



12 April 2018

(18-2204)

Page: 1/4

Original: English

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

**NOTIFICATION OF AN APPEAL BY THE REPUBLIC OF KOREA UNDER ARTICLE 16.4 AND
ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING
THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF
THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 9 April 2018, from the delegation of the Republic of Korea, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Korea hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides* (WT/DS495/R) ("Panel Report").
2. Pursuant to Rules 21 of the Working Procedures, Korea files this Notice of Appeal together with its Appellant Submission with the Appellate Body Secretariat.
3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.
4. Korea seeks review by the Appellate Body of the Panel's expert selection. In particular, the Panel acted inconsistently with Article 11 of the DSU in selecting experts that had a conflict of interest in the matter.¹ Korea requests the Appellate Body to find that in consulting such experts, the Panel acted inconsistently with Korea's due process rights under Article 11 of the DSU. Since the Panel relied on its consultations with such experts in its assessment under Articles 5.7, 5.6, and 2.3 of the SPS Agreement², Korea requests that the Appellate Body reverse the Panel's findings under these provisions, including in paragraphs 7.96, 7.108-7.109, 7.111, 7.251-7.256, 7.321-7.322, 7.349-7.350, 7.355, 7.359-7.360, 8.1, 8.2 b-e, and 8.3 a-b.
5. Korea seeks review by the Appellate Body of the Panel's findings under Article 5.7 of the SPS Agreement. The Panel erred in making findings under Article 5.7 even though the provision was not within its terms of reference.³ Korea requests the Appellate Body to find that, in proceeding in this manner, the Panel acted inconsistently with Articles 6.2, 7, and 11 of the DSU.
6. Korea also seeks review by the Appellate Body of the Panel's interpretation and application of Article 5.7. In particular, the Panel erred in finding that:

¹ See, for example, Panel Report, paras. 1.26, 1.27. and 1.28.

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

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

- Korea had the burden proof under Article 5.7.⁴
- There was not insufficient scientific evidence to conduct a risk assessment with respect to the product specific import bans, the blanket import ban, and the extension of the additional testing requirements to fishery and livestock products in 2013.⁵
- The 2013 blanket import ban and the 2013 additional testing requirements were not based on pertinent available information.⁶
- Korea did not review the measures within a reasonable period of time.⁷

7. Korea also seeks review by the Appellate Body of the Panel's analysis of whether the measures were based on pertinent available information in light of Article 11 of the DSU. The Panel's failure to make an objective assessment of the matter under Article 11 of the DSU includes the Panel's internally contradictory reasoning in relation to the product-specific bans and the import ban.⁸

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

9. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article 5.6 of the SPS Agreement. Korea requests the Appellate Body to find that the Panel erred in the interpretation and application of Article 5.6.⁹ The Panel's errors under Article 5.6 include the findings that:

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

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

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

12. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings concerning the use of such evidence and data, in particular in paragraphs 7.5, 7.8, 7.134, 7.142, 7.207, 7.219, 7.226, 7.236, and 7.245. Since the Panel relied on such evidence and data in its assessment under Article 5.6, Korea further requests that the Appellate Body reverse the Panel's

⁴ See, for example, Panel Report, para. 7.75.

⁵ See, for example, Panel Report, paras. 7.93, 7.96, 7.108, and 7.111.

⁶ See, for example, Panel Report, paras. 7.109 and 7.111.

⁷ See, for example, Panel Report, paras. 7.107, 7.110, and 7.111.

⁸ See, for example, Panel Report, paras. 7.98, 7.100, 7.109 and 7.111.

⁹ See, for example, Panel Report, paras. 7.172-7.173.

¹⁰ See, for example, Panel Report, paras. 7.251 and 7.253.

¹¹ See, for example, Panel Report, paras. 7.252 and 7.253.

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

findings that Korea's SPS measures are inconsistent with Article 5.6 of the SPS Agreement, including in paragraphs 7.251-7.256, and 8.2(b)-(e).¹³

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

- Similar conditions existed in Japan and in other Members with regard to the adoption of the 2013 additional testing requirements and of the blanket import ban with respect to the 27 fishery products covered by Japan's claim and for Pacific cod originating from Aomori, Chiba, Gunma, Iwate, Miyagi, and Tochigi prefectures, and similar conditions existed in Japan and in other Members for all food products, including the 28 fishery products, with regard to the maintenance of Korea's measures.¹⁴
- The import ban and the additional testing requirements arbitrarily or unjustifiably discriminate.¹⁵
- The 2013 additional testing requirements and the blanket import ban with respect to the 27 fishery products subject to Japan's claim from the 8 prefectures and Pacific cod from 6 prefectures, i.e. excluding Pacific cod from Fukushima and Ibaraki, were inconsistent with Article 2.3, first sentence of the SPS Agreement when Korea adopted them, and that by maintaining the product-specific and blanket import bans on the 28 fishery products from the 8 prefectures and the 2011 and 2013 additional testing requirements on Japanese products, Korea acted inconsistently with Article 2.3, first sentence of the SPS Agreement.¹⁶
- Korea's measures constitute disguised restrictions on international trade and thereby violate the second sentence of Article 2.3 of the SPS Agreement.¹⁷

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

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

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

- Annex B(1) requires that the content of the regulation be published and that such publication must make the publication contain sufficient content that the importing Member will know the conditions, including specific principles and methods, that apply to its goods.¹⁹

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

¹⁴ See, for example, Panel Report, paras. 7.321 and 7.322.

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

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

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

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

¹⁹ See, for example, Panel Report, paras. 7.461 and 7.464.

- Korea had not published the full content of the blanket import ban and the additional testing requirements.²⁰
- The 2011 and 2013 press releases announcing the additional testing requirements did not include content that is sufficient to enable an interested Member to know the conditions that would be applied to its goods.²¹
- Korea did not publish the measures in a manner so as to enable Japan to become acquainted with the challenged measures.²²
- Korea acted inconsistently with Annex B(1), as a consequence with Article 7 of the SPS Agreement, with respect to the publication of all of the challenged measures.²³
- Korea's SPS Enquiry Point's failure to respond to Japan's follow-up query in conjunction with its earlier failure to relate the answers and documents provided to their relevance for the questions Japan had posed, is sufficient to establish that Korea acted inconsistently with Annex B(3) and as a consequence Article 7 of the SPS Agreement.²⁴

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

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

²⁰ See, for example, Panel Report, paras. 7.483, 7.487, 7.492, and 7.496.

²¹ See, for example, Panel Report, paras. 7.500-7.501.

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

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

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

²⁵ See, for example, Panel Report, paras. 7.474, 7.485, and 7.497.