

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

(DS495)

**RESPONSES OF THE UNITED STATES TO THE PANEL'S
QUESTIONS TO THE THIRD PARTIES**

August 2, 2016

QUESTIONS FOR THE THIRD PARTIES

1. Some third-parties have argued that the publication obligation requires publication of the text of the relevant SPS measures. Other third parties have argued that in some cases a publication containing less than the text of an SPS regulation may satisfy the obligation under Annex B(1) of the SPS Agreement, while in other cases information beyond such text may be required. Is the publication obligation broader or narrower depending on the specificities of the relevant regulation?

1. Annex B, paragraph 1, sets forth one publication obligation for all SPS “regulations” (as defined in footnote 5 to paragraph 1: a Member must publish any SPS regulation. To “publish” an SPS regulation is to print the text that constitutes the measure itself.¹ This understanding is further supported by the definition of “regulation” as SPS “measures such as laws, decrees, or ordinances which are applicable generally”. The listed “measures” are typically written, and publication of such a measure would therefore mean printing the text of the measure.

2. As explained in the oral statement of the United States, content, not form, is the focus of compliance with the publication obligation. In some case, 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 EU.²

2. What level of detail of information is required by Annex B(1) to enable a Member to become acquainted with the SPS regulation?

3. According to its dictionary definition, “acquainted” is synonymous with “familiar” and “conversant.”³ 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 asserts.⁴ As discussed above, for a written measure – which we understand Korea’s measure to be – this obligation would include publication of the measure itself.

4. United States: Please explain your understanding of the relationship between Annex B(3) and Article 5.8?

4. 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

¹ The dictionary definition of “publish” is to “print (something) in a book or journal so as to make it generally known.” OxfordDictionaries.com (definition 1.1).

² Oral Statement of the European Union, para. 5.

³ *The New Shorter Oxford English Dictionary*, 4th edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 509.

⁴ See Japan’s First Written Submission, paras. 82-83.

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.

5. Annex B, paragraph 3, states that the enquiry point is to be “responsible” to provide answers to all “reasonable” *requests*, but does not set out nature of the response. Rather, Annex B, paragraph 3, ensures that an initial point of contact exists to which members can address reasonable enquiries and requests for documents. By establishing this mechanism, Annex B, 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.

6. On the other hand, Article 5.8 is as 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. Article 5.8 provides:

When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measures may be requested and shall be provided by the Member maintaining the measure.

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 on a Member 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.

5. Nothing in Article 5.8 specifies a procedure, either for submitting or receiving a request, or for providing the relevant explanation. The responding Member is not relieved of its obligation to explain the measure because the requesting Member failed to invoke Article 5.8 by way of the enquiry point. For example, a concerned Member, exercising its rights under Article 5.8, may request the explanation directly from a foreign or trade ministry or from the government office to which that concern relates. Similarly, a response to a request under Article 5.8 need not be provided by the enquiry point for the responding Member to satisfy the substantive obligation. For example, the enquiry point may receive an enquiry, including but not limited to an enquiry under Article 5.8, then communicate the enquiry to the relevant government office to which it relates. 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.

6. 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, but alternatively, a Member could exercise the same rights without the enquiry point.

6. The European Union in its opening statement has argued that the provisional nature of a measure is relevant under analysis in Articles 2.3 and 5.6. New Zealand takes a different view. Please provide your view to the Panel on the relevance of the provisional nature of a measure on an analysis under Articles 2.3 and 5.6.

7. In its oral statement, the EU argued that when a provisional measure was necessarily based on insufficient scientific information the obligation to perform a risk assessment under Article 5.1 is less stringent.⁵ The United States does not fully agree 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. The EU further suggested that a similar accommodation should be made under Articles 2.3 and 5.6.⁶ New Zealand, on the other hand, “is not certain that the analysis under Articles 2.3 and 5.6 should be carried out in a different manner for provisional measures.”⁷ Nevertheless, New Zealand points out that the Panel need not determine this issue because Korea’s measures have not been established as provisional pursuant to Article 5.7.⁸

8. 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 and claim that its measure was adopted on a provisional basis. 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 panels’ 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 such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that[] covered agreement[]”.⁹

⁵ Third-Party Oral Statement of the European Union, para. 18.

⁶ Third-Party Oral Statement of the European Union, para. 18.

⁷ Third-Party Oral Statement of New Zealand, para. 6.

⁸ Third-Party Oral Statement of New Zealand, para. 6.

⁹ DSU, Article 7.1 (panel’s terms of reference).