

WORLD TRADE ORGANIZATION

New Zealand Third Participant Oral Statement

***KOREA – IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS
FOR RADIONUCLIDES
(WT/DS495)***

THIRD PARTICIPANT ORAL STATEMENT BY NEW ZEALAND

12 July 2016

1. Mr Chairman, distinguished Members of the Panel, New Zealand appreciates the opportunity to make a brief oral statement in this hearing. New Zealand's participation as a third party in these proceedings reflects our systemic interest in the proper implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures.

2. New Zealand will focus today on two issues: provisional measures and transparency. Specifically, New Zealand will comment on the relationship between Articles 5.7, 2.3 and 5.6 of the SPS Agreement, and the interpretation of the obligations in Annex B on transparency.

Relationship between Articles 5.7, 2.3 and 5.6

3. First I will address the relationship between Articles 5.7, 2.3 and 5.6 of the SPS Agreement. Article 5.7 of the SPS Agreement relates to provisional measures, adopted in cases where relevant scientific evidence is insufficient. Japan makes no claim under this Article. Consequently, Korea does not make a specific legal argument relating to Article 5.7.

4. While Article 5.7 is not directly at issue in this case, Korea generally describes its measures as "provisional in nature pursuant to Article 5.7 of the SPS Agreement"¹ and its arguments under Article 2.3 (Non-Discrimination) and 5.6 (Appropriate Level of Protection) draw on the alleged lack of scientific information, and inability to carry out a risk assessment.² These links between Articles 2.3, 5.6 and 5.7 warrant consideration.

5. In its third party written submission, commenting on the relationship between Articles 2.3 and 5.7, the European Union states that "the non-discrimination analysis of a provisional measure should not be carried out under the same standard as for a definitive measure, based on a full risk assessment."³ Regarding the relationship between Articles 5.6 and 5.7, the European Union also states that "the necessity analysis under Article 5.6 should take account of the fact that the measure at issue is provisional within the meaning of Article 5.7".⁴

¹ Korea First Written Submission, para. 83.

² Korea First Written Submission, paras. 138, 190, 244 and 248.

³ EU Third Party Written Submission, para. 44.

⁴ EU Third Party Written Submission, para. 83.

6. In contrast, New Zealand is not certain that the analysis under Articles 2.3 and 5.6 should be carried out in a different manner for provisional measures. Provisional measures should be non-discriminatory and no more trade-restrictive than required to achieve a Member's appropriate level of protection. Nevertheless, in this case it is not necessary for the Panel to consider this issue in order to resolve the dispute, as Korea's measures have not been shown to be provisional in accordance with Article 5.7.

7. If a Panel were to take into account the provisional nature of measures in an examination of claims under Article 2.3 and 5.6, then it must be demonstrated that the measures are indeed "provisional" in accordance with Article 5.7. The burden falls on the party invoking the Article 5.7 "justification" to prove that their measures comply with Article 5.7, meeting the four cumulative requirements which must be met in order to adopt and maintain a provisional SPS measure (as set out by the Appellate Body in *Japan – Agricultural Products II*). In the absence of such proof, arguments relating to insufficient scientific evidence and provisional measures may not be part of the interpretative exercise under Articles 2.3 and 5.6. We cannot "relax" the core obligations in these two articles by referencing Article 5.7 but not providing any evidence that the elements of Article 5.7 are met.

Transparency

8. The second issue New Zealand will comment on is transparency. We consider that the two key transparency issues in this dispute are: 1) publication requirements under Article 7 and Annex B of the SPS Agreement; and 2) the interpretation of Annex B.3 on enquiry points.

9. New Zealand considers that the obligation in Annex B.1 that "all sanitary and phytosanitary regulations which have been adopted are published promptly" requires that the regulations themselves must be published. Publishing an incomplete summary of regulations, for example, through a press release, is not an acceptable means of satisfying this obligation. Given the technical nature of SPS regulations, in order to ensure compliance, Members must have access to the full text of regulations. This is especially important for measures of a provisional nature, which are adopted without prior notice and without Members having had an opportunity to comment.

10. In regard to enquiry points, New Zealand submits that Annex B.3 requires Members to both establish an enquiry point, as well as respond to all reasonable questions and

provide relevant documents. Annex B.3 reads: “Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents”. New Zealand considers that this paragraph contains two obligations. First, to ensure that an enquiry point to which Members can direct reasonable questions and requests for relevant documents exists; and second, to ensure that the enquiry point provides answers to all reasonable questions from interested Members as well as relevant documents.

11. New Zealand concurs with the statement made by Canada in its third party written submission,⁵ that to interpret this obligation in a way that requires an enquiry point to be established, but does not require the enquiry point to actually respond to questions, makes little sense. Further, the qualifications placed on what can be directed to the enquiry point – *reasonable* questions and requests for *relevant* documents – would be ineffective and unnecessary if there were no obligation to respond to questions at all.

13. Distinguished Members of the Panel, to interpret the transparency Annex of the SPS Agreement in a way that would lead to a lack of transparency, allowing Members to ignore reasonable questions and requests for relevant documents, would be highly undesirable.

14. Mr Chairman, Members of the Panel, thank you for your attention. New Zealand stands ready to answer any questions you may have.

⁵ Canada Third Party Written Submission, para. 21.