

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

(DS495)

**THIRD PARTY EXECUTIVE SUMMARY OF
THE UNITED STATES OF AMERICA**

August 10, 2016

EXECUTIVE SUMMARY OF U.S. 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 position 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.