1. MEASURE AND PRODUCT AT ISSUE

- **Measures at issue**: Product-specific import bans; “blanket import bans” on all fishery products from certain areas of Japan; and additional testing and certification requirements for possible presence of radionuclides in imports from Japan.

- **Product at issue**: Various fishery and food products.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **SPS Art. 5.6 (appropriate level of protection)**: The Panel identified Korea’s ALOP as consisting of both qualitative aspects and a quantitative element of radiation dose limit. The Appellate Body reversed the Panel’s findings of inconsistency with Art. 5.6 based on the Panel’s failure to then consider all elements of the identified ALOP. The Appellate Body found that the Panel erred by focusing on the quantitative element as a decisive indicator of whether Japan’s proposed alternative measure would achieve Korea’s ALOP, contrary to its articulation of the ALOP as containing multiple elements.

- **SPS Art. 2.3 (discrimination)**: The Appellate Body reversed the Panel’s findings of inconsistency under Art. 2.3 due to the Panel’s error in finding that “similar conditions” prevail between Japan and other Members. According to the Appellate Body, the Panel did not consider all relevant conditions, including territorial conditions with potential to affect products that have not manifested in products but “are relevant in light of the regulatory objective and specific SPS risk at issue”. Consequently, the Panel erred by focusing on product test data to the exclusion of territorial conditions that could differently affect the potential for contamination.

- **SPS Art. 5.7 (provisional measures)**: The Appellate Body found that the Panel exceeded its mandate, contrary to DSU Arts. 7.1 and 11, in making findings as to the consistency of Korea’s measures with SPS Art. 5.7. The Appellate Body considered that Japan had not made a claim under SPS Art. 5.7, and Korea did not invoke it as an exception, but relied on the provisional nature of the measures as context as part of its rebuttal arguments under certain other provisions. The Appellate Body declared the Panel’s findings that Korea’s measures did not fall within the scope of SPS Art. 5.7 as moot and of no legal effect.

- **SPS Art. 7 and Annex B(1) (publication, notification and transparency requirements)**: The Appellate Body agreed with the Panel that the publication of the measure must contain sufficient content that the importing Member would know the conditions that apply to its goods. However, it modified the Panel’s finding to the extent that Annex B(1) requires, in all cases, publication to include the “specific principles and methods” applicable to the products, considering instead that this requires a case-by-case determination. The Appellate Body upheld the Panel’s findings that Korea acted inconsistently with Annex B(1) and Art. 7 by (i) not publishing the full product scope of the blanket import ban; (ii) not publishing sufficient information to enable Japan to become acquainted with the requirements of the additional testing requirements; and (iii) not showing that interested Members would have known to look to the websites indicated by Korea for information of the SPS measures at issue.

- **SPS Annex B(3) (enquiry point)**: While agreeing with the Panel that the Annex B(3) is not a mere formality of establishing an enquiry point, the Appellate Body disagreed that a single failure of an enquiry point to respond to a request would result in an inconsistency with Annex B(3) and reversed the Panel’s finding, which was based on two instances.

- **SPS Article 8 and Annex C(1)(a) (presumption of likeness)**: The Appellate Body considered that the distinction of applying Korea’s additional testing requirements only to Japan was not based solely on origin as it could not be separated from the public health concerns underpinning the measures. The Appellate Body upheld the Panel’s finding that, in this case, the Japanese and Korean products could not be presumed to be “like”, but expressed no general conclusion on whether likeness may be presumed under Annex C(1)(a).

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2. Other issues addressed: consultation with experts and the Codex, IAEA, and ICRP (SPS Art. 11.2 and DSU Art. 11).