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

(DS495)

Oral Statement of the United States of America at the Third-Party Session

of the First Substantive Meeting of the Panel with the Parties

July 12, 2016

I. INTRODUCTION

1. Mr. Chairman, members of the Panel: We welcome the opportunity to make an oral statement in this dispute. The United States has a systemic interest in the interpretation of the SPS Agreement[1] and will address in this statement certain interpretative issues arising in this dispute, and their application given our understanding of the facts developed to date.

2. We will first address the two transparency obligations at issue set forth in Article 7 and Annex B. Next, we will address issues related to Japan's substantive legal claims arising under Article 2.3 and Article 5.6.

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

3. With respect to transparency, Japan alleges that Korea acted inconsistently with Article 7 and Annex B(1) by failing to publish the SPS measures at issue. In particular, Japan challenges Korea's publication of press releases on government web sites, which announced the import bans and testing and certification requirements. The April 14, 2011, Press Release, "Status of KFDA's Response and Management Measures Regarding the Japanese Nuclear Crisis", stated that for foods produced or manufactured in Japanese Prefectures (not subject to the ban), the submission of a certificate of origin issued by the Government of Japan shall be requested, and the radiation inspections will be conducted on every import line. "If iodine or cesium is detected even with the certificate of origin during the import inspection, additional certification regarding strontium and other radionuclides shall be requested."[2]

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[1] *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement").

[2] Korea's First Submission, Exhibit KOR-72.

4. 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 requires that any SPS measure which has been adopted be "published". 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".

5. Paragraph 1 of Annex B thus 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.

6. Given the requirements of Paragraph 1, Korea's publication of a press release *about* the measure therefore would appear to fall short of its publication obligation. While publication of the press release may have made Japan and other Members aware of the existence of the SPS measure, as Korea notes in its submission[3], it did not contain the SPS measure itself. And by including bullet summaries of the "details of each measure"[4] but not the measures themselves, the press releases did not enable Members to become acquainted with the measure because any summary of "the details" necessarily paraphrases the language of the measure itself.

7. Japan's second transparency claim relates to the interpretation of Annex B as it relates to a Member's designated national enquiry point. Japan claims that the failure of Korea's enquiry

[3] *See* Korea's First Written Submission, para. 372.

[4] Korea's First Submission, Exhibit KOR-72.

point to dispel uncertainty by responding to Japan's reasonable inquiries and requests for relevant documents was inconsistent with Paragraph 3 of the Annex.

8. 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.

9. 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.

10. 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.

11. 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.

III. ARTICLE 2.3

12. Japan claims that both the import bans and the additional testing requirements breach Article 2.3 by arbitrarily or unjustifiably discriminating between Members where identical or similar conditions prevail, amounting to disguised trade restrictions.[5] Japan asserts the relevant conditions are similar because food containing a safe amount of cesium presents low risk of containing additional radionuclides, regardless of its origin.[6] Korea states that Japan's product-based test is inappropriate and ignores relevant, dissimilar conditions in the territory of Japan post-nuclear accident.[7] Korea finds error in Japan's reliance upon a comparison of products, rather than on a comparison of the conditions that prevail in Japan and other countries.[8]

13. 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 of [an importing] Member",

[5] *See* Japan's First Written Submission, paras. 195, 402.

[6] *See* Japan's First Written Submission, paras. 248, 411.

[7] *See* Korea's First Written Submission, paras. 112-113.

[8] *See* Korea's First Written Submission, para. 112.

including, but not limited to, the conditions occurring in a Member's territory and any relevant conditions relating to the product at issue.

14. We note that prior panels have deemed a variety of conditions relevant to the assessment under Article 2.3. The reasoning of the panel in *India – Agricultural Products* is instructive. That panel deemed relevant "the presence of a disease within a territory (and the concomitant risk associated with that disease)."[9] The panel further found that:

> "[T]here is no evidence before the Panel to suggest that the risks associated with LPNAI are in any way different on the basis of the origin of the relevant product; thus, India is protecting against an identical or similar risk when it takes measures to protect against LPNAI . . . risks against which India is protecting constitute conditions that are similar in India and other Members."[10]

15. Therefore, 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.

[9] *India – Agricultural Products*, para. 7.460.

[10] *India –Agricultural Products*, para. 7.469.

IV. ARTICLE 5.6

16. Japan asserts that Korea breached Article 5.6 because a reasonably available less trade-restrictive alternative – namely, testing each consignment to ensure cesium levels do not exceed 100 Becquerel per kilogram – achieves Korea's appropriate level of protection, *i.e.*, 1 millisievert per year.[11] Korea submitted that Japan misstates its level of protection, as Korea aims to maintain levels of radioactive contamination "as low as reasonably achievable."[12] Korea further asserts that there is insufficient scientific evidence to determine that Japan's alternative would achieve Korea's appropriate level of protection.

17. As a preliminary matter, we note that 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 Japan's legal claims in this proceeding.

18. Annex A(5) defines "appropriate level of sanitary or phytosanitary protection" as "the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory." The precise level of

[11] *See* Japan's First Written Submission, para. 340.

[12] *See* Korea's First Written Submission, para. 234.

protection Korea intends to achieve through these measures is unclear from its submission. In particular, "as low as reasonably achievable" appears to introduce a notion of cost-benefit analysis, which would be for Korea to decide – and thus would make the determination of the level of protection circular in this proceeding. In cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the Panel may identify the level of protection on the basis of the level of protection reflected in the SPS measure actually applied.[13] In this respect, the level of cesium in products Korea deems safe for import from Members other than Japan would be a relevant consideration.

V. CONCLUSION

19. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States.

[13] *See Australia-Salmon (AB)*, para. 207.