KOREA – IMPORT BANS, TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES

(AB-2018-1 / DS495)

THIRD PARTICIPANT SUBMISSION
OF THE UNITED STATES OF AMERICA

April 30, 2018

SERVICE LIST

Participants

Mr. Kim Inchul, Permanent Mission of the Republic of Korea
H.E. Mr. Junichi Ihara, Permanent Mission of Japan

Third Parties

H.E. Mr. Evandro De Sampaio Didonet, Permanent Mission of Brazil
H.E. Mr. Stephen De Boer, Permanent Mission of Canada
H.E. Mr. Zhang Xiangchen, Permanent Mission of the People's Republic 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. Mr. J.S. Deepak, Permanent Mission of India
H.E. Mr. David Walker, Permanent Mission of New Zealand
H.E. Mr. Harald Neple, Permanent Mission of Norway
H.E. Mr. Gennady Ovechko, Permanent Mission of the Russian Federation
Dr. C.Y. Cyrus Chu, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	**Full Citation**
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Canada – Continued Suspension (AB)	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009
Dominican Republic – Import and Sale of Cigarettes (Panel)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – IT Products (Panel)	Panel Reports, European Communities and its member States – Tariff Treatment of Certain Information Technology Products, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
EC – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014

Short Form	**Full Citation**
EC – Selected Customs Matters (AB)	Appellate Body Report, European Communities – Selected Customs Matters, WT/DS315/AB/R, adopted 11 December 2006
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
India – Agricultural Products (AB)	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/AB/R, adopted 19 June 2015
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
Thailand – Cigarettes (Philippines) (Panel)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
US – Carbon Steel (AB)	Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Continued Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses (Panel)	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R

I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States presents its views on certain issues raised on appeal by Korea and Japan. In this submission, the United States will address certain issues of legal interpretation concerning the *Agreement on Sanitary and Phytosanitary Measures* (the "SPS Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. In Section II, the United States explains why Korea's claims under Articles 6.2, 7.1, and 11 of the DSU that the Panel committed legal error in making findings under Article 5.7 must fail.

3. While the Panel's terms of reference under Articles 6.2 and 7.1 limit the scope of the "matter" before it, Article 7.2 requires panels to address all relevant provisions "cited by the parties to the dispute." The matter at issue, as identified in Japan's panel request, included claims under Articles 2.3, 5.5, and 5.6 of the SPS Agreement. Given Korea's reference to Article 5.7 in its written submissions, the Panel was within its authority to examine the applicability of Article 5.7.

4. Korea's claim under DSU Article 11 must fail because Articles 6.2 and 7.1 set out a panel's terms of reference and Article 11 does not provide an additional legal basis for the review of a panel's authority.

5. In Section III, the United States explains that the Panel acted consistently with its obligations under the DSU in limiting its reliance on post-panel establishment evidence to assess the consistency of Korea's measures with the relevant obligations at the time of the Panel's establishment.

6. Under the DSU, it is the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the Panel, that are properly within the Panel's terms of reference. The post-establishment evidence offered by Japan is therefore relevant to the extent that it relates to the legal situation that existed on that date.

7. Any later-in-time measures a Member may impose – whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel – would be addressed by the panel's recommendation under Article 19.1 of the DSU, which is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.

8. In Section IV, the United States explains that the Panel's elaboration of the "essential elements" to be included in the publication of a measure would appear to go further than the text of paragraph 1, Annex B warrants.

---

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

9. Based on its text, paragraph 1 requires publication of SPS *regulations*, including "laws, decrees or ordinances which are applicable generally." The SPS measure must be published "promptly" and "in such a manner as to enable interested Members to become acquainted with them." Thus, Members must be able to become acquainted with the relevant *SPS regulation* itself. The Panel's interpretation reads into the publication requirement additional requirements not set out in the text of paragraph 1.

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

II. THE PANEL'S DECISION TO ANALYZE KOREA'S MEASURES UNDER ARTICLE 5.7 OF THE SPS AGREEMENT

11. In its report, the Panel found that "Korea argue[d] that its measures were adopted provisionally pursuant to Article 5.7 of the SPS Agreement," and that "because the measures were adopted provisionally this affects the Panel's analysis of the substantive elements of Japan's claims under other provisions of the SPS Agreement."[2] The Panel therefore proceeded to analyze Korea's measures under Article 5.7 and found that they did not fall within the scope of Article 5.7 of the SPS Agreement, because none of the provisional measures fulfilled all four of the cumulative elements of Article 5.7.[3]

12. On appeal, Korea argues that the Panel exceeded its terms of reference by making findings under Article 5.7 of the SPS Agreement, in breach of Articles 6.2, 7, and 11. Specifically, Korea argues that Japan did not include a claim under Article 5.7 in its panel request,[4] and that, before the Panel, Korea argued only that Article 5.7 "provides context" for the assessment under Articles 2.3 and 5.6 – a position that "did not require the Panel to make an independent assessment of the consistency of its measures with the requirements of Article 5.7."[5]

13. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Article 7.1 provides panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)…, the matter referred to the DSB . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[2] Panel Report, para. 7.67.
[3] Panel Report, para. 7.111.
[4] Korea's Appellant Submission, para. 54.
[5] Korea's Appellant Submission, para. 55.

14. Article 6.2 provides that a party's request for establishment of a panel shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

15. Read together, the "matter" to be examined by the DSB consists of "the specific measures at issue" and the "brief summary of the legal basis of the complaint" as set forth in the request for the establishment of a panel.[6]

16. But while the Panel's terms of reference limit the scope of the "matter" before it, Article 7 makes clear that these terms of reference would not prevent the Panel from reviewing any claims or arguments raised by a responding party in its defense. That is, to the extent a responding party raises legal or factual arguments to rebut complainant's claims, including arguments under provisions of the WTO Agreement not cited by the complainant, the Panel also must examine those arguments.

17. As noted above, Article 7.1 of the DSU requires a panel "[t]o examine, *in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)*…, the matter referred to the DSB . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Article 7.2 goes on to state that "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Therefore, Articles 6.2 and 7.1 of the DSU do not limit a panel's examination to the relevant claims and arguments raised by a complaining party where the respondent also has cited to "relevant provisions" in the covered agreements. Were this not the case, a complainant could prejudice a responding party's defense merely by excluding the relevant claims from its panel request.

18. Before the Panel, the matter at issue, as identified in Japan's panel request, included claims under Articles 2.3, 5.5, and 5.6 of the SPS Agreement. Japan did not include in its panel request any claims under Article 5.7 of the SPS Agreement.

19. In the factual background of its first written submission, Korea indicated that "[its] emergency measures of 2011 and its special temporary measures of 2013 are provisional in nature pursuant to Article 5.7 of the SPS Agreement."[7] Korea did not offer any legal argumentation or evidence to demonstrate that the adoption of the provisional measures fulfilled all four of the cumulative elements of Article 5.7.[8]

20. Neither party requested that the Panel make findings under Article 5.7. Japan did not include Article 5.7 in its panel request and Korea did not explicitly invoke Article 5.7 as a legal defense. This being the case, it would not appear to have been necessary for the Panel to examine the consistency of Korea's measures with Article 5.7 in the manner it did in order to make its findings under Articles 2.3 and 5.6 of the SPS Agreement. The Panel could have

[6] *US – Carbon Steel (AB),* paras. 124-126.
[7] Korea's First Written Submission, para. 83.
[8] *See* Panel Report, para. 7.104, citing Korea's response to Panel question No. 151 ("Japan has not pursued a claim under Article 5.7. In the absence of a claim under Article 5.7, Korea's SPS measures must be presumed to be in compliance with all of the requirements of that provision.")

limited its consideration of the nature, scope, and quality of scientific evidence to its examination of Japan's claims under Article 2.3 and 5.6, for example.[9]

21. However, the United States disagrees with Korea's claim that the Panel committed legal error in making findings under Article 5.7. As explained above, a panel's terms of reference extend to any "relevant provisions" of the covered agreements cited to by "the parties" to a dispute. Therefore, given Korea's reference to Article 5.7 in its submissions, and the nature of Article 5.7 as a "qualified exemption" to Articles 2.3 and 5.6 of the SPS Agreement, the Panel was within its authority to examine the applicability of Article 5.7 to the claims within its terms of reference.

22. We note that Korea also has challenged the Panel's findings under Article 5.7 of the SPS Agreement as a breach of Article 11 of the DSU, apparently on the same basis as its challenge under Articles 6.2 and 7.1 of the DSU. Specifically, Korea claims, in a single sentence only, that "[i]n addition, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU."[10] Korea does not explain this claim further, but would appear to be arguing that the Panel addressed more than it had been asked to by the parties in making findings under Article 5.7.

23. Given the lack of development of this claim by Korea, the Division may find on this basis alone that Korea has failed to substantiate its claim under Article 11 of the DSU. The United States also would note, however, that to the extent Korea raises an identical argument to that raised substantively under Articles 6.2 and 7.1 of the DSU, Korea's claim under Article 11 of the DSU must fail.

24. Article 11 provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[11]

25. Based on the text, Article 11 thus speaks to the nature of a panel's assessment of the facts and the legal provisions before it. Article 11 does not address *which* claims and arguments a panel has the authority to assess. Rather, as just discussed, Articles 6.2 and 7.1 set out a panel's terms of reference. If a claim falls within the terms of reference under these two articles, Article 11 does not provide an additional legal basis for the review of a panel's authority. Therefore, to the extent Korea attempts to raise a separate claim under Article 11 of the DSU that the Panel lacked the legal authority to address the parties' arguments under Article 5.7, that claim must fail, because no such claim exists under Article 11.

---

[9] Based on its finding that Korea's measures did not fall without the scope of Article 5.7, the Panel did not "make any assumptions about the relationship between their provisional nature and their consistency with the provisions of the SPS Agreement raised by Japan. That being said, the Panel is mindful that the nature, scope, and quality of scientific evidence is particularly relevant in this case for determining whether the constituent elements of Japan's claims under Article 2.3, 5.6, and 8 (Annex C) have been demonstrated." Panel Report, para. 7112.
[10] Korea's Appellant Submission, para. 59 (citing to *Chile – Price Band System* (AB), para. 173).
[11] Article 11 of the DSU.

26. For these reasons, Korea has failed to show that the Panel's decision to make findings under Article 5.7 constitutes a breach of Article 11 of the DSU. As discussed above, Korea has not shown that the Panel exceeded its terms of reference under Articles 6.2 and 7.1 of the DSU, such that it acted "*ultra petita*" under the DSU. And Korea has not articulated or substantiated arguments under Article 11 to show, for example, that the Panel's assessment of Korea's measures under Article 5.7 was not "objective." Therefore, the Division also should reject Korea's claim under Article 11 of the DSU.

III. THE PANEL'S CONSIDERATION OF POST-PANEL ESTABLISHMENT EVIDENCE

27. Before the Panel, Japan presented scientific evidence that included (1) data not available to Korean authorities when the measures at issue were adopted and (2) recent data through the date of filing of the written submission, later supplemented with even more recent data.[12] Korea argues on appeal that the Panel's acceptance and assessment of post-panel establishment evidence to determine the consistency of Korea's SPS measures constitutes a breach of the legal standard under Article 11 of the DSU.[13] Japan argues that, "when assessing whether the *maintenance* of a challenged measure is inconsistent with these *continuing obligations*, a panel must include in its assessment all timely submitted evidence speaking to the continuing inconsistency" during "the most recent, post-establishment, factual situation."[14]

28. As a general matter, the Panel determined that it "can consider evidence that was developed subsequent to its establishment."[15] Citing to prior panel and Appellate Body reports, it found that "[e]vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel," and that, therefore, a panel "is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment."[16]

29. With respect to Japan's argument that the Panel must assess Korea's ongoing consistency with Articles 2.3 and 5.6 even past the date of panel establishment, while the Panel agreed with Japan that these provisions "apply not only when the measures are adopted, but throughout the time they remain in force,"[17] the Panel considered that its assessment of consistency must be limited to the factual situation as it existed at the time of panel establishment: "the data underlying the analysis or conclusion should relate to the factual situation with respect to the potential contamination of food products with radionuclides that formed the basis for the claims at the date of establishment of the panel."[18]

30. Korea argues on appeal that the Panel should not have considered evidence that did not exist prior to the Panel's establishment, nor evidence that was not available to Korea at the time

[12] Panel Report, para 7.129.
[13] Korea's Appellant Submission, paras. 200-207.
[14] Japan's Other Appellant Submission, paras. 14, 15. (original emphasis)
[15] Panel Report, para 7.134.
[16] Panel Report, para 7.1 (citing to *EC – Selected Customs Matters* (AB), para. 188; *Canada – Aircraft* (AB), para. 192; *US – Animals*, para. 7.448).
[17] Panel Report, para 7.135.
[18] Panel Report, para 7.143.

the measures were imposed.[19] By considering such evidence, Korea claims that the Panel breached its obligations under Article 11 of the DSU.

31. Japan, on the other hand, argues on appeal that because its Article 2.3 and 5.6 claims relate to continuing obligations, the Panel erred in excluding certain evidence speaking to the factual situation after the date of the Panel's establishment.[20] In particular, Japan argues that in the case of obligations that apply at a particular moment in time, such as Article 5.7, the evidence must relate to the measure at that point in time.[21] In contrast, there are obligations that apply continuously over time.[22] In this context, Japan asserts "a panel cannot be constrained to assess the facts as they stood at a particular point in time, such as the adoption of the measure."[23] Rather panels "are required to assess all of the timely-submitted evidence that speaks to whether the maintenance of the measure, on an ongoing basis, violates the continuing obligation."[24] In failing to do so, Japan asserts that the Panel's approach entails legal error in the interpretation and application of Articles 3.3, 3.4, 3.7 and 11 of the DSU, read in light of Articles 2.3 and 5.6 of the SPS Agreement, and in the application of Articles 2.3 and 5.6 of the SPS Agreement.[25]

32. The United States considers that the Panel acted consistently with its obligations under the DSU in limiting its reliance on post-panel establishment evidence to assess the consistency of Korea's measures with the relevant obligations at the time of the panel's establishment.

33. Pursuant to the DSU, the Panel's terms of reference, to examine the matter referred by the DSB to the Panel when it was established,[26] provide the basis for the Panel to make findings and recommendations[27] on the measures identified by the United States in its panel request, such that the aim of the WTO dispute settlement system – "to secure a positive solution to a dispute" – will be achieved.[28] Article 3.4 of the DSU similarly emphasizes that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."

34. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its

[19] Korea's Appellant Submission, para. 334.
[20] Japan's Other Appellant Submission, para. 41.
[21] Japan's Other Appellant Submission, para. 138.
[22] Japan's Other Appellant Submission, para. 145.
[23] Japan's Other Appellant Submission, para. 147.
[24] Japan's Other Appellant Submission, para. 147.
[25] Japan's Other Appellant Submission, para. 4.
[26] DSU, Article 7.1.
[27] DSU, Article 11 ("[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . ."); DSU, Article 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.") (footnotes omitted).
[28] *See* DSU, Article 3.7; *Chile – Price Band System* (AB), paras. 140-142; *Colombia – Ports of Entry*, para. 7.246.

panel request.[29] Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[30] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[31]

35. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel.*"[32] It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings.

36. The DSU addresses the role and duties of a panel with respect to the matter referred to it by the DSB. Specifically, Article 11 requires that the panel should make an objective assessment of the "matter", including an objective examination of the facts and the applicability of and conformity with the covered agreements.[33] It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings.

37. Based on this standard, the Panel was right to find that post-establishment evidence was relevant to its assessment of Korea's measures as they existed at the time of the panel's establishment, as it is these measures that were within the Panel's terms of reference.[34] Because that assessment is limited to whether the measures at issue are consistent with the relevant obligations at the time of establishment of the Panel, the post-establishment evidence offered by Japan is relevant only to the extent that it relates to the legal situation that existed on that date. The United States thus disagrees with both Korea's and Japan's arguments on appeal. The Panel would not have complied with its obligations under the DSU had it either refused to address post-establishment evidence relevant to its assessment of the measures as they existed at the time of the Panel's established, or chosen to rely on this post-establishment evidence to

[29] DSU, Art. 7.1.
[30] DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.
[31] *EC – Chicken Cuts (AB)*, para. 156.
[32] *See, e.g., EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id*., para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products*, para. 7.456.
[33] DSU, Art. 11.
[34] *See EC – Selected Customs Matters* (AB), para. 188 (a panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment).

make findings regarding consistency of the measures at a time after the date of the Panel's establishment.

38. With respect to any measures taken after the panel's establishment, including modifications to the measures within a panel's terms of reference, the United States notes that such measures would not evade review. For while a finding by a panel concerns a measure as it existed at the time the panel was established, the panel's recommendation under Article 19.1 of the DSU is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.[35] That is, where a panel "concludes that a measure is inconsistent with a covered agreement, it *shall* recommend that the Member concerned bring the measure into conformity with that agreement."[36]

39. Defining the scope of a dispute based on the measures as they existed at the time of panel establishment — and requiring a recommendation to be made thereon — is not only consistent with the requirements of the DSU, it also benefits the parties by balancing the interests of complainants and respondents. Just as a complainant may not obtain findings on substantively new measures introduced after the establishment of a panel,[37] so too the respondent may not avoid findings and recommendations by altering or revoking its measures after the date of panel establishment.[38] A complainant therefore may obtain a recommendation that is prospective, and can be invoked both with respect to unchanged measures and with respect to any later-in-time measures a responding party may impose — whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel. Therefore Japan's concern regarding Korea's potential maintenance of a WTO-inconsistent measure, including after the date of establishment, would fall within the scope of the Panel's prospective recommendation that "Korea bring its measures into conformity with its obligations under the SPS Agreement."[39]

IV. THE PANEL'S INTERPRETATION OF THE PUBLICATION OBLIGATION IN ANNEX B(1)

40. In interpreting the requirements of paragraph 1 of Annex B, the Panel found that "publication of the regulation itself does not necessarily ensure that the information in it is sufficient to enable Members to acquaint themselves with the measure," and that other provisions of Annex B "provide[] contextual support for an understanding that the obligation in B(1) requires the importing Member to ensure that the publication of its regulation contains sufficient elements to allow interested Members to know what conditions would apply to their goods, including the specific principles and methods applicable to the products."[40] The Panel further found that:

[35] *China – Raw Materials (AB)*, para. 260.
[36] DSU, Art. 19.1 (emphasis added).
[37] *See, e.g., EC – Chicken Cuts (AB)*, paras. 155-162.
[38] *See, e.g., EC – IT Products*, para. 7.167; *US – Wool Shirts and Blouses (Panel)*, para. 6.2; *Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.
[39] Panel Report, para. 8.7.
[40] Panel Report, paras. 7.462, 7.463.

> Some of the essential elements [of the publication requirement] can be inferred from the substantive requirements for promulgating SPS regulations found in the SPS Agreement[FN1], and from the context and object and purpose of Annex B(1). They may include the objective pursued by the regulation, the specific risk that the regulation addresses and the appropriate level of sanitary or phytosanitary protection adopted by the Member[FN2], whether relevant international standards, guidelines, or recommendations exist, and if the measure is based on that standard, conforms to it, or seeks to achieve a higher level of protection.[FN3] In light of the goal of enabling Members to know what conditions apply to their products and to give them time to adapt to the new requirements one would also expect information on: the substantive and procedural requirements that an exporter must fulfil, the date on which the regulation takes effect, the products affected by the SPS regulation, as well as, in the case of regulations affecting specific Members or regions, the Members or regions the regulation applies to.[41]

[FN1] This is in line with the Appellate Body's findings in the context of Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement, which require giving of a "public notice" of certain decisions made in the process of imposition of measures. Although the provision mandating publication provides guidance regarding the content of the public notice, the Appellate Body noted in *China – GOES* that the required content of these notices is linked to "the content of the findings needed to satisfy the substantive requirements" for the imposition of measures in the Anti-Dumping Agreement and of the SCM Agreement (Appellate Body Report, *China – GOES*, para. 257). Similarly, in *Australia – Apples*, the Appellate Body referred to the main elements of SPS measures in the context of a Member demonstrating that a proposed alternative measure achieved the importing Member's ALOP. Appellate Body Report, *Australia – Apples*, para. 364.

[FN2] Appellate Body Report, *Australia – Salmon*, footnote 161 (finding that Annex B(3) and Articles 4.1, 5.4 and 5.6 of the SPS Agreement imply "a clear obligation of the importing Member to determine its appropriate level of protection").

[FN3] See SPS Agreement, Article 3.3. See also Appellate Body Report, *EC – Hormones*, paras. 174-177.

41. Korea appeals the Panel's finding that Korea failed to publish its measures consistent with Annex B(1), and also claims that the Panel erred in adding obligations to Annex B(1) that are not included in the provision.[42] Specifically, Korea argues the Panel's interpretation effectively converted the language "to become acquainted with" in Annex B(1) into "to comply with."[43] The threshold of the latter obligation is much higher than that of the former; for example, to comply with the obligation as interpreted by the Panel, Korea argues, a Member would be required to publish detailed methodologies for compliance.[44]

42. The United States agrees with the Panel's conclusion that Korea's publication in a press release of information about its SPS measure was insufficient to satisfy the requirements of

[41] Panel Report, para. 7.463.
[42] Korea's Appellant Submission, paras. 347-375.
[43] Korea's Appellant Submission, para. 358 ("The Panel's reading and interpretation of Annex B(1) is equivalent to rewriting the language of Annex B(1).")
[44] Korea's Appellant Submission, para. 358.

paragraph 1 of Annex B. However, the United States considers that the Panel's interpretation of paragraph 1 goes beyond the requirements of that obligation when interpreted correctly.

43. Annex B, paragraph 1, sets forth an obligation to 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.[45] According to footnote 5 to paragraph 1, SPS regulations include "[s]anitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally." Paragraph 1 of Annex B thus requires publication of the SPS *measure* itself [46]

44. The SPS measure must be published "promptly". And the measure must be published "in such a manner as to enable interested Members to become acquainted with them."

45. According to its dictionary definition, "acquainted" is synonymous with "familiar" and "conversant."[47] In the context of the publication obligation set forth in Annex B, paragraph 1, therefore, 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 Japan asserted before the Panel.[48] As discussed above, for a written measure – which we understand Korea's measure to be – this obligation would include publication of the measure itself. [49]

46. 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, as noted by the European Union before the Panel.[50]

47. The Panel's elaboration of the "essential elements" to be included in the publication of a measure, to allow traders to become "acquainted with" the measure, would appear to go further than the text of paragraph 1, Annex B warrants.

48. Based on the text of paragraph 1, the object *with which* Members must be able to become familiar or acquainted is the relevant *SPS regulation* that has been adopted.

---

[45] SPS Agreement, Annex B(1) defines "regulations" in footnote 5, as SPS measures "such as laws, decrees or ordinances which are applicable generally."

[46] We do not understand Korea to take the position that its import bans and other requirements are unwritten measures.

[47] *The New Shorter Oxford English Dictionary*, 4th edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 509.

[48] *See* Japan's First Written Submission, paras. 82-83.

[49] Panel Report, para 7.462. As examples of disputes where publication failed to acquaint Members with the measure, the Panel points to two disputes concerning Article X:1 of the GATT 1994. We note that in these disputes, the respondent failed to publish *the measure itself*. First, in *EC – IT Products* the respondent made the minutes of a Customs Code Committee available, with draft Explanatory Notes. *EC – IT Products* (Panel), para. 7.1087. In *Thailand – Cigarettes* the respondent published *components* comprising a given maximum retail selling price (MRSP), as determined by the relevant authority applying the methodology. *Thailand – Cigarettes* (Panel), para. 7.787-789.

[50] Oral Statement of the European Union, para. 5.

49. Contrary to the Panel's findings, the context of paragraph 1, Annex B also supports this interpretation. For example, Paragraph 5 requires, among other things, advanced public notice of any proposed regulation and notification "of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation" "[w]henever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members." Paragraph 5 also suggests that the requirement of a "reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force" set out in paragraph 2 also applies only where traders are not otherwise unfamiliar with the standard being applied by a Member. That is, where traders are not already familiar with the standard to be applied by a Member's proposed regulation, certain additional requirements must be met beyond the publication and advanced notice required by paragraphs 1 and 2.

50. The Panel's interpretation essentially reads into the publication requirement of paragraph 1 those additional requirements set out in paragraph 5. But as just explained, those additional requirements are triggered only under certain circumstances. Therefore, the context of paragraph 1 also does not support the interpretation set out by the Panel.

51. In sum, the United States agrees with the Panel's conclusion that Korea's publication of a press release about the SPS measure at issue, and its failure to publish the SPS measure itself, resulted in a breach of paragraph 1, Annex B. However, the United States disagrees with the Panel that publication of the measure itself would not be sufficient to satisfy the publication requirement in paragraph 1.

V. THE PANEL'S INTERPRETATION OF THE ENQUIRY POINT OBLIGATION IN PARAGRAPH 3 OF ANNEX B

52. The Panel found that compliance with Annex B(3), and thus Article 7 of the SPS Agreement, is achieved not only through the formality of creating an enquiry point, but also through the actual provision of information and answers to reasonable questions.[51] The Panel reasoned that it would be incongruous to conclude that the drafters of the SPS Agreement would establish an obligation to set up an enquiry point, endow it with responsibility, and then not require the concomitant benefit to interested Members of receiving answers and documents.[52] The Panel then assessed each of Japan's inquiries and Korea's responses, and found that Korea failed to comply with its obligations under paragraph 3, Annex B.

53. On appeal, Korea argues "Paragraph 3 at most imposes on each Member the obligation to ensure that its respective enquiry point is given the responsibilities described therein," but that "[t]here is nothing in paragraph 3 to suggest that individual instances in which an enquiry points fails to respond to a question or to provide a document necessarily result in a violation of a Member's obligation."[53] "Instead," Korea argues, "a claim under paragraph 3 must be based on allegations and evidence that the Member has failed to ensure that 'one enquiry point exists

[51] Panel Report, 7.510.
[52] Panel Report, para 7.508.
[53] Korea's Appellant Submission, para. 383.

which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents'."

54. The United States agrees that Annex B(3) sets out a procedural obligation to establish an enquiry point that is responsible for providing certain information, but does not impose a substantive obligation on a Member to provide such information *only through* such an enquiry point.

55. As the United States explained before the Panel, 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, however, Paragraph 3 does not itself impose a substantive obligation on a Member to provide information or to explain the reasons behind its measures. Annex B(3) also does not specify the nature of the enquiry point's response.

56. 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, as just discussed, Paragraph 1 of Annex B requires publication of measures and in a manner that enables Members to become acquainted with them. And Article 5.8 requires a Member to provide an explanation of the reasons for an SPS measure if requested. These provisions do not, however, require that the information be published or provided by the enquiry point described in Paragraph 3.[54]

57. 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,,

58. 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.

59. In either case, it is the substantive obligation under, for example, Article 5.8, that would require a Member to respond to the enquiry or concern appropriately. If a Member's relevant governmental agency or body were to supply the reasons or requested information directly, this would not appear to result in any breach of Paragraph 3 of Annex B by rendering the enquiry point not "responsible for" answering questions or providing information.

[54] We note that Japan's submissions before the Panel appropriately challenged Korea's substantive failures following Japan's specific requests "under Article 5.8 of the SPS Agreement," for example, to provide Japan with an explanation of the reasons for the SPS measures as a violation of Article 5.8. Japan also identifies Korea's failure, following Japan's requests "under Article 4 of the SPS Agreement," to provide Japan with an explanation of the objectives and rationale, clear identification of risks, and copy of risk assessment or technical justification, as a violation of Article 4 of the SPS Agreement. Japan further identifies Korea's failure "to respond fully" to Japan's questions and requests for documents as a violation of Article 7 and Annex B(3).

VI. CONCLUSION

60. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the SPS Agreement and DSU.