measure currently being applied by Korea. Korea already applies cesium testing to imports of Japanese food products. Therefore, cesium testing is not different to the measures already being applied by Korea.

69. The panel in *Brazil – Tyres* also confirmed the principle that a measure already being applied by the respondent party cannot constitute an "alternative" measure. The panel specifically found that "the alternative measures…do not constitute alternatives that could apply as a substitute for the import ban on retreaded tyres … Rather, they would appear to be complementary measures that Brazil in fact already applies, at least in part."[24] The panel's finding was upheld on appeal by the Appellate Body, which noted that "some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy."[25]

70. Similarly, cesium testing is not an "alternative" measure to Korea's import bans or additional testing requirements, but rather a "complementary" measure already being applied by Korea that is "cumulative rather than substitutable" with respect to those measures challenged by Japan. Japan concedes that cesium testing is an "integral element" of Korea's additional testing requirements because the requirement to undertake additional testing depends on the results of a prior cesium test. Indeed, cesium testing, the additional testing requirements, and the import bans are all integral and complementary parts of Korea's comprehensive response to the radioactive contamination from the FDNPP. The measures are complementary in that they are applied to target different prefectures in Japan that pose different risks based on their proximity to the FDNPP accident and prior recordings of high levels of radioactivity in food products, as well as to address food safety risks arising from contamination in Japanese food products by different radionuclides. Thus, cesium testing is a complementary measure already currently applied by Korea and does not constitute an "alternative" measure that could apply as a "substitute" for Korea's import ban and additional testing requirements. Similarly, the Appellate Body has held that "[s]ubstituting one element of [a] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect" and therefore found that the panel did not err in "rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban."[26]

71. Japan also states that the fact that cesium testing alone is "different" from Korea's existing measures is evident to Japan's fishermen and farmers because cesium testing alone would significantly enhance competitive opportunities for their products. Japan misses the point. Whether a measure enhances or restricts competitive opportunities for products is relevant for determining whether the proposed alternative measure is "significantly less restrictive to trade" than the challenged measure but is not relevant for determining whether the proposed measure constitutes "another measure" under footnote 3 of Article 5.6.

72. In addition, Japan refers to Korea's ALOP, which it again mistakenly describes as achieving a committed dose exposure of Korea's consumers that does not exceed 1 mSv/year. Japan then claims that the additional testing requirements make no independent contribution to Korea's ALOP. In doing so, Japan attempts to distinguish Korea's measures from those in *Brazil – Retreaded Tyres*, which each allegedly contributed independently to the achievement of the policy objective at issue. However, the panel in *Brazil – Retreaded Tyres* noted in fact that the European Communities' proposed waste tyre disposal schemes would not seem able to achieve the same level of protection pursued by Brazil – i.e., "non-generation" of waste tyres in the first place – as the import ban.[27] As a result, the panel found that such schemes are not "an *alternative* to the import ban in light of the level of protection Brazil pursues in relation to the health risks

[23] Appellate Body Report, *India – Agricultural Products*, para. 5.203. (emphasis added)
[24] Panel Report, *Brazil – Tyres*, para. 7.172.
[25] Appellate Body Report, *Brazil – Tyres*, para. 181.
[26] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.
[27] Panel Report, *Brazil – Retreaded Tyres*, para. 7.177.

concerned..."[28] Thus, the panel found that the European Communities' proposed measures did not contribute to the achievement of Brazil's policy objective or level of protection.

73. Similarly, cesium testing alone cannot achieve Korea's policy objective of achieving a high level of protection or ALOP for its people, which is not 1 mSv/year. Japan is incorrect when it states that additional testing requirements contribute nothing additional to the achievement of Korea's ALOP. Korea aims to achieve a very high level of protection that is stricter than the 1 mSv/year dose limit of the International Commission on Radiological Protection (ICRP). As Korea noted at the Second Substantive Meeting, it is undisputed between the parties that strontium is hazardous and even more so than cesium. The additional testing provides information on the levels of strontium and other radionuclides in Japan's food products, and as a result, independently contributes to Korea's policy objective or ALOP. Thus, this is not a case where, in proposing cesium testing only, Japan is merely removing a "redundant" measure.

74. In sum, because cesium testing is a "complementary" measure currently applied by Korea as part of its comprehensive regulatory response to the FDNPP accident, cesium testing itself does not constitute "another measure" that could apply as a "substitute" for Korea's import ban and additional testing requirements under footnote 3 of Article 5.6.

75. For these reasons, Japan's proposed measure – cesium testing – does not constitute "another measure" within the meaning of footnote 3 and Article 5.6 and, consequently, Japan's claim must fail.

3. Japan's Claim Is Premised on the Use of the Scaling Factor Method though the Pre-Conditions for Use of the Method Are Not Met

76. Japan claims that cesium testing achieves Korea's alleged ALOP of 1 mSv/year. In doing so, Japan relies heavily on the analysis provided in Exhibits JPN-11 and JPN-148. Korea has already shown that 1 mSv/year is not Korea's ALOP. In addition, Korea has shown that Japan's methodological approach is flawed.

77. Japan repeatedly claims that it is not using the Scaling Factor Method (SFM) in the Exhibit JPN-11 and JPN-148 statements. Contrary to those claims, Korea has shown that Japan's consultants indeed used the SFM in their analysis. As Korea previously pointed out, Exhibit JPN-148 references a "scaling approach" throughout the analysis. The SFM is a technique for predicting amounts of other unmeasured radionuclides on the basis of ratios with Cs-137. The SFM was developed to predict emissions from nuclear facilities where the characteristics of the source terms are very well characterized and relatively unchanging over time. This method relies on a very strong correlation among radionuclides and other conditions that are not met in this case. However, Korea's experts demonstrated that Japan's analysis based on the SFM is scientifically invalid because (i) there are no acceptable grounds for the use of a scaling factor and (ii) there is no evidence of any correlation between cesium and other radionuclides for the purposes of assessing food safety

4. Japan's Measurement Data Are Insufficient

78. Japan claims that measurements in Japanese food products in Exhibits JPN-11, JPN-148, JPN-238 and JPN-239 confirm the conservative nature of the 100 Bq/kg cesium threshold. Japan asserts that the data further confirms that, if cesium levels are below 100 Bq/kg, overall exposure will not exceed 1 mSv/year. Japan's argument has several flaws.

79. As Korea has explained, the data included in Exhibits JPN-11, JPN-148, JPN-238 and JPN-239 were not available to Korea's regulator at the time the measures at issue were taken or even when this Panel was established. Thus, assessing Korea's measures against these analyses and data would constitute an improper second-guessing of Korea's regulator and would violate the applicable standard of review and the Panel's terms of reference.

80. Japan has emphasized the conservative nature of its approach, including its assumptions regarding the contribution of strontium to the overall radiation dose. However, Japan's approach is

[28] Panel Report, *Brazil – Retreaded Tyres*, para. 7.178.

novel as was confirmed by one of the Panel's experts. Any such novel assumptions or new approach must be validated through sufficient measurements, including of strontium and other radionuclides. Such measurements did not exist at the time the Panel was established and do not yet exist today. Thus, all assertions regarding the supposedly conservative nature of Japan's approach, and utilizing data after September 28, 2015, are *ex post facto* rationalizations.

81. In addition, as Korea has noted, the data set in Exhibits JPN-11 and JPN-148 is quite limited. Only 419 pairs of cesium and strontium data points were provided to support the conclusion in Exhibit JPN-148. Subsequently, Japan submitted an updated sample set of 579 pairs of cesium and strontium data points, which now included data points with the "ND" values for cesium or strontium, or both. However, even including the "ND" values in the analysis of the Sr-90/Cs-137 ratio for a total of 579 pairs of data points is not sufficient, considering the long period of time that has elapsed since the Fukushima accident in 2011.

82. To this day there are highly insufficient samples of strontium measurements within Japan's monitoring program. One of the Panel's experts recommended that one-third of the amount of money spent on measuring Cs-134+137 should be spent on measuring Sr-90. Another expert suggested that 5 percent of samples should also be analysed for Sr-90. To date, Japan has measured 1,272,711 Cs-134+137 samples and only 3,752 Sr-90 samples, which is about 0.295 percent of the total cesium measurements. Even fewer samples have been tested for significant radionuclides such as H3, Ru, Ce, among others.

83. Without sufficient measurement data, Korea cannot ensure that testing for cesium only will guarantee that overall exposure remain below Korea's ALOP.

5. The Additional Testing Requirements Are Not Significantly More Restrictive to Trade than Japan's Proposed Measure

84. Japan errs when it asserts that Korea's additional testing requirements are trade-restrictive because of the additional time and increased costs associated with the testing, and because testing supposedly must be conducted in Japan.

85. As Korea has stated, differences in time or costs associated with the process for testing additional radionuclides as opposed to cesium cannot be an indicator of trade restrictiveness. Any additional time or increased costs are the result of the scientific process or current state of technology that is available for testing. As Japan itself recognizes, strontium and other additional radionuclides are more difficult to test than cesium. That is independent from any action taken on the part of Korea's regulator. Korea cannot be penalized under Article 5.6 because there is not a faster method for testing additional radionuclides.

86. Strontium testing is no more burdensome than other tests used in the food safety context, for example, for mercury. The technical limitations that prevent quicker and cheaper strontium testing should not be understood to be a restriction on trade, particularly since these limitations are completely outside the control of Korea.

87. Japan also continues to incorrectly state that a Japanese product found to contain cesium must be shipped back to Japan to undergo additional testing. This is an incorrect fact that Korea has repeatedly clarified. Korea notes that a Japanese product that is subject to additional testing requirements can either undergo such testing in Japan prior to export to Korea, or if already at the Korean border, the product can undergo additional testing in Korea at an institution that is authorized by Japan. Thus, Japan's attempts to highlight the costs associated with shipping the Japanese consignment back to Japan for additional testing are not relevant.

88. Japan therefore has failed to establish that its proposed measure is "significantly less restrictive to trade" than the additional testing requirements. Because Japan fails to establish the key elements under Article 5.6, the Panel should reject Japan's claim.

2 B. The Role of Panel Experts in Assessing Japan's Article 5.6 Claim

89. Finally, Korea recalls that the role of panel experts in an assessment of Article 5.6 is limited. Whether or not an alternative measure's level of risk achieves a Member's appropriate level of protection is a question of legal characterization that cannot be delegated to scientific experts.[29]

90. Yet, during the expert meeting, several of the Panel experts opined on the "necessity" of Korea's SPS measures in light of Korea's ALOP. This is a question that falls outside the purview of the Panel experts. The ALOP is the sole prerogative of Korea, and whether an SPS measure is "necessary" to achieve Korea's ALOP is a legal question that cannot be delegated to scientific experts. Korea further notes that a large number of the experts' responses were premised on a dose limit of 1mSv/year, which, as Korea has explained repeatedly, is not Korea's ALOP.

X. KOREA'S SPS MEASURES ARE CONSISTENT WITH ARTICLE 7 / ANNEX B OF THE SPS AGREEMENT

A. Publication of Korea's SPS Measures

91. Korea promptly published the SPS regulations at issue through press releases and notices that were immediately posted on government websites. Thus, Korea has fully complied with its transparency obligations under Article 7 and Annex B(1). Indeed, publication on the intern is the approach recommended by the SPS Committee.

92. Japan was well aware of Korea's press releases and notices as it specifically referred to many of them in the request for consultations, request for establishment of a panel, and in its submissions to this Panel.

93. Japan argues that the publication of the basic requirements of a regulation is not sufficient to provide more or less complete familiarity with the regulation. However, Korea has demonstrated that its press releases and notices provided detailed information about the SPS measures at issue. The information that Korea provided was sufficient to enable interested Members to become acquainted with them. In fact, several of Japan's exhibits were compiled using information from Korean government websites. The information that Japan complains was not provided was either provided by Korea, or is information that is generally not included in SPS regulations, such as the rules of origin.

94. Finally, Japan seems to introduce a new requirement that publication on the Internet only complies with Annex B(1) if it occurs "in a specifically designated location". Japan fails to provide any basis in the text of Annex B(1) for this requirement. Indeed, Annex B(1) does not specify the medium to be used for publication, nor does it require that publication occur "in a specifically designated location".

B. Korea's SPS Enquiry Point

95. Korea has satisfied its obligations under Annex B by establishing an Enquiry Point, which was responsive to Japan's questions. The Panel should reject Japan's attempt to apply a strict liability standard under Annex B(3). The actual language used in Annex B(3) indicates that the obligation on Members is to "ensure that one enquiry point exists". There is no indication in the text of Annex B(3) that the drafters intended to establish a strict liability standard pursuant to which a single instance in which an Enquiry Point fails to respond to a request could give rise to a WTO dispute.

96. Simply because in a single instance an Enquiry Point may not have provided information that satisfied the requesting party, does not give rise to a violation of Annex B(3).

97. Regardless, in this case, Korea's Enquiry Point responded to Japan's request and provided Japan with the requested information. Japan rests its entire claim in this case on a single request (24 June 2014), to which Japan acknowledges Korea responded,[30] and an alleged follow-up

[29] Appellate Body Report, *Australia – Apples*, para. 384. See Korea's first written submission, para. 98.
[30] Japan's first written submission, para. 185.

(13 November 2014).[31] Thus, at most, Japan's claim would be based on a single instance in which the Korean Enquiry Point would have failed to respond to a request. This does not constitute a failure by Korea to "ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents".

98. In sum, Japan's claims under Article 7 and Annex B have no merit and should be rejected by the Panel.

XI. KOREA'S SPS MEASURES ARE CONSISTENT WITH ARTICLE 8 / ANNEX C OF THE SPS AGREEMENT

99. Japan's arguments fail to establish that Korea's additional testing requirements are inconsistent with Article 8 and Annex C of the SPS Agreement.

3 A. Scope of Article 8 and Annex C

100. Japan fails to demonstrate that Korea's additional testing requirements are "procedures" within the meaning of Annex C. Japan argues that a "procedure" is defined as "[t]he fact or manner of proceeding with *any* action, or in *any* circumstance or situation". In other words, a "procedure" refers to the way or the manner in which an action or situation is processed. However, Korea's additional testing requirements do not specify the "way or manner" in which an action or situation must take place. They do not dictate the process for testing, only that testing for additional radionuclides be conducted for products that contain at least 1 Bq/kg of cesium or iodine.

101. Japan references the apparently broad scope of the wording in the chapeau of Annex C and footnote 7 of Annex C. However, the fact the chapeau references "*any* procedure" or that footnote 7 indicates that Annex C procedures can include "procedures for sampling, testing and certification," does not change the fact that Korea's additional testing requirements must still first be characterized as "procedures."

102. Because Korea's additional testing requirements indicate that testing for additional radionuclides must be conducted in products that contain at least 1 Bq/kg of cesium or iodine, not how or in what way or manner the testing is to be conducted, the additional testing requirements are not "procedures". Notably, footnote 7 to Annex C also specifies that "control, inspection and approval procedures" include "procedures for sampling, testing and certification." A "procedure" for testing would have to articulate a process for conducting the testing beyond just requiring that the testing be conducted.

103. Japan incorrectly asserts that Korea's definition of "procedures" hinges on the "specificity" or "formality" of the measure and the amount of detail published regarding the measure. On the contrary, Korea's arguments concern the nature of the measure itself and not the specificity of the details published regarding the measure. Korea's additional testing requirements are not "procedures" because they do not concern the process for conducting testing, and not because of any alleged lack of specificity in the information published about the requirements.

104. Thus, because Korea's additional testing requirements are not "procedures," they are not covered under Article 8 and Annex C.

B. Assuming Annex C(1)(a) Applies, Korea's Additional Testing Requirements Are Not Undertaken in a Less Favourable Manner For Imported Products Than For Like Domestic Products

105. Japan claims that Korea's additional testing requirements are inconsistent with Annex C(1)(a) because they allegedly are not "undertaken and completed … in no less favourable manner for imported products than for like domestic products."

[31] Japan's first written submission, paras. 184-190.

106. Japan has the burden of establishing "likeness" and has failed to meet this burden. Japan also has failed to establish that the additional testing requirements are undertaken in a "less favourable" manner for Japanese imports.

107. The approach to "less favourable treatment" under Annex C(1)(a) should proceed pursuant to the analytical approach under Article 2.1 of the TBT Agreement. The Appellate Body has found that Article 2.1 of the TBT Agreement does not "prohibit[] *any* detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from *legitimate regulatory distinctions*."[32]

108. Any differences in treatment of Japanese products resulting from Korea's additional testing requirements do not amount to less favourable treatment because they are explained by a legitimate regulatory distinction. Korea has demonstrated that it implemented its additional testing requirements with respect to Japanese food products because of the food safety risks posed by the radioactive contamination from the FDNPP. Thus, Japan's claim of inconsistency with Annex C(1)(a) fails.

C. Assuming Annex C(1)(c) Applies, Korea's Additional Testing Requirements Are Not Inconsistent With This Provision

109. Japan also claims that Korea's additional testing requirements are inconsistent with Annex C(1)(c). Korea's additional testing requirements are not "information requirements" under Annex C(1)(c). However, even assuming they were subject to Annex C(1)(c), Korea's additional testing requirements are necessary to achieve Korea's ALOP.

110. Japan's attempt to liken the situation in this case with *Russia – Pigs (EU)* is misplaced. In that case, the panel examined the necessity of Russia's requests for information ("information requirements") required for the process of determining the existence of African swine fever (ASF)-free areas within the European Union (Article 8 / Annex C "procedure").[33] Thus, "information requirements" are requests for information to carry out an Article 8 / Annex C procedure. In contrast, Korea does not separately request information in order to carry out its additional testing requirements. The additional testing requirements do not involve "information requirements" that are separate from the measure itself.

111. Japan itself has stated that both the additional testing and certification requirements involve or constitute information requirements. As Japan's statement reflects, the additional testing requirements do not involve "information requirements" that can be separated from the measure itself. Japan also asserts that Korea requires not only additional testing be undertaken, but also that a "test report" or "certificate" be submitted to disclose the results of the additional testing to Korean authorities. Again, a test report or certificate is not a separate information requirement in order to carry out an Article 8 / Annex C procedure. The submission of a test report or certificate is part of the additional testing requirement itself, as there would be no purpose to requiring additional testing if the results of that testing were not recorded and presented to Korean authorities.

112. Japan also continues to challenge the additional testing requirements as being "unnecessary" to "ensure compliance with Korea's 1 mSv/year ALOP". In making such arguments, Japan is challenging the necessity of the testing requirements themselves and not any requirement to provide information. In doing so, Japan simply reiterates its Article 2.3 and 5.6 arguments. Even so, Korea has repeatedly shown that only testing for cesium does not ensure compliance with Korea's ALOP. As a result, its additional testing requirements are necessary.

113. Finally, in its responses to Panel questions after the Second Substantive Meeting, Japan asserted that in the event the Panel were to consider that Korea's additional testing requirements do not constitute "information requirements" within the meaning of Annex C(1)(c), Japan submits that the additional "certification" requirements alone constitute "information requirements", and that these certification requirements are not "limited to what is necessary for appropriate control, inspection and approval procedures." Even if the Panel were to accept this new argument at such a late stage in the proceedings, Japan again errs in trying to adopt a formalistic separation between

[32] Appellate Body Report, *US – Clove Cigarettes*, para. 174 (emphasis added).
[33] Panel Report, *Russia – Pigs (EU)*, paras. 7.564-7.571.

the additional testing requirements and the so-called "additional certification requirements." The "additional certification requirements" are not separate from the "additional testing requirements." They reflect the results from the testing conducted.

114. Even if Korea's additional testing requirements are subject to Annex C(1)(c), Korea has shown that the additional testing requirements are necessary to achieve Korea's ALOP given the insufficient measurement data on radionuclides other than cesium, the lack of correlation found between cesium and other radionuclides, and the ongoing contamination stemming from the FDNPP.

D. Assuming Annex C(1)(e) Applies, Korea's Additional Testing Requirements Are Limited To What Is Reasonable And Necessary

115. A "specimen" refers to a sample taken from a larger consignment. Annex C(1)(e) refers to regulations on the control, transport, inspection and approval of diagnostic specimens (including biological samples, infectious substances, etc.) for disease control and testing purposes. The World Organization for Animal Health (OIE) (or formerly the International Office of Epizootics), which is specifically referenced in the preamble of the SPS Agreement, has adopted standards in relation to the handling of such specimens. The most relevant standards are included in Chapter 1.1.3 of the Manual of Diagnostic Tests and Vaccines for Terrestrial Animals: "Transport of Specimens of Animal Origin". The OIE Manual articulates requirements for the transport, collection, storage, handling and acceptance of animal specimens.

116. Korea's additional testing requirements do not concern "individual specimens". While Korea's additional testing requirements involve testing certain randomly selected samples within each Japanese consignment for other radionuclides if more than 1 Bq/kg of cesium or iodine is detected, the additional testing requirements do not outline methods or procedures concerning how the "individual specimens" or "biological samples" will be collected, handled, stored, and transported. Thus, Korea's additional testing requirements are not such procedures covered under Annex C(1)(e).

117. Even if Korea's additional testing requirements were to fall within the scope of Annex C(1)(e), they are both reasonable and necessary to achieve Korea's ALOP. Moreover, Japan's Annex C(1)(e) claim is again premised on misrepresentations regarding the key elements of Korea's additional testing requirements. Testing for additional radionuclides does not have to take place in Japan. Korea only requires that the laboratory or institution conducting the testing be authorized by the Japanese government, and thus has implemented its additional testing requirements in a reasonable manner.

E. Assuming Annex C(1)(g) Applies, the Provision Does Not Impose a Mandatory Obligation on Korea's Additional Testing Requirements

118. Korea notes that Annex C(1)(g) uses the words "should be used" rather than "shall", or even "are" which is used in Annex C, paragraphs 1(a), 1(c), and 1(e). The plain language meaning of "should", as opposed to "shall", means that this provision is hortatory.

119. Korea also notes that the language in Annex C(1)(g) is very similar to Article 5.2.6 under the TBT Agreement. However, in the latter, the mandatory nature of the provision is explicit. The distinctions in the language used in the two agreements must be given effect.

120. Moreover, the language in Article 5.2.6 of the TBT Agreement has a "necessity" test embedded within the provision. By contrast, Annex C(1)(g) only encourages the "minimizing" of inconvenience. There is an inherent lack of specificity in how each Member is to minimize the inconvenience to applicants, importers, and exporters in any given situation and what that entails. As a result, other language in the provision also provides further support for the hortatory nature of Annex C(1)(g).

121. Even assuming that Annex C(1)(g) were to impose a mandatory obligation, Korea has already demonstrated that Japan's claim fails because it is again premised on mischaracterizations of Korea's additional testing requirements.

122. Japan claims that Korea erroneously compares (i) pre-market testing of Japanese food products with (ii) point-of-sale testing of both Japanese and domestic food products. Japan then asserts that domestic Korean food products are subject only to point-of-sale testing, which may include additional testing, and are not subject to pre-market testing. This is incorrect.

123. Cesium testing is conducted on samples from randomly selected final products. In addition, Korea conducts radioactivity testing on randomly selected domestic products both at the pre-market stage (i.e., at the stage of production) and at the point-of-sale stage, in the same manner as radioactivity testing is conducted for imported foods both at the border and at the point-of-sale. Moreover, additional testing is also required for domestic Korean products that are found to contain more than 1 Bq/kg of cesium or iodine at both the pre-market stage (i.e., at the stage of production) and point-of-sale stage.

124. With respect to the "siting of facilities," Korea does not require that food products from Japan containing at least 1 Bq/kg of cesium or iodine be sent back to Japan for additional testing. Korea permits the testing for additional radionuclides to occur in Korea or prior to export to Korea, as long as the testing is conducted by an institution authorized by the Japanese government.

125. With respect to the "selection of samples", Korea reiterates that domestic food products are also subject to additional testing if at least 1 Bq/kg of cesium or iodine was detected. Japan incorrectly alleges that under Korea's measure, mandatory additional testing is required for all consignments from Japan in which any cesium or iodine is found, while Korean products are not subject to similar mandatory testing for additional radionuclides when cesium or iodine is found. For Korean products that have been found to contain at least 1 Bq/kg of cesium or iodine, testing for additional radionuclides is mandatory.

126. The plain text of Annex C(1)(g) references the "criteria" used in the "selection of samples" of imported and domestic products. Japan does not challenge cesium testing, whether at the pre-export stage or at the Korean border. That means Japan does not challenge the scope or frequency of that testing. Japan's Annex C(1)(g) claim only relates to Korea's additional testing requirements. Korea has shown that the "criteria" used in the "selection of samples" of imported and domestic products for additional testing is the same. Specifically, if 1 Bq/kg of cesium or iodine is detected, both imported Japanese products and domestic Korean products are subject to mandatory additional testing requirements. Pursuant to its annual Guidelines for Food Safety Management, Korea has required additional testing for strontium, plutonium, and other radionuclides if 1 Bq/kg of cesium or iodine is detected.

127. Japan then claims that the Panel must ensure an "apples-to-apples comparison" of the differences in sampling criteria under Annex C(1)(g) which may necessitate an assessment of whether any differences in sampling criteria are rationally related to, and justified by, differences in the respective purpose of the schemes being compared. This is a new test proposed by Japan, which is not linked to the plain text of Annex C(1)(g). There is no indication of a trade-restrictiveness or necessity test in the provision. Annex C(1)(g) only encourages Members to use the "same criteria" with respect to the "siting of facilities" and "selection of samples" for imported products and domestic products. Annex C(1)(g) does not call for an analysis of whether the differences in sampling criteria are "rationally related to, and justified by, differences in the respective purpose of the schemes being compared". As a result, the Panel should disregard Japan's attempts to insert new tests into its analysis that do not have any basis in the text of Annex C(1)(g).

128. Ultimately, however, because Annex C(1)(g) does not impose a mandatory obligation, Japan fails to show that Korea's additional testing requirements are inconsistent with Annex C(1)(g) of the SPS Agreement.

XII. CONCLUSION

129. For these reasons, Korea respectfully requests that the Panel reject Japan's claims in their entirety.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

BRAZIL'S VIEWS ON THE TRANSPARENCY OBLIGATIONS IN THE SPS AGREEMENT

1. Brazil intervenes in this dispute due to its systemic interest in the correct and consistent interpretation of the obligations contained in the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), particularly those related to transparency and the provision of information related to SPS measures by the WTO Members. This integrated executive summary integrates comments made by Brazil in its Third Party Written Submission and the responses to the Panel's questions.

2. In its third party submission, Brazil clarified that it does not question the Members' right to adopt sanitary measures they deemed necessary, including an appropriate level of protection higher than that established by international standards. However, this right is not unbounded as the adoption of SPS measures are to be applied only to the extent necessary, based on scientific principles and in a non-discriminatory manner.

3. Brazil understands that the transparency obligations under Article 7 and Annex B are not something irrelevant, but central pieces of the SPS Agreement, and are directly linked to the right to adopt SPS measures. These obligations constitute the adequate means to inform others Members affected by the measures and to provide additional information they deemed necessary.

4. In what regards the obligation contained in Article 7 and Annex B, Brazil explained that, in order to maintain the balance of rights and obligations in the WTO, Members need to ensure that any sanitary measure which may affect international trade are promptly informed to the Membership, particularly those directly affected by the implementation of the measure. The duty to inform is not to be understood as *pro forma*, but entails the need to provide prompt, on-time, and effective information on all aspects of the relevant measure.

5. As for the questions of the Panel to the third parties, Brazil argued that the scope of the publication obligation provided for in Annex B(1) is not straightforward and should be interpreted in light of the provision's own object and purpose. In this sense, when Annex B(1) determines that measures adopted be published promptly "in such a manner" as to enable interested Members to become acquainted with them, it establishes that the content of the publication/notification in order to comply with this publication obligation is not fixed.

6. The expression "in such a manner" of Annex B(1) works as an operative element that informs the scope of the publication obligation and the level of detail of information to be provided. As the very basis of transparency obligations, Brazil understands that the SPS measure itself need to be published and does not agree with interpretations that suggest that the publication obligation may be narrower depending on the specificities of the relevant regulation. Nevertheless, although in most situations the simple publication of the text of the relevant SPS measures may suffice to provide enough information to interested Members, there may be cases in which the nature of the measure requires additional information so as to allow the Membership to "become acquainted with" the real scope of the SPS measure.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. As a third party in this case, Canada submitted a written statement, an oral statement, and responses to third party questions issued by the Panel. In this Executive Summary, Canada summarizes its position on issues related to the scope of SPS Agreement Annex B.1 and Annex B.3, the interpretation of Article 2.3, and the impact of Article 5.7 on Articles 2.3 and 5.6.

A. SPS Agreement Transparency Provisions: Annex B

1. The regulation must be published under Annex B.1

2. It is Canada's position that the adopted regulation must be published pursuant to Annex B.1. Canada believes that the plain and ordinary meaning of the provision, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention), is clear and requires that all adopted SPS regulations be published promptly.

3. The context of Annex B.1 also suggests that it is the final measure itself that must be published. In contrast to Annex B.5(a) and (b), which refer to the publication of a *notice* in advance of a regulation, and Annex B.5(c), which refers to the actual copies of the *proposed* regulation, Annex B.1 clearly refers to the *adopted* measure itself that must be published promptly.

4. Canada also notes that footnote 5 to Annex B.1 states that regulations include "laws, decrees, or ordinances which are applicable generally". The Appellate Body in *Japan – Agricultural Products II* clarified that measures that are "similar in character" to those in the footnote also fall within the scope of Annex B.1. Canada does not believe a press release falls within the scope of Annex B.1 as it is not the regulation itself, it does not fall within the scope of footnote 5, and is not "similar in character" to those instruments in footnote 5. Canada does not believe that publishing a summary of a regulation is sufficient to fulfil the requirements of Annex B.1. However, if the actual regulation or measure is appended to the press release, or if there is a direct web link to the regulation or measure in a press release, the requirement to publish the "regulation" in Annex B.1 would be met.

2. "To become acquainted with" a measure in Annex B.1 means a measure must provide the level of information necessary for an exporter to understand what is required for a product to get to market

5. Annex B.1 requires that the publication of a measure be done in such a manner as to allow other Members "to become acquainted with them". It is Canada's position that this requirement goes beyond the mere publication of the measure, to whether the measure provides a level of information necessary for an exporter to understand what is required for a product to get to market.

6. In accordance with Article 31(1) of the Vienna Convention, Canada notes that the ordinary meaning of the word "acquaint" in the Shorter Oxford English Dictionary is to be made "aware" or "familiar". This suggests that a threshold amount of information must be included in the regulation. In this case, exporters would need to be sufficiently aware and familiar with the measures so that they could export their products. This could only be achieved if the measure includes a certain degree of detail and specificity. Canada also believes that the meaning of "in such a manner" should not be restricted to how a measure is published, but speaks to the content of the measure.

7. Canada notes that the Appellate Body in *Japan – Agricultural Products II* stated that the scope of Annex B.1 should be interpreted in light of the object and purpose of the provision. Canada believes that its position on the interpretation of Annex B.1 is supported by the object and purpose of the provision and the SPS Agreement more generally, which is to facilitate transparency and the predictability of the rules affecting trade in products subject to those rules.

8. The amount of information necessary to meet the threshold in Annex B.1 will depend on the circumstances of the particular measure. In some cases, a measure may be less complex and require less detail for a Member and its exporters to become sufficiently "acquainted" with the measure. However, in other cases a measure may include a series of complex requirements and necessitate a greater level of detail and explanation for exporters to understand what is required of them.

9. Canada agrees with Norway's citation of three cases under Article X:1 of the GATT 1994, as support for its position on this issue based on the similarity of the provision to Annex B.1 of the SPS Agreement. In *EC – IT Products*, the Panel held that the minutes of a Customs Code Committee meeting did not provide traders and governments with adequate knowledge of the measures at issue. In *Dominican Republic – Import and Sale of Cigarettes* and *Thailand – Cigarettes (Philippines),* the panels set out specifically what type of information would be necessary to meet the requirements of the transparency provision. These cases suggest strongly that there is a substantive requirement to the transparency provisions of Article X:1 of the GATT 1994, and not just a procedural requirement, and Canada believes that the same substantive requirement exists for Annex B.1 of the SPS Agreement.

3. Annex B.3 includes a substantive obligation to provide answers to "reasonable questions" and to provide "relevant documents" where requested

10. Canada believes that Annex B.3 is not limited to a procedural requirement of establishing an Enquiry Point, but includes a substantive obligation of responding meaningfully to reasonable questions and providing relevant documents that fall within the scope of Annex B.3(a)-(d).

11. It is Canada's position that limiting Annex B.3 to a procedural requirement is contrary to the plain and ordinary meaning of the provision, and would deprive it of any practical meaning. Furthermore, such an interpretation would be contrary to the object and purpose of the provision, which is clear from reading the text: there is an obligation to not only have an Enquiry Point, but to answer all reasonable questions and provide documents that fall within the scope of the provision. To suggest that the text of the treaty should be interpreted as requiring the establishment of an Enquiry Point to respond to inquiries that fall within the subparagraph (a)-(d), but that there is no obligation to actually answer any of these inquiries, is absurd. As stated by the Appellate Body in *Australia – Salmon*, it "would obviously be wrong to interpret the SPS Agreement in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement".

12. Canada also believes there is extensive support for its position when the provision is read in its context. Annex B.4, also under "Enquiry Points", clearly assumes that the documents requested under Annex B.3 will be delivered (and supplied at a certain price). Canada also recalls that Article 7 (Transparency) requires Members to "…provide information on their [SPS] measures in accordance with the provisions of Annex B", and Annex B.3 reflects the obligation in Article 7 to provide relevant documents and answer reasonable questions.

13. Canada disagrees with the United States' position that Members' substantive obligations with respect to transparency are not found in Annex B.3, but are found in other provisions such as Annex B.1 and Article 5.8. Canada notes that the transparency obligations in Annex B.1 and Article 5.8 address two very narrow and specific scenarios. Annex B.1 addresses the requirement to promptly publish the adopted SPS measure in such a manner as to enable Members to become acquainted with them, while Article 5.8 allows a Member to request an explanation of the reasons for an SPS measure when there is reason to believe that the measure is constraining or has the potential to constrain its exports, and the measure is not based on international standards. The only other substantive transparency obligations in Annex B fall under "Notification Procedures", which are also limited and specific in their application: they apply in the context of a proposed

regulation. It would be illogical to suggest that there are comprehensive transparency obligations for proposed regulations, but none when the measure has been adopted.

14. Canada has taken the position that the meaning of "reasonable questions" and "relevant documents" in Annex B.3 should be determined in light of what information Members and exporters need in order to ensure equality of competitive opportunities for foreign producers and exporters. This position is supported by the plain and ordinary meaning of "reasonable" and "relevant" in the Shorter Oxford English Dictionary. "Reasonable" means "appropriate or suitable to the circumstances or purpose" and not "irrational, absurd or ridiculous". "Relevant" means "bearing on, connected with, or pertinent to the matter at hand". Canada submits that what would constitute reasonable information or relevant documents in this case would be information that would be necessary for exporters to understand what is required for a product to be eligible for market access.

15. Overall, there will be an element of discretionary judgment that WTO panels will have to exercise in deciding what level of detailed information must be published in Annex B.1 and what can be addressed subsequently under Annex B.3. Canada believes that the two provisions work in tandem.

B. SPS Agreement Substantive Provisions

1. SPS Agreement Article 2.3 and "where identical or similar provisions prevail"

16. The first sentence of Article 2.3 sets out a three-step test that includes the following cumulative elements: a) that identical or similar conditions prevail in the territories of the Members being compared; b) that the challenged measure discriminates between those Members; and c) that the discrimination is arbitrary or unjustifiable.

17. The first step of the test requires a comparison of conditions, similar to that found in Article XX of the GATT 1994. Canada notes that the Appellate Body in *EC – Seal Products* stated that the term "conditions" could encompass a number of circumstances facing a country, while the panel in *Australia – Salmon (Article 21.5 – Canada)* stated that discrimination under Article 2.3 of the SPS Agreement may include discrimination between products that are different.

18. Canada takes the position that it is the similarity of risks that is the central factor in the first step of the Article 2.3 analysis. For example, the mere presence of a disease in a Member's territory and the risk associated with that disease may be a relevant condition if the same or similar disease prevails in another Member's territory. A comparison of the level of risks posed by comparable products may be one of many factors that can be taken into account in an "identical or similar conditions" analysis. Canada also notes that the jurisprudence suggests that the conditions to be compared must be relevant and case-specific, and that the regulatory objective of a measure can provide guidance on the question of which conditions prevailing in Members are relevant. In the context of this case, Canada believes that an assessment of relevant conditions should include, for example, the presence of toxins within a territory, namely the presence of cesium, and the risk-mitigating measures in place to assure the sanitary safety of food products.

2. The nature of a provisional measure under Article 5.7 should be taken into account in an assessment under Articles 2.3 and 5.6

19. Canada believes that the provisional nature of a measure is a relevant consideration for the purposes of the other substantive obligations in the SPS Agreement, if the measure also satisfies the criteria in Article 5.7.

20. Canada recalls the position of the Appellate Body in *EC – Approval and Marketing of Biotech Products*, that the threshold issue for Article 5.7 is whether relevant scientific evidence is insufficient. A measure would fall within the scope of Article 5.7 only if the four cumulative criteria cited by the Appellate Body in *Japan – Agricultural Products II* are met: the measure is imposed where relevant scientific information is insufficient; the measure is adopted on the basis of pertinent information; the Member adopting the measure seeks to obtain the additional

information necessary for a more objective assessment of risk; and that the Member reviews the measure accordingly within a reasonable period of time.

21. Canada notes that the panel in *EC – Approval and Marketing of Biotech Products* stated that the obligations of Articles 2.1, 2.3 and 2.4 are applicable to provisional measures under Article 5.7. However, Canada believes that if a measure meets the requirements of Article 5.7, this must be taken into account in an assessment of the measure under Articles 2.3 and 5.6. Therefore, for example, an analysis under Article 2.3 would take into account the fact that there was insufficient evidence to complete a full risk assessment on which to base the measure. Similarly, an assessment under Article 2.3 should take into account the fact that a measure is provisional under Article 5.7. For example, in assessing whether a measure is arbitrary or unjustifiable, Korea may provide a justifiable rationale for the imposition of more stringent measures against Japanese fish products as compared to similar products from other countries.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. CLAIMS RELATED TO ARTICLE 7 AND ANNEX B OF THE SPS AGREEMENT

1.1. THE ALLEGED FAILURE TO PUBLISH THE SPS REGULATIONS

4.1.2.1. Relationship of Article 7 and Annex B

1. The European Union (EU) agrees with previous panels and the Appellate Body that a finding of inconsistency with Annex B would result in a finding of inconsistency also with Article 7. The EU recalls that previous panels have therefore started by examining the claims under Annex B.

4.1.2.2. Paragraph 1 of Annex B

2. According to Annex B(1), Members shall ensure that SPS regulations (i.e. SPS measures, read in conjunction with footnote 5 of the SPS Agreement) are published promptly "in such a manner as to enable interested Members to become acquainted with them." The Appellate Body has previously stated in *Japan – Agricultural Products II* that the object and purpose of Annex B(1) is to enable interested Members to become acquainted with SPS measures and to enhance transparency regarding those measures. With regard to the similarly worded publication obligation in Article X:1 GATT 1994, the panel previously found in *EC – IT Products* that the publication should provide governments and traders with "adequate" knowledge of the measures in question. The case law as well as the fact that the SPS Agreement contains several provisions dealing with transparency (e.g. Article 5.8, Article 7, Annex B) underline the importance of transparency obligations under the SPS Agreement.

3. The overall purpose of Annex B(1) therefore is to ensure that other Members (and their exporters) are able to understand the SPS measure in question, to know what is required of them so that they can continue exporting e.g. their food and feed products to the Member adopting the SPS measure. Whether a given publication fulfils this purpose in a specific case will depend on a case-by-case analysis.

4. Accordingly, the EU considers that in principle the publication of the SPS measure as such is required but also sufficient to fulfil the transparency obligation under Annex B(1). However, what is required of a Member to comply with the obligation to publish may depend on the factual circumstances of a given case. The EU therefore does not take the position that the publication by Korea of press releases regarding the SPS measures *per se* allows to conclude on the inconsistency of the publication with Annex B(1) on the grounds that a press release does not constitute the SPS measure itself. The EU considers that in certain exceptional circumstances, the publication of a text falling short of the full text of the SPS measure may be sufficient to fulfil the transparency obligations. In the case of a press release, this could be the case, for example, if the press release contains a web link to the full text of the respective SPS measure or if the SPS measure is described in such a manner so as to amount *de facto* to the publication of the SPS measure. The EU does not conclude on the factual question as to whether this is the case.

1.2. THE ALLEGED FAILURE TO PROVIDE INFORMATION

5. Annex B(3) states that each Member "shall ensure that one enquiry point exists" which is "responsible" for providing answers and documents. In view of the importance of the transparency obligations under the SPS Agreement, the EU considers that Annex B(3) would be devoid of purpose if it would contain a mere obligation to set up an enquiry point and to provide any type of answers or documents, irrespective of their substantive content.

6. According to the European Union's view, Annex B(3) contains an obligation for Members to provide meaningful answers and documents. The provision of an answer/document creates a presumption that the obligation to provide meaningful answers has been complied with. This presumption may be rebutted in which case the panel may find an inconsistency with Annex B(3).

7. However, the obligation to provide meaningful answers is subject to certain limitations, e.g., (i) it only applies with respect to "reasonable" questions and "relevant" documents; (ii) it is subject to a standard of reasonableness; (iii) it must be considered in the overall context (e.g. not every

failure to reply is an inconsistency) and (iv) the questions and documents must "regard", i.e. be closely related to the items listed exhaustively in subparagraphs (a) to (d).

8. The EU also notes that any argument that Article 5.8 contains a specific (and hence the only) obligation to provide answers under the SPS Agreement cannot prevail. Article 5.8 concerns a specific obligation to provide "explanations of the reasons" for an SPS measure in particular circumstances. This is a situation which is not necessarily covered by Annex B(3) and hence Article 5.8 is not relevant to define the scope of the obligation under Annex B(3).

2. CLAIMS RELATED TO ARTICLE 2.3 OF THE SPS AGREEMENT

2.1. RELATIONSHIP OF ARTICLE 2.3 WITH OTHER PROVISIONS

9. The EU agrees with previous case law stating that an inconsistency with Article 2.3 can be found independently of an inconsistency with the more specific obligation of Article 5.5. Therefore Japan may invoke an inconsistency with Article 2.3 without having to invoke Article 5.5.

10. The EU also considers that the potential provisional nature of Korea's SPS measures and hence Article 5.7 and its relationship with Article 2.3 may be relevant for the panel's assessment in the present case. Japan makes no claim under Article 5.7 of the SPS Agreement. Korea also does not make an explicit argument under Article 5.7, except to generally describe its measures as "provisional in nature pursuant to Article 5.7". Korea's arguments under Article 2.3 (and under Article 5.6) focus on the alleged lack of scientific information. The EU notes that Article 5.7 can be relied upon by the respondent against a claim brought under another relevant provision of the SPS Agreement even if the complainant did not invoke Article 5.7.

11. The EU considers that Article 2.3 remains applicable even if a measure is provisional under Article 5.7. Other than in Article 2.2, Article 5.7 is not mentioned as a qualified exemption in Article 2.3. The EU also considers that the provisions in Article 5.7 and Article 5.5 (and Article 5.6, see below) are closely connected and contextually inform each other. A situation of insufficient scientific evidence should not completely insulate the regulating Member from the specific non-discrimination obligation under Article 5.5 and the same applies to the general non-discrimination obligation under Article 2.3. However, the assessment under Article 2.3 would in such case be informed by the fact that a provisional measure is, by definition, based on incomplete information. This is similar to the situation in EC - Biotech where the panel held that, where scientific evidence is insufficient, Members are only required to perform a risk assessment which "takes into account available pertinent information". The non-discrimination analysis of a provisional measure should therefore not be carried out under the same standard as for a definitive measure, based on a full risk assessment.

12. The EU also takes the view that Article 2.3 cannot be meaningfully applied in the present case without taking into account if Korea's SPS measures are provisional, whether Article 5.7 is invoked or not and whether the conditions of Article 5.7 are fulfilled or not. In deciding any claim under Article 2.3, a panel must look at the totality of the facts and evidence which may include the provisionality of a measure. This is also warranted under Article 11 DSU. The EU also considers that the fact that "all relevant factors" should be considered for the guidelines with respect to the implementation of the non-discrimination obligation under Article 5.5 indicates that all relevant factors should also be considered for an analysis as regards non-discrimination under Article 2.3.

2.2. ARTICLE 2.3

13. Under Article 2.3, first sentence, an SPS measure is discriminatory if (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (2) the discrimination is arbitrary or unjustifiable; and (3) identical or similar conditions prevail in the territory of the Members compared. The EU agrees with the position of previous panels that measures that constitute arbitrary or unjustifiable discrimination also constitute a disguised restriction under Article 2.3, second sentence.

14. The central issue under Article 2.3 in the present case appears to be whether identical or similar conditions prevail in the territory of the Members compared. The EU recalls that Article 2.3, contrary to the usual position with respect to non-discrimination obligations under other WTO agreements, may also include discrimination between different (non-competing) products. Article 2.3 therefore does not require a comparison in order to determine whether certain products are "like" but requires a comparison in order to determine whether conditions are similar or identical.

15. Japan's comparison in the present case focuses on the question of whether and to what extent Japanese food and food from other sources may contain cesium and other radionuclides. Contrary to Korea's contention, the EU does not consider that this constitutes an assessment as to whether the products are comparable, since Japan did not carry out any analysis of the competitive relationship between Japanese and non-Japanese fishery products. The level of radionuclides in food products is one important element to assess whether conditions are similar in a case like the present one. However, the EU considers that the panel will have to carefully assess whether Japan has shown, on the basis of a comparison of all relevant factors, that the conditions in the respective territories are similar.

3. CLAIMS RELATED TO ARTICLE 5.6 OF THE SPS AGREEMENT

16. Under Article 5.6, an SPS measure is more trade-restrictive than required if there is an alternative SPS measure which (1) is reasonably available, taking into account technical and economic feasibility; (2) achieves the Member's ALOP and (3) is significantly less trade restrictive than the contested measure. It is for each Member to choose its own ALOP. However, the Member should calibrate its measures according to the chosen level.

3.1. IMPORT BANS

17. The EU proceeds on the assumption that Japan's proposed alternative measure corresponds to Korea's approach to food from non-Japanese sources.

18. The Appellate Body has noted that the SPS Agreement contains an implicit obligation to determine the appropriate level of protection. Where a Member does not do so with sufficient precision, the ALOP may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. With this in mind, the relationship between Korea's 1 mSv/year benchmark and the "ALARA" principle should be clarified, in order to understand at which level the ALOP is actually set. Moreover, the Panel may look to the "SPS measure actually applied" for evidence on Korea's ALOP. If such an assessment showed that Korea seeks to ensure an ALOP of 1 mSv/year with respect to Korean food and non-Japanese imports, it would be difficult to see how a different ALOP could apply to Japanese imports. If the ALOP was said to be "ALARA" for food from all sources, this might suggest that Korea's measure does not reach Korea's own ALOP with respect to Korean and non-Japanese food.

19. Another contentious issue is whether Japan's proposed alternative measure achieves Korea's ALOP. In this respect, the EU focuses on the relationship between necessity, as expressed in Article 5.6, and insufficient scientific evidence, as expressed in Article 5.7 of the SPS Agreement. As mentioned earlier, none of the Parties invokes Article 5.7 in the present case.

20. Article 5.6 should be read together with Article 2.2 of the SPS Agreement. Article 2.2 excludes from its scope of application the kinds of situations covered by Article 5.7. This does not necessarily mean that situations covered by Article 5.7 are excluded from the scope of Article 5.6. Articles 5.6 and 5.7 are closely connected provisions. For example, the reference to "technical feasibility" in Article 5.6 could lead the adjudicator to ask whether it was technically feasible, in a situation of insufficient scientific evidence, for the regulator to design a less restrictive measure; conversely, the Article 5.7 requirements to base provisional measures on "available pertinent information", to seek additional information and review the measure, are a way of preventing the maintenance of overly trade-restrictive measures. In deciding any claim under Article 5.6, a panel must look at the totality of the facts and evidence. It is hard to see how facts and evidence showing that a measure is, in some sense, provisional in nature could be disregarded just because Article 5.7 was not relied upon. Moreover, even where those facts and evidence would not in themselves be sufficient to fulfil the requirements of Article 5.7, there is no basis on which a panel could simply disregard them entirely, in view of its obligation under Article 11 DSU.

21. The *EC - Biotech* panel held that, where scientific evidence is insufficient, Members are only required to perform a risk assessment which "takes into account available pertinent information". Such considerations should also weigh in with respect to Article 5.6. A provisional measure is, by definition, based on incomplete information. There may be uncertainty as to such a measure's contribution to the Member's ALOP, or its trade-restrictiveness. Alternative measures may be more difficult to implement on a provisional basis. A provisional measure could still be more trade restrictive than necessary, for example if it does not take into account "available pertinent information". Conversely, the fact that a measure is manifestly unnecessary and disproportionate would be relevant to determining whether or not the measure is in fact based on pertinent information. Both scenarios would support the conclusion that the measure breaches both Article 5.7 and Article 5.6.

22. Moving on, the EU agrees that, in principle, product testing is a less trade restrictive measure than an import ban, since it still allows imports to access the regulating Member's market. Finally, the EU agrees with Japan that the regulating Member's existing use of the alternative measure with respect to the same or closely comparable products or risks could support the claim that the measure is reasonably available.

3.2. ADDITIONAL TESTING REQUIREMENTS

23. The EU refers *mutatis mutandis* to its comments on the necessity of the import bans, adding only the following remarks on whether the alternative measure is significantly less trade restrictive. Here, the central issue is the extent of market access permitted by the two measures being compared. Any additional costs, complexities and delays that are imposed on imports as a result of the measure at issue, which would not be imposed under the alternative measure, should be taken into account. Thus, the EU disagrees with Korea insofar as it seems to suggest that differences in costs and delays are not a relevant consideration.

24. With respect to Korea's argument that additional testing is also contemplated by the Codex standard, the EU notes that whether or not an SPS measure is based on an international standard is not necessarily an issue that arises under the third prong of the Article 5.6 test. If the measures were considered to conform to a relevant international standard, they would benefit from a rebuttable presumption of conformity with the SPS Agreement under Article 3.2. Article 5.6 of the SPS Agreement applies "without prejudice" to Article 3.2. Consequently, in such a situation, it would be for the complainant to rebut the presumption of necessity.

4. CLAIMS RELATED TO ARTICLE 8 AND ANNEX C OF THE SPS AGREEMENT

25. The Appellate Body has found that Article 8 of the SPS Agreement "establishes an obligation to comply with the provisions in Annex C". A violation of the obligations in Annex C will also entail a violation of Article 8. Korea argues that an SPS measure itself cannot also constitute a "procedure" subject to Annex C. The EU does not find such a rigid distinction convincing. An SPS measure may itself contain rules on inspection and control procedures. For example, if a measure simply requires food to be tested on importation in order to establish whether it contains a certain contaminant, it would be an SPS measure, but it would also concern inspection and control procedures. On the other hand, the requirements of Annex C should not apply to each and every SPS measure. Annex C measures must concern control, inspection and approval procedures.

26. Many of the specific provisions of Annex C are similar to obligations that are expressed elsewhere in the SPS Agreement. For example, paragraph 1(a) is related to the non-discrimination rule of Article 2.3, and paragraphs 1(c) and 1(e) are reminiscent of the necessity rules in Articles 2.2 and 5.6. With this in mind, the EU expects that the Panel will have largely completed its task with respect to some of the Annex C claims by deciding on Japan's Article 2.3 and 5.6 claims.

27. Regarding paragraph 1(a), the EU recalls the finding of the *EC - Biotech* panel that "a mere showing that a Member has undertaken or completed a particular approval procedure in a manner which is unfavourable for a given imported product would not be sufficient to establish a "less favourable manner" of undertaking or completing approval procedures if the relevant Member's conduct is explained by factors or circumstances unrelated to the foreign origin of the product." Regarding paragraph 1(c), the same report suggests that a complainant should normally identify "specific information requirements which were imposed on applicants" in the relevant procedures, and "why any such requirements were not necessary". Regarding paragraph 1(e), that panel suggested that it is not sufficient that the procedure involves testing of specimens, but that the claim must identify specific requirements which were imposed "for the approval of individual specimens".

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

I. Introduction

This case and the associated third party submissions have raised some important systemic issues concerning transparency and provisional measures under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). New Zealand's participation as a third party in these proceedings reflects our systemic interest in the proper implementation of the SPS Agreement.

II. Relationship between Articles 5.7, 2.3 and 5.6

Article 5.7 of the SPS Agreement relates to provisional measures, adopted in cases where relevant scientific evidence is insufficient. Japan makes no claim under this Article. Consequently, Korea does not make a specific legal argument relating to Article 5.7. While Article 5.7 is not directly at issue in this case, Korea generally describes its measures as "provisional in nature pursuant to Article 5.7 of the SPS Agreement"[1] and its arguments under Articles 2.3 (Non-Discrimination) and 5.6 (Appropriate Level of Protection) draw on the alleged lack of scientific information, and inability to carry out a risk assessment.[2]

The EU argued, in its third party submission, that the provisional nature of a measure is relevant to the analysis carried out under Articles 2.3 and 5.6. In contrast, New Zealand considers that articles 2.3 and 5.6 apply in the same way to both provisional and definitive SPS measures.

In relation to Articles 2.3 and 5.7, the EU says in its written submission "the non-discrimination analysis of a provisional measure should not be carried out under the same standard as for a definitive measure, based on a full risk assessment." New Zealand takes a different view. A different standard should not be applied. However, if relevant, the factors surrounding the imposition of provisional measures may be taken into account when carrying out an analysis under Article 2.3. For instance, the fact that insufficient evidence is available about conditions in one Member *vis a vis* another Member may contribute to a finding that similar conditions do not prevail in these two countries. Evidence will have to be adduced as to the lack of evidence available, leading to the claim that similar conditions do not prevail.

We apply a similar analysis to Article 5.6. We do not consider that a different standard should be applied to assessing the compliance of provisional measures with Article 5.6. Rather, the circumstances surrounding the establishment or maintenance of a measure should be taken into account when assessing whether the measures in questions are "not more trade restrictive than required to achieve the [Member's] appropriate level of protection, taking into account technical and economic feasibility". The consideration of technical feasibility provides scope to consider the technical difficulties which may arise from having a lack of scientific information available when designing a measure or considering alternative measures (in terms of footnote 3 to Article 5.6) and determining whether it will meet a Member's appropriate level of protection.

In this case it is not necessary for the Panel to consider this issue in order to resolve the dispute, as Korea's measures have not been shown to be provisional in accordance with Article 5.7. However, if a Panel were to take into account the provisional nature of measures in an examination of claims under Articles 2.3 and 5.6, then it must be demonstrated that the measures are indeed "provisional" in accordance with Article 5.7. The burden falls on the party invoking the Article 5.7 "justification" to prove that their measures comply with Article 5.7, meeting the four cumulative requirements which must be met in order to adopt and maintain a provisional SPS measure (as set out by the Appellate Body in *Japan — Agricultural Products II*[3]). In the absence of such proof, arguments relating to insufficient scientific evidence and provisional measures may not

[1] Korea First Written Submission, para. 83.
[2] Korea First Written Submission, paras. 138, 190, 244 and 248.
[3] Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 22 February 1999, para. 89.

be part of the interpretative exercise under Articles 2.3 and 5.6. We cannot "relax" the core obligations in these two articles by referencing Article 5.7 but not providing any evidence that the elements of Article 5.7 are met.

III. Annex B(1) of the SPS Agreement requires publication of the measure itself

New Zealand's view is that the publication obligation under Annex B(1) requires publication of the text of the relevant SPS measures, in all instances. Annex B(1) states clearly that all SPS regulations (SPS measures such as laws, decrees, or ordinances) shall be published. Moreover, an interpretation of this obligation in accordance with the plain reading of the words, and in light of the object and purpose of the Annex – transparency – suggests that the measures themselves are to be published.

Publishing an incomplete summary of regulations, for example, through a press release, is not an acceptable means of satisfying this obligation. Given the technical nature of SPS regulations, in order to ensure compliance, Members must have access to the full text of regulations. This is especially important for measures of a provisional nature, which are adopted without prior notice and without Members having had an opportunity to comment.

A requirement to publish the text of SPS measures provides a predictable baseline which must be met by all Members. While the legal obligation to publish SPS measures will be met once the text of the measure is published, Members should be encouraged to publish extra information relating to their measures to assist with implementation and understanding. A Member must never publish *less* than the measure itself.

New Zealand does not see a continuum of obligations as useful here, with publication meaning less than the text of an SPS regulation in some circumstances, and more than the text of the regulation in other circumstances. Rather than Members unilaterally deciding what they should publish, depending on how complex they believe their regulations to be, Members need certainty about what they are obligated to publish. New Zealand sees one fixed standard - publication of the measure itself - as facilitating such certainty.

We recognise that in some cases, additional information may be required by some Parties in order to interpret particularly complicated measures. However, it is the role of the enquiry point, pursuant to Annex B(3), to provide this information if requested by interested Members.

IV. Annex B(1) of the SPS Agreement does not govern the level of detail required in a measure

There are two possible interpretations of the obligation that "Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them."

The first interpretation is that this obligation is about access to SPS regulations; the manner in which a regulation is published refers to the way in which a regulation is published, the medium of publication. Regulations must be published in an accessible way, such as on a government website, or in easily accessible journals. Annex B(1) applies to regulations that *have been adopted*. Therefore, it would not follow from this that Annex B(1) should govern the level of detail that a regulation must go into, because it applies to regulations that have already been adopted.

The second interpretation is that the manner in which a regulation is published refers to the content of the regulation, and the level of detail required in the publication so that a Member can become acquainted with the requirements of the regulation.

New Zealand's inclination is to follow the first interpretation. The ordinary meaning of the word manner ("a way in which a thing is done or happens") in the context of this obligation seems to refer to the way in which a regulation is published, rather than the level of detail required of the regulation (for the reasons set out above in paragraph 7).

However, if the Panel takes the second interpretation of Annex B(1) and determines that it governs the level required in a regulation, New Zealand considers that the level of detail required by Annex(1) is that which will allow Members to understand what is required for compliance with a

particular SPS regulation. New Zealand agrees with Canada, who adopted a similar approach in its oral statement, stating that "the level of detail or information required by Annex B(1) is that which allows Members and its exporters to understand what is required for their products to be eligible for market access".

V. Members are required to provide answers to reasonable questions and relevant documents under Annex B(3), not under Article 5.8

New Zealand considers that Annex B(3) contains a substantive obligation for Members to both establish an enquiry point, and through this enquiry point, to respond to all reasonable questions from interested Members as well as provide relevant documents.

As stated by Canada in its third party written submission,[4] to interpret this obligation in a way that requires an enquiry point to be established, but does not require the enquiry point to actually respond to questions, makes little sense. Further, the qualifications placed on what can be directed to the enquiry point – *reasonable* questions and requests for *relevant* documents – would be ineffective and unnecessary if there were no obligation to respond to questions at all.

Article 5.8 is applicable only in a narrow range of circumstances. It allows Members to request an explanation of the reasons for SPS measures in situations where they have reason to believe that a specific SPS measure maintained by another member is constraining, or has the potential to constrain its exports, and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist. On the contrary, Annex B(3) is applicable in a much wider range of circumstances – Members must provide answers to all reasonable questions from interested Members, as well as provide relevant documents regarding any SPS regulations adopted or proposed within their territory, risk assessment procedures, and the determination of their appropriate level of sanitary or phytosanitary protection, among other things.

As we can see from a comparison of these two provisions, the purpose and content of Article 5.8 and Annex B(3) are different, and they are applicable in different situations. Article 5.8 is specific to Members seeking clarification about the reasons behind measures they believe to be constraining and not based on international standards. However, under Annex B(1) a Member may ask reasonable questions and request relevant documents about *any* SPS measure imposed by a Member.

[4] Canada Third Party Written Submission, para. 21.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. INTRODUCTION

1. A transparent regulatory framework is a prerequisite for international trade in general and the importation of food products in particular. Without the possibility to gain access to relevant and precise information regarding the requirements applicable to the importation of food products, traders are left without predictability and the appropriate due process guarantees. In the Recommended procedures for implementing the transparency obligation of the SPS Agreement (Article 7), the SPS Committee recognised transparency as one of the fundamental principles of the WTO.[1]

II. THE RELATIONSHIP BETWEEN ARTICLE 7 AND ANNEX B

2. Article 1.3 of the SPS Agreement states that "[t]he annexes are an integral part of this Agreement". The SPS Agreement Article 7 refers to Annex B, stating that "Members […] shall provide information on their sanitary or phytosanitary measures in accordance with Annex B". In *India – Agricultural Products* the panel clarified that "Article 7 must be read together with the provisions of Annex B of the SPS Agreement".[2] Moreover, the same panel pointed out that the Appellate Body has found that "an inconsistency with the provisions of Annex B results in an inconsistency with Article 7".[3]

3. Accordingly, it is quite clear that a violation of any of the paragraphs of Annex B will result in a violation of Article 7 of the SPS Agreement. Whether this is the situation in the case at hand, will depend on an interpretation of paragraph 3 and the assessment of the facts.

III. PUBLICATION REQUIREMENTS

A. Interpretation of Article 7 and paragraph 1 of Annex B

a) Publication vs information

4. In *Japan - Agricultural Products II* the Appellate Body addressed paragraph 1 of Annex B to the SPS Agreement and stated that;

> The object and purpose of paragraph 1 of Annex B is "to enable interested Members to become acquainted with" the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision. [4]

5. Article 7 of the SPS Agreement contains an obligation on Members, namely that Members "shall provide information" on their sanitary or phytosanitary measures. This must be done in accordance with the provisions in Annex B, which clarifies and specifies the content of Article 7. Following Annex B(1), adopted SPS regulations must be "published promptly in such a manner as to enable interested Members to become acquainted with them".

6. In *Japan – Agricultural Products II*, guidelines had been distributed to a limited number of addressees, and the Ministry of Agriculture, Forestry and Fisheries (MAFF) was available to answer queries. Still, the panel found that this was not sufficient to satisfy the publication requirement in Annex B(1) of the SPS Agreement.[5] Norway understands this to mean that access to information

[1] G/SPS/7/Rev.3, para. 1.
[2] Panel Report, *India – Agricultural Products,* para. 7.741.
[3] Ibid, referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 108.
[4] Appellate Body Report, *Japan - Agricultural Products II*, para. 106.
[5] Panel Report, *Japan - Agricultural Products II,* para. 8.115.

upon request would not fulfil the publication requirement. Rather, the publication requirement in paragraph 1 of Annex B and Article 7 must be interpreted to the effect that it entails a positive obligation on the Member, a duty to act on one's own initiative and to publish all SPS regulations.

7. Thus, the publication requirement will be fulfilled only if SPS regulations are published in a manner that makes them publicly available, so all interested Members and traders can become acquainted with them. This interpretation is in line with the fundamental aim of transparency, namely to facilitate international trade by ensuring clarity and predictability of Members' regulations.

b) The content of the publication requirement

8. In accordance with paragraph 1 of Annex B to the SPS Agreement, Members shall ensure that "all sanitary and phytosanitary regulations" are published promptly. In line with the wording of the SPS Agreement, it is the SPS regulation itself that must be published. This interpretation is also in line with the assessment of the panel in *Japan - Agricultural Products II.*[6] Footnote 5 to Annex B(1) clarifies that "regulations" mean "sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally", thus referring back to the wording of Article 7 of the SPS Agreement. This entails an obligation to publish the *text* of the relevant SPS measures, regardless of the specificities of the relevant regulation.

9. Should, however, the Panel find that paragraph 1 of Annex B to the SPS Agreement does not contain an unconditional obligation to publish the SPS regulation itself, Norway would argue, in the alternative, that this provision nevertheless contains an obligation on Members to publish complete and sufficiently detailed information on the regulation to allow other Members and traders to achieve the clarity and predictability necessary to facilitate international trade in food products. This follows from the standard set in paragraph 1 of Annex B to the SPS Agreement, namely that SPS measures must be published "in such a manner as to enable interested Members to become acquainted with them" (underlining added).

10. Similar publication requirements may be found in a number of WTO Agreements and case law concerning other WTO Agreements containing such provisions may also be relevant for the interpretation of the SPS Agreement. In this respect, Norway refers to the panel reports in *EC – IT Products,*[7] *Dominican Republic — Import and Sale of Cigarettes*[8] and *Thailand — Cigarettes (Philippines).*[9] These cases illustrate that Members must publish complete and precise information regarding the applicable rules and restrictions on the importation of food products. The manner in which this information is published must be adequate, to ensure that it enables Members to become acquainted with them.

11. The case at hand also illustrates the need for precise information on SPS regulations, to ensure that Members and traders are able to gain knowledge about the regulatory framework within which they must operate. Moreover, the challenges highlighted by Japan in this case point back to the object and purpose of transparency as a fundamental principle of the WTO, namely to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members for the benefit of all traders.

12. In its First Written Submission, Korea argues that Japan complains about a level of detail that goes beyond the publication requirement in paragraph 1 of Annex B to the SPS Agreement.[10] Moreover, Korea claims that "[t]he fact that paragraph 3 anticipates that interested Members may have questions confirms that publication under paragraph 1 does not require that publication include a description with the level of detail demanded in this case by Japan".[11]

13. Norway does not share this interpretation of the relationship between paragraphs 1 and 3 of Annex B of the SPS Agreement. As set out above, it is in our view clear that the publication requirement in paragraph 1 relates to the measure itself. We cannot, however, see that the obligations set out in paragraph 3 affect or limit the scope of the publication requirement in

[6] Ibid.
[7] Panel Reports, *EC – IT Products,* paras 7.1086 and 7.1087.
[8] Panel Report, *Dominican Republic - Import and Sale of Cigarettes,* para. 7.414.
[9] Panel Report, *Thailand - Cigarettes (Philippines*), paragraph 7.789.
[10] Korea's First Written Submission, para. 376.
[11] Korea's First Written Submission, para. 377.

paragraph 1. Rather, paragraph 3 complements paragraph 1 in that it stipulates easy access, through one enquiry point, to relevant information on SPS measures. This includes, but is not limited to, information about the measure itself. Paragraph 3 has a much wider scope, in that it obliges Members to provide documents on proposed SPS measures, control and inspection procedures, risk assessment procedures etc.

14. Thus, the level of detail demanded by Japan is not in itself decisive for the content of the publication requirement. What must be published is the SPS regulation itself, irrespective of the level of detail in the regulation.

IV. THE INTERPRETATION OF ARTICLE 7 AND PARAGRAPH 3 OF ANNEX B

a) The obligation to provide answers and documents in paragraph 3 of Annex B

15. Annex B of the SPS Agreement is entitled "Transparency of Sanitary and Phytosanitary Regulations" and concerns in its entirety different forms of transparency provisions. This reflects the importance of clarity, predictability and information on national regulations for the trade in food products.

16. Paragraph 3 requires Members to establish enquiry points which are responsible for "the provision of answers to all reasonable questions from interested Members" and "for the provision of relevant documents". The obligation to have an enquiry point is not disputed in this case, rather the disagreement between Korea and Japan concerns the precise content of the obligation in paragraph 3.

17. To this, Norway would argue that an obligation on Members to answer reasonable questions and to provide relevant documents follow from the wording of paragraph 3. The answers and the documents may not necessarily be prepared by the enquiry point itself, for instance other governmental entities may assist the enquiry point. However, the basic idea with the enquiry point is that interested Members shall have one point of contact in another Member where it will be able to obtain answers to its questions.

18. Read in the context of the wording of Article 7 of the SPS Agreement, which states that "Members shall […] provide information […] in accordance with […] Annex B", it is further underlined that the Member that receives a reasonable question though its enquiry point, is obligated to answer the question. Likewise, if a Member receives a request for relevant documents through its enquiry point, it is obligated to provide them.

19. This interpretation finds support not only in an ordinary reading of the text and its context, but also in the revised Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7), adopted by the SPS Committee.[12] In paragraph 1, in the final sentence, it is stated that "[t]ransparency under the SPS Agreement also includes answering reasonable questions". In paragraph 52 of the Recommended Procedures, under the heading "Guidelines for National Enquiry Points", it is stated that the enquiry point "is an effective avenue for obtaining information regarding SPS systems and measures from other Members".

20. Moreover, an interpretation of paragraph 3 under which a Member was not obliged to provide answers, but merely to have an enquiry point with no obligations to follow up on requests received, would not be in line with the purpose of the provision, namely to increase transparency to facilitate international trade. If the provision were to be interpreted as Korea suggests,[13] it would be rendered a mere formalistic provision – to establish an enquiry point – but with no real content. In Norway's view, such a reading of the provision would defeat its very purpose.

b) The obligation to provide "relevant documents" in paragraph 3 of Annex B

21. What constitutes "relevant documents" must be assessed on a case by case basis. However, the interpretation of which type of documents that are relevant is informed by the context in which this term is used. In this respect, Norway refers in particular to Article 7 of the

[12] G/SPS/7/rev.3.
[13] Korea's First Written Submission, paras. 392 and 393.

SPS Agreement, which imposes an obligation to provide information on SPS measures in accordance with Annex B. Moreover, paragraph 1 of Annex B, contains an obligation to publish *SPS regulations*, which is to be understood as *SPS measures*.[14]

22. In light of the obligation to publish and provide information on SPS measures, such measures are indeed "relevant documents" in the context of paragraph 3 of Annex B. The obligation to publish the measure cannot be interpreted as excluding the measure itself from the obligation of the SPS enquiry point to provide relevant documents.

23. Accordingly, Norway does not share Korea's assertion that "there is no basis for Japan to complain that it was not provided with 'copies of the measures at issue'".[15] Rather, the provision of copies of the measure itself seems to be at the very heart of what are "relevant documents" in the context of paragraph 3 of Annex B.

[14] Cf. footnote 5 to Annex B(1).
[15] Korea's First Written Submission, para. 395.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF US THIRD PARTY ORAL STATEMENT

I. INTRODUCTION

1. The United States will first address the two transparency obligations set forth in Article 7 and Annex B; second, we address interpretive issues related to Japan's claims arising under Article 2.3 and Article 5.6.

II. JAPAN'S TRANSPARENCY CLAIMS UNDER ARTICLE 7 AND ANNEX B

2. Neither Article 7 nor Paragraph 1 of Annex B prescribes the form in which a measure must be published. Therefore, the United States considers that publication through a press release would not necessarily raise a concern under the SPS Agreement. More important to compliance with a Member's obligation is the manner and content of any publication. Paragraph 1 of Annex B requires publication of the SPS *measure* itself, which includes any laws, decrees, or ordinances that are applicable generally. We do not understand Korea to take the position that its import bans and other requirements are unwritten measures.

3. Given the requirements of Paragraph 1, Korea's publication of press releases *about* the measures would appear to fall short of its publication obligation. While publication of the press releases may have made Japan and other Members aware of the existence of the SPS measures, that publication did not contain the SPS measures themselves. And by including bullet summaries of the details of the measures but not the measures themselves, the press releases did not enable Members to become acquainted with each measure because any summary necessarily paraphrases the language of the measure itself.

4. Paragraph 3 of Annex B provides that each Member shall ensure that one enquiry point "exists, which is responsible for the provision of answers to all reasonable questions", and for providing relevant documents. On its face, Paragraph 3 creates a procedural obligation to ensure that an enquiry point "exists" and that this enquiry point "is responsible for" providing certain information. By its terms, Paragraph 3 does not itself impose a substantive obligation on a Member to provide information or to explain the reasons behind its measures.

5. Members' substantive obligations with respect to transparency and the provision of certain information regarding SPS measures are created by other provisions of the SPS Agreement. For example, Article 5.8 requires a Member to provide an explanation of the reasons for an SPS measure if requested; Article 5.8 does not, however, require that the information be published or provided by the enquiry point described in Paragraph 3.

6. Rather, Paragraph 3 requires that a mechanism exist through which Members may submit questions or request documents, among other things; it does not impose additional substantive obligations on the enquiry point itself. Indeed, one can imagine that the enquiry point may be the office that receives an enquiry, but would then communicate the enquiry to the relevant government office to which it relates. Similarly, a concerned Member, instead of making enquiries to the enquiry point, may bring its concerns directly to the government office to which that concern relates.

III. ARTICLE 2.3

7. The United States considers that the factual assessment at issue under Article 2.3 should be based on all relevant factors to the conditions that may affect the risk presented by a product to human, animal, or plant life or health within the territory, including, but not limited to, the conditions occurring in a Member's territory and any relevant conditions relating to the product at issue.

8. The panel in *India – Agricultural Products* deemed relevant the presence of a disease within a territory, and the concomitant risk associated with that disease. It is appropriate for the Panel to consider differences that may exist between and among WTO Members from which the products are imported, including with regard to circumstances in which the products do not pose a risk even though they originate in a country reporting a unique condition that, alone, could result in a higher risk. Here, for example, the radionuclide release resulting from the accident in Japan is a relevant factor, just as the risk associated with the presence of radionuclides for particular products – regardless of their location – is relevant. These and other factors should be part of the Panel's assessment of whether Japan has shown that similar conditions prevail with respect to other Members.

IV. ARTICLE 5.6

9. It is not clear from the submissions whether Korea's measure is based on scientific evidence demonstrating that, as a result of the accident, radionuclides other than cesium are present in the Japanese environment in excess of acceptable levels and could be transmitted via traded products. It is further not clear whether radionuclides other than cesium could be present in the subject products even where safe amounts of cesium are detected. The United States notes that while the existence or sufficiency of any such scientific evidence could be addressed in the context of a legal claim pursuant to Articles 2.2 or 5.1 of the SPS Agreement, these articles appear to be outside the scope of this proceeding.

10. The precise level of protection Korea intends to achieve through these measures is unclear from its submission. In cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, a panel may identify the level of protection on the basis of the level of protection reflected in the SPS measure actually applied. In this respect, the level of cesium in products Korea deems safe for import from Members other than Japan would be a relevant consideration.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOR THE THIRD PARTIES

11. Annex B, Paragraph 1, sets forth one publication obligation for all SPS "regulations." To publish an SPS regulation is to print the text that constitutes the measure itself. The "measures" are typically written, and publication of such a measure would therefore mean printing the text of the measure.

12. Content, not form, is the focus of compliance with the publication obligation. In some cases, for Members to become acquainted with the SPS measure at issue, additional information may also need to be published to meet the obligation. For example, when a law incorporates by reference another law, ordinance, or decree, the referenced measure also may need to be published.

13. "Acquainted" is synonymous with familiar and conversant. To become acquainted with an SPS regulation, Members must be provided with enough information not only to be aware of the measure, but to be familiar with the content of the measure. As discussed above, for a written measure – which we understand Korea's measure to be – this obligation would include publication of the measure itself.

14. On its face, Annex B, Paragraph 3, creates an obligation to ensure that an enquiry point "exists" and that this enquiry point "is responsible for" providing certain information including responses to reasonable questions. By its terms, however, Paragraph 3 does not obligate a Member to reply to each such question through the enquiry point or stipulate the nature or substance of any response. Therefore, Annex B, Paragraph 3, alone, does not provide a substantive standard against which an enquiry point's response to a request can be measured.

15. Paragraph 3 states that the enquiry point is to be "responsible" for providing answers to all "reasonable" *requests*, but does not set out the nature of the response. Paragraph 3 ensures that no Member will be precluded from making an enquiry about an SPS measure, including, for example, because the Member does not know how best to direct its enquiry.

16. On the other hand, Article 5.8 is an example of Members' substantive obligations with respect to transparency and the provision of certain types of information regarding SPS measures. Unlike Annex B, Paragraph 3, Article 5.8 does not designate a process, *e.g.*, point of contact. In other words, Article 5.8 obligates a Member maintaining a measure to provide, upon request, an explanation of the reasons for an SPS measure that constrains exports. The United States invoked Article 5.8 as an example of a substantive obligation to provide information of a particular nature, and to distinguish the substantive language of Article 5.8 from the procedural language of Annex B, Paragraph 3, to establish a process and entity to receive enquiries.

17. Regardless of the channel by which a request pursuant to Article 5.8 is made, Article 5.8 (and not Annex B, Paragraph 3) dictates the content of the response, *i.e.*, an explanation of the reasons for the measure.

18. Therefore, the relationship between Annex B, Paragraph 3, and Article 5.8 is that a Member could appropriately exercise its rights under Article 5.8 to seek an explanation of the reasons for an SPS measure by way of the enquiry point required by Annex B, Paragraph 3; alternatively, a Member could exercise the same rights without the enquiry point.

19. The United States does not fully agree with the EU's positon that the provisional nature of a measure is relevant under the analyses in Articles 2.3 and 5.6, as a Member will adopt a measure provisionally, within the meaning of Article 5.7, only when the evidence is insufficient to conduct a risk assessment pursuant to Article 5.1. This does not mean the obligation under Article 5.1 is "less stringent" but that a different obligation applies in that specific situation.

20. The United States agrees with New Zealand that, in this case, it is not necessary for the Panel to determine whether a "similar accommodation" is required in relation to claims under Articles 2.3 and 5.6. Korea did not invoke Article 5.7. Nor has either party submitted evidence or argumentation on the provisional nature of the measure such that the Panel could make such a finding. Without more, whether the provisional nature of a measure could be relevant to a panel's analysis under Articles 2.3 and 5.6 would not appear to be a question raised by this dispute, and therefore the Panel need not address it to make findings consistent with DSU Article 7.1.

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ANNEX D

CERTAIN PROCEDURAL RULINGS MADE BY THE PANEL

ANNEX D-1

Decision of Panel on request for enhanced third-party rights

KOREA — IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES
(WT/DS495)

Dear representatives of Canada, Norway, and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei),

The Panel refers to the joint communication dated 1 March 2016 from Canada, Norway and Chinese Taipei (the requesting third parties), asking the Panel to exercise its discretion under Article 12.1 of the DSU to grant third parties enhanced rights in the Working Procedures "in order to ensure that the interests of third parties can be fully taken into account." Specifically, the requesting third parties ask the Panel to grant them rights to: (i) "receive an electronic copy of all submissions and statements of the parties, including responses to Panel questions, up to the issuance of the interim report"; and (ii) "be present for the entirety of all substantive meetings of the Panel with the parties".

On 11 March 2016, following the Panel's invitation to comment on the request, Korea (the respondent) expressed its opposition to the granting of enhanced rights to third parties in these proceedings. On the same date, Japan (the complainant) indicated that it did not oppose the request so long as certain procedural concerns could be accommodated and that confidential information would be protected. The Panel also received comments from a number of other third parties supporting the request: the European Union, Guatemala, India, and New Zealand. The United States submitted that any deviation from the DSU should only be granted with the parties consent.

We understand that the additional rights requested are limited to allowing the third parties to be present during all substantive meetings without taking the floor and to receiving all written communications of the parties up to the issuance of the interim report without the right to present views on those communications.

The Appellate Body has clarified that panels "enjoy a discretion to grant additional participatory rights to third parties in particular cases, as long as such 'enhanced' rights are consistent with the provisions of the DSU and the principles of due process."

[1] Prior panels have used this discretion on a number of occasions, such as when the measures at issue resulted in significant economic benefits for certain third parties,[2] where third parties maintain measures similar to the measures at issue[3], or where the third party was involved as a party in a parallel panel proceeding.[4] None of these factors is present in this dispute.

In making their joint request, Canada, Norway, and Chinese Taipei have identified as the bases for receiving enhanced third party rights their systemic interests in the case as it will be "breaking new legal ground" regarding the transparency obligations under the SPS Agreement, as well as the need to be fully apprised of arguments and evidence so as not to compromise their ability to make submissions in the event of an appeal.

With respect to the argument that the Panel is considering issues of first impression with respect to several obligations in the SPS Agreement, we observe that many panels are faced with the task of interpreting provisions that have not yet been subject to dispute settlement. Members would

[1] Appellate Body Report, *US – FSC (Article 21.5 – EC),* para. 243. *See* also Appellate Body Report, *EC – Hormones (Canada)*, para. 154; Appellate Body Report, *US – 1916 Act*, para. 150; Panel Report, *EC – Export Subsidies on Sugar*, para. 2.3.

[2] Panel Reports, *EC – Bananas III (Guatemala and Honduras),* para. 7.8; Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(a). See, also, Panel Reports, *EC – Export Subsidies on Sugar*, para. 2.5.

[3] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(b).

[4] Panel Report, *EC — Hormones (Canada)*, para. 8.17.

have been aware, when drafting the DSU, that panels would be called upon regularly to consider important systemic issues of first impression. They drafted the basis for third-party access contained in Article 10 of the DSU with this in mind. In our view, therefore, the fact that a panel will consider issues of first impression is not sufficient to justify according enhanced third-party rights beyond those contained in Article 10 of the DSU.

Nor are we persuaded that the additional access requested is required to ensure that the ability of the requesting third parties to make written submissions to, and be given an opportunity to be heard by, the Appellate Body in the event of an appeal would not be compromised. The drafters of the DSU devised Article 10 in full knowledge of and bearing in mind that third parties would have an opportunity to make submissions and be heard by the Appellate Body and considered that the access permitted under Article 10 would be sufficient to enable them to participate effectively in appellate proceedings. We also note that, in addition to access to the full written submissions up to the first substantive meeting and the right to be heard, any Member, including third parties, may request non-confidential summaries of the parties' arguments under Article 18.2 of the DSU. Moreover, third parties will be able to read the Panel Report, which will contain the executive summaries of the parties' arguments as well as the Panel's detailed reasoning for its findings pursuant to Article 12.7 of the DSU.

Finally, in reaching our decision, we are mindful that the distinction drawn in the DSU between parties and third parties should not be blurred.[5]

For the reasons stated above, we decline Canada, Norway, and Chinese Taipei's joint request for enhanced third party rights in these proceedings.

Yours sincerely,

William Ehlers
Chairperson of the Panel

c.c. H.E. Mr Junichi IHARA
Permanent Mission of Japan

H.E. Mr CHOI Kyong-lim
Permanent Mission of the Republic of Korea

H.E Mr Marcos GALVÃO
Permanent Mission of Brazil

H.E. Mr YU Jianhua
Permanent Mission of China

H.E. Mr Marc VANHEUKELEN
Permanent Mission of the European Union

H.E. Mr Eduardo Ernesto SPERISEN-YURT
Permanent Mission of Guatemala

H.E. Ms Anjali PRASAD
Permanent Mission of India

H.E. Mr. Vangelis VITALIS
Permanent Mission of New Zealand

H.E. Mr Gennady OVECHKO

[5] Panel Report, *EC- Bananas III (Guatemala and Honduras)*, para. 7.9. See also, Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(d); Panel Report, *EC –Export Subsidies on Sugar (Australia, Brazil and Thailand)*, para. 2.7. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.166.

Permanent Mission of the Russian Federation

H.E. Mr Michael PUNKE
Permanent Mission of the United States of America

ANNEX D-2

Decision of Panel on selection of experts[*]

KOREA — IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES
(WT/DS495)

Dear Sirs [representatives of Korea and Japan],

The Panel recalls that pursuant to Article 13 of the DSU and Article 11.2 of the SPS Agreement, we have decided to consult experts in this dispute in the following areas: (i) release of nuclear materials into the environment (by accident or other means); (ii) radionuclide contamination in foods including testing methods and any differences in contamination based on the source of contamination (air, groundwater, or naturally occurring); and (iii) radionuclides in marine environments including issues of radionuclide deposits in the ocean and levels of radioactivity in marine organisms.

The Panel received names of experts from UNSCEAR, ICRP, IAEA, WHO, and FAO/Codex. The Panel is grateful to these organizations for their assistance. The Panel contacted each of the 25 named experts and inquired as to their availability, conflict of interest and areas of expertise. The parties were provided with the information of the 15 available experts and given the opportunitiy to comment.

The Panel has considered the background and qualifications of each available expert as well as the importance of having more than one expert to respond to questions in each area.[1]

In addition, the Panel carefully considered the comments submitted by the parties. The Panel notes that Japan accepts all of the proposed experts, although it has expressed preferences for some over others. With respect to Korea's comments on the experts, the Panel notes that Korea accepts 5 of the proposed experts and objects to the rest.

Korea objects to one expert who had been preliminarily consulted by Korea in this matter. Korea objected to two experts because of their previous affiliations with the Japanese government in this area. The Panel found these objections to be well founded and will not select these experts.

Korea objects to four experts because they appeared to have participated in the drafting of a 2013 report by UNSCEAR on the Fukushima Dai-ichi accident. Korea argues that because in its view its measures were adopted provisionally because there was insufficient scientific evidence to conduct a risk assessment within the meaning of Article 5.7 of the SPS Agreement, the Panel could not rely on any expert that had participated in a risk assessment.

First, the Panel notes that the UNSCEAR report was commissioned by an organ of the United Nations who of course sought the best experts in the field. The report dealt with the immediate effects of the disaster on the people living in and around the Fukushima Dai-ichi nuclear power plant not those who consume some Japanese products as part of their diet. There are some elements in the report that address internal exposure of people living in and around the Fukushima Dai-ichi nuclear power plant through consumption of contaminated food, but the report is not an assessment of the risks arising from human consumption of radionuclides in food products.

Furthermore, the Panel does not agree with Korea that anyone who participated in a risk assessment would be *per se* inappropriate to consult in a situation where Article 5.7 is raised by the respondent. The Panel does not believe that this is the principle established by the Appellate Body in *US/Canada – Continued Suspension*. Nevertheless, the Panel notes that it was able to identify enough suitable experts without selecting the four experts who participated in the preparation of the UNSCEAR report.

[*] The Panel has made certain redactions indicated as [***] to protect the privacy of the experts.
[1] Therefore, the Panel, at this time, did not select experts who had expertise in only one identified area.

Based on its evaluation, the Panel selects the following experts:

Expert	Recommended by	release of nuclear materials into the environment (by accident or other means)	radionuclide contamination in foods	radionuclides in marine environments
Lynn ANSPAUGH	UNSCEAR, WHO	Yes	Yes	Yes
Rolf MICHEL	UNSCEAR	Yes	Yes	
Lavrans SKUTERUD	ICRP	Yes	Yes	
Patsy THOMPSON	UNSCEAR	Yes	Yes	Yes
Joanne BROWN	WHO	Yes	Yes	

The Panel notes that it has selected two experts, [***] and [***] who Korea objects to. In making its selection the Panel considered first, that Korea objects to every expert proposed with expertise in radionuclides in marine environments. Therefore, there was no way for the Panel to have experts in this field without selecting one that Korea objects to.

The Panel examined Korea's objections to all the available experts with expertise in radionuclides in marine environments. The Panel finds that Korea's objections to [***] and [***] are not sufficient to preclude them from serving as experts assisting the Panel in evaluating the evidence presented.

With respect to [***], Korea mentions (i) [***] involvement in the preparation of the UNSCEAR report on Fukushima Dai-ichi; (ii) as well as some statements [***] made with respect to radon exposure from natural gas in fracking sites; and (iii) statements purportedly made by [***] with respect to the wildlife at Chernobyl.

With respect to [***] participation in the UNSCEAR report, the Panel recalls its reasoning above that this is not *per se* a reason to exclude an expert. Moreover, the Panel notes that [***] was listed as a "critical reviewer" of the report, which indicates to us that the report does not reflect [***] own work. With respect to [***] statements on radon, the Panel notes that radon is not a man-made radionuclide subject to Korea's measures and that [***] statements were made in the context of an environmental release and not about the presence of radionuclides in food. Finally, there is an allegation, without citation, that [***] made a statement about wildlife living near Chernobyl. The Panel cannot objectively evaluate this statement without more information. Nevetherless, even if accurate, the alleged statement does not relate to humans consuming food or other products from the Chernobyl site. Therefore, the Panel finds that Korea's objection is insufficient to demonstrate any bias or partiality on [***] part.

Korea objects to [***] because Korea believes that [***] has written articles in which [***] has provided [***] own assessment of the risk posed by the FDNPP. However, Korea does not provide citations to such articles. Instead, Korea provides an excerpt from an article in a [***] newspaper written by [***] which relates to the effects of post-Fukushima radiation on fish caught off the West Coast of North America. [***] comment relates to the diluation of the radioactive waste by the time it crosses the Pacific, thus posing limited health risk to [***] consuming [***] products. Korea's letter then turns to a different quotation from a different news article without making an overt reference to the change. In that article [***] was explaining, in [***] [***], a [***] government initiative to provide iodine thyroid blocking pills to those within a 10km radius of a nuclear power plant for immediate use in the event of an accident. [***] statement about people not needing to fear living near a nuclear power plant has nothing to do with food consumption from an area contaminated after a nuclear accident. Finally, Korea cites a press release from Families Against Radiation Exposure, which appears to be a [***] NGO in [***]. The statements attributed to [***] are from 2009, two years before the Fukushima disaster, and do not relate to the consumption of food that has been contaminated after a nuclear release, but rather to children living near nuclear power plants. The Panel also notes that in the latter two instances, [***] was acting in [***] [***] as an official of the [***]. Therefore, the Panel finds that Korea's assertion that [***] has provided an assessment of the risks posed by the FDNPP is unsubstantiated.

Korea also requests that the Panel seek additional experts in the areas of severe nuclear accidents and the risks of radionuclides to human health. Neither party in this dispute has claimed that man-made radionuclides are not risky to human health. Neither party has disputed the serious health risks from stochastic effects of exposure to radiation (such as thyroid cancer, leukemia, and other cancers). Therefore, the Panel does not consider that it needs assistance in assessing any evidence in this area.

With respect to severe nuclear accidents, the Panel recalls that one of the areas of expertise it has sought assistance in is "release of nuclear materials into the environment (by accident or other means)". The Panel believes that this encompasses severe nuclear accidents. The Panel recalls that it has sought the names of experts from the international organizations dealing with the effects of severe nuclear accidents – the WHO, Codex, the IAEA, ICRP and UNSCEAR. We are therefore confident that we have received the names of those who are the most qualified to assist the Panel in evaluating the evidence presented to it with respect to the accident at Fukushima Dai-ichi.

The Panel is committed to its obligation, as explained by the Appellate Body, to ensure due process in these proceedings by selecting experts that are independent and impartial.[2] For the reasons stated above, the Panel is satisfied that the five selected experts all have the relevant expertise required and are capable of rendering independent and impartial advice to the Panel on the relevant issues in the dispute. The Panel recognizes and will bear in mind the fact that its obligation to protect the parties' due process rights applies not only to the process for selecting experts, but also to the Panel's consultations with the experts, and continues throughout the proceedings.[3]

In light of the importance of the present decision, the Panel shall annex this communication to its Report.

Yours faithfully,

William Ehlers
Chairman of the Panel

[2] Appellate Body Report, *US/Canada – Continued Suspension*, para. 436.
[3] Ibid.

ANNEX D-3

Decision on redacting submissions to be sent to experts

KOREA — IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES
(WT/DS495)

Dear Sirs [representatives of Korea and Japan],

The Panel wishes to thank the parties for their comments of 14 September 2016 on the redacted versions of the submissions to be sent to the experts.

Paragraph 36 of the Panel's Working Procedures for Consultations with Experts provides that "[t]he Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary." The Panel notes that the parties have differing view on whether the entirety of the parties' submissions should be transmitted to the experts in light of the reference to relevant parts in the Working Procedures. Although, sending un-redacted versions would have been less time consuming for both the Panel and the parties, the Panel has decided to adopt a conservative approach towards the interpretation of the Working Procedures and redact portions of the submissions. The purpose of the redaction is to provide the experts with a clear picture of the factual issues they need to consider without the distraction of the legal argumentation.

In particular, the Panel applied the following criteria for redaction. First, argumentation that was solely legal in nature and referring to interpretation of WTO obligations was redacted. Second, argumentation and facts that related to claims that the Panel is not seeking advice from the experts on (namely Article 7, Article 8 and Annexes B and C) were redacted. Finally, the Panel sought to redact any potentially inflammatory characterisations of the parties' arguments or actions. The Panel has reviewed the redactions in light of these criteria and the parties' comments and made changes where relevant.

In particular, the Panel has adjusted the redaction on Article 8 and Annex C claims. Although there was reference to some of the relevant scientific issues in these sections, they are repetitive of those under Articles 2.3 and 5.6. Therefore, in the interest of consistency across submissions the entirety of the sections on Article 8 of both parties will be redacted. The Panel maintains its redaction of the legal arguments on what is the relevant condition for comparison under Article 2.3. These issues are not relevant for the experts' analysis of the factual questions being posed to them. The Panel will not redact argumentation about the methodologies used by the experts of either party or their suitability for supporting the conclusions reached. These are precisely the issues where the Panel needs the advice of the experts. The revised redactions can be put on the USB key provided earlier. Please contact the Panel Secretary to arrange a time for this.

We note Japan's concern that the experts may require some additional context to assist them in answering the Panel's questions. In this regard, the Panel recalls that paragraph 36 of the Panel's Working Procedures for Consultations with Experts states that "[t]he experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions". . The Panel also recalls that the parties will be able to provide their own advance questions to the experts to assist them in preparation for the meeting as well as pose oral questions to the experts at the meeting. The Panel trusts that these mechanisms will adequately address Japan's concern.

In its communication of 14 September 2016, Japan notes that planning for attendance at panel meetings can be burdensome and that the revised timetable should be based on a realistic time-frame for the experts to prepare their responses to the Panel's questions. The Panel understands Japan's concerns and indeed this was one of the main considerations for the Panel to propose moving the date of the second meeting. In its letter to the parties of 7 September 2016, the Panel noted that there was a "large volume of complex material on the record that the experts will have to review in order to respond" [to the Panel's questions]. The Panel believes the revised draft

timetable responds to the need to provide the experts with sufficient time to answer the Panel's questions. Moreover, in light of Japan's comments on the revised timetable the second meeting is likely to begin in January or early February 2017 and there is scope within the timetable that would allow the Panel to grant the experts an extension if one is required without necessitating moving the meeting date.

In its letter of 14 September 2016, Korea notes that the Table of Documents sent to the parties included Annex A and Annex B but that that these two annexes had not been included on the USB key. Korea asks if it could review any redactions to these annexes if they are to be sent to the experts. In an email of 12 September 2016, responding to a similar query from Japan, the Secretariat informed the parties that these two annexes are to be sent to the experts but as they had not been redacted they had not been included in the documents on the USB key. Korea also requests that Korea's opening statement at the first substantive meeting be added to the Table of Documents. This has been done.

Yours faithfully

William Ehlers
(Chairman of the Panel)

ANNEX D-4

Decision of Panel on request to comment on exhibits

KOREA — IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES
(WT/DS495)

Thank you for your email. After reviewing Japan's comments on the relevant exhibits, the Panel notes that Japan does not contest the exhibits as such, but rather takes issue with the fact that Korea did not provide a translation of all relevant parts of Exhibits KOR-299(a) and KOR-304(a). As Japan's comments were limited to pointing out the full text of the exhibits, the Panel does not see the need for Korea to comment further.

The Panel recalls that paragraph 10 of its Working Procedures requires that "translations should include all germane portions of documents that the party seeks to rely upon. Germane portions include not only specific provisions of measures, but also relevant context." In light of Japan's comments and taking account of paragraph 10 of the Panel's Working Procedures, the Panel requests that Korea provide full translations of any slides relating to Japan's "measures to prevent fish movement inside and outside the harbour" including, but not limited to, p. 14. and the entirety of KOR-304(a).

Such translations should be provided to the Panel by 5 p.m. Friday, 28 April 2017.

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