

**IN THE WORLD TRADE ORGANIZATION**

**WT/DS495**

**Korea — Import Bans, and Testing and Certification Requirements for  
Radionuclides**

**Third Party Submission**

**by**

**Norway**

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Table of cases cited in this submission

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Japan - Agricultural Products II</i>	<i>Panel Report, Japan – Measures Affecting Agricultural Products, WT/DS76/R</i>
<i>Japan - Agricultural Products II (AB)</i>	<i>Appellate Body Report, Japan - Measures Affecting Agricultural Products, WT/DS76/AB/R</i>
<i>EC – IT Products</i>	<i>Panel Reports, European Communities and its Member States — Tariff Treatment of Certain Information Technology Products, WT/DS375/R, WT/DS376/R, WT/DS377/R</i>
<i>Thailand - Cigarettes (Philippines)</i>	<i>Panel Report, Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/R</i>
<i>Dominican Republic - Import and Sale of Cigarettes</i>	<i>Panel Report, Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R</i>
<i>EC-Biotech</i>	<i>Panel Report, European Communities – measures affecting the approval and marketing of biotech products, WT/DS291/R, WT/DS292/R, WT/DS293/R</i>

## I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this case concerning a disagreement between Japan, as complainant, and Korea, regarding the conformity with the covered agreements of import bans and additional certification requirements for radionuclides affecting the importation of food products.
2. Norway has requested the participation as third party with enhanced third party rights<sup>1</sup> in this case mainly for two reasons; First, the systemic aspects of this case, in particular related to transparency, is in our view of great importance in order to facilitate international trade. Second, as a big exporter of seafood, Norway has a special trade interest in the well-functioning of the *Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)*.
3. Norway will not address all the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the interpretation of the transparency obligations contained in Article 7 and Annex B of the *SPS Agreement*.<sup>2</sup>

## II. PUBLICATION REQUIREMENTS

### A. Introduction

4. A transparent regulatory framework is a prerequisite for international trade in general and the importation of food products in particular. Without the possibility to gain access to relevant and precise information regarding the requirements applicable to the importation of food products, traders are left without predictability and the appropriate due process guaranties. In the *Recommended procedures for implementing the transparency obligation of the SPS Agreement (Article 7)*, the *SPS Committee* recognized transparency as one of the fundamental principles of the WTO:

The term transparency in the context of the World Trade Organization (WTO) is used to signify one of the fundamental principles of its agreements: the aim is to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members.<sup>3</sup>

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<sup>1</sup> Cf request of 1 March 2016.

<sup>2</sup> The Annexes are an integral part of the SPS Agreement, cf Article 1.3 SPS.

<sup>3</sup> G/SPS/7/Rev.3, paragraph 1.

5. Furthermore, the *SPS Committee* emphasized that:  
Transparency under the SPS Agreement also includes answering reasonable questions, and publishing regulations.<sup>4</sup>
6. In the case at hand, Japan challenges Korea's failure to publish certain import bans and additional testing requirements. Moreover, Japan challenges Korea's failure, through its SPS Enquiry Point, to provide copies of the measures and to respond fully to Japan's reasonable questions. Both situations are claimed to be in violation of Article 7 of the *SPS Agreement* and paragraphs 1 and 3 of Annex B to the *SPS Agreement*. In the following, Norway will discuss certain aspects of the relevant obligations.

## **B. Interpretation of Article 7 and Annex B of the SPS Agreement**

### **a) Introduction**

7. Article 7 of the *SPS Agreement* provides that:

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

8. Paragraphs 1 and 3 of Annex B to the *SPS Agreement* provides, amongst others, that:

1. Members shall ensure that all sanitary and phytosanitary regulations<sup>5</sup> which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

(footnote 5 of Paragraph 1: Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally)

3. 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 regarding: [...]

(underlining added)

9. In *Japan - Agricultural Products II* the Appellate Body addressed Paragraph 1 of Annex B to the *SPS Agreement* and stated that;

The object and purpose of paragraph 1 of Annex B is "to enable interested Members to

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<sup>4</sup> Ibid.

become acquainted with" the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.<sup>5</sup>

**b) Publication vs information**

10. Article 7 of the *SPS Agreement* contains an obligation on Members, namely that Members “shall provide information” on their sanitary or phytosanitary measures. This must be done in accordance with the provisions in Annex B, which clarifies and specifies the content of Article 7. Following the provisions of Annex B, adopted SPS regulations must be “published promptly in such a manner as to enable interested Members to become acquainted with them”.

11. In *Japan - Measures Affecting Agricultural Products*, the panel had the opportunity to address this obligation. In this case, Japan acknowledged that it had not published the phytosanitary regulation at issue (a varietal testing requirement). However, guidelines had been distributed to a limited number of addressees, and the Ministry of Agriculture, Forestry and Fisheries (MAFF) was available to answer queries. Still, this was not enough to satisfy the requirement in paragraph 1 of Annex B of the *SPS Agreement* and Article 7 of that Agreement, and the panel stated that this situation:

does not equal prompt publication which enables interested Members to become acquainted with the varietal testing requirement.<sup>6</sup> (underlining added)

12. Norway understands this to mean that access to information upon request would not fulfil the publication requirement. Rather, the publication requirement in paragraph 1 of Annex B of the *SPS Agreement* and Article 7 of that Agreement must be interpreted to the effect that it entails a positive obligation on the Member, a duty to act on one’s own initiative and to publish all SPS regulations.

13. Thus, the publication requirement will be fulfilled only if SPS regulations are published in a manner that makes them publicly available, so all interested Members and traders can become acquainted with them. This interpretation is in line with the fundamental aim of

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<sup>5</sup> *Japan - Agricultural Products II* (AB), paragraph 106.

<sup>6</sup> *Japan - Agricultural Products II*, paragraph 8.115.

transparency, namely to facilitate international trade by ensuring clarity and predictability of Members' regulations.

**c) *The content of the publication requirement***

14. In accordance with Paragraph 1 of Annex B to the *SPS Agreement*, Members shall ensure that “all sanitary and phytosanitary regulations” are published promptly. Accordingly, it is the “regulations” that must be published. A footnote to this provision clarifies that “regulations” are to be understood as “sanitary and phytosanitary measures”, thus referring back to the wording of Article 7 of the *SPS Agreement*. In *EC-Biotech*, the panel classified regulations in Paragraph 1 of Annex B as a sub-category of “SPS measures”.<sup>7</sup>
15. In its first written submission, Korea argues that the publication of press releases are sufficient to fulfil the publication requirement in the *SPS Agreement*.<sup>8</sup> Without taking a stand as to the actual content of the press releases, Norway would like to underline that according to the wording of the *SPS Agreement*, it is the SPS regulation itself that must be published. This interpretation is also in line with the assessment of the panel in *Japan - Measures Affecting Agricultural Products*. In this case the panel found that the publication requirement in Paragraph 1 of Annex B to the *SPS Agreement* was not fulfilled, because

“The publication by MAFF of the protocols relating to approved products does not ensure publication of the varietal testing requirement itself.”<sup>9</sup> (underlining added)

16. Should, however, the Panel find that Paragraph 1 of Annex B to the *SPS Agreement* does not contain an unconditional obligation to publish the SPS regulation itself, Norway would argue, in the alternative, that this provision nevertheless contains an obligation on Members to publish complete and sufficiently detailed information on the regulation to allow other Members and traders to achieve the clarity and predictability necessary to facilitate international trade in food products. This follows from the standard set in Paragraph 1 of Annex B to the *SPS Agreement*, namely that SPS measures must be published “in such a manner as to enable interested Members to become acquainted with them” (underlining added).

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<sup>7</sup> *EC-Biotech*, paragraph 7.1455.

<sup>8</sup> Korea's FWS, see especially paragraphs 365-367.

<sup>9</sup> *Japan - Agricultural Products II*, paragraph 8.115.

17. As stated by Korea in its first written submission, similar publication requirements may be found in a number of WTO Agreements. Hence, case law concerning other WTO Agreements containing such provisions may also be relevant for the interpretation of the *SPS Agreement*.<sup>10</sup>

18. Article X:1 of the GATT 1994 contains an obligation to publish laws, regulations, etc. promptly and “in such a manner as to enable governments and traders to become acquainted with them” (emphasis added). Given the very similar wording of Paragraph 1 of Annex B to the *SPS Agreement* and Article X:1 of the GATT 1994, the guidance given on the interpretation of the GATT 1994 must in our view also be relevant for the interpretation on the content of the publication requirement in the case at hand.

19. The panel in *EC – IT Products* interpreted the phrase, “in such a manner as to enable governments and traders to become acquainted with them,” in Article X:1 of the GATT 1994 as follows:

“not any manner of publication that would satisfy the requirement, but only those that would give power to or supply governments and traders with knowledge of the particular measures that is “adequate” so that traders and Governments may become “familiar” with them, or “known” to them in a “more or less complete” way.”<sup>11</sup>

20. In that case, the panel concluded that the European Commission’s posting of the minutes of the Customs Code Committee on the Comitology website did not fulfill this requirement, and commented, “In particular, we note that there is nothing in the minutes, or the draft CNENs attached, that would supply traders and governments with adequate knowledge of measures that are or would be applied in trading with the EC member States.”<sup>12</sup> (underlining added)

21. In *Dominican Republic — Import and Sale of Cigarettes*, the panel also focused on the information the publication must contain:

“the Dominican Republic should have either published the information related to the Central Bank average-price surveys of cigarettes or, alternatively, publish its decision to not conduct these surveys and to resort to an alternative method, in such a manner as to enable governments and traders to become acquainted with the method it would

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<sup>10</sup> Korea FWS, paragraph 360.

<sup>11</sup> *EC – IT Products*, paragraph 7.1086.

<sup>12</sup> *Ibid*, paragraph 7.1087.

use in order to determine the tax base for the Selective Consumption Tax on cigarettes.”<sup>13</sup> (underlining added)

22. In *Thailand — Cigarettes (Philippines)*, the panel considered a claim regarding failure to publish the methodology for determining MRSPs (which is an element of the tax rate for cigarettes), and held that:

“The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of Article X:1. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted.”<sup>14</sup> (underlining added)

23. Overall, these cases illustrate that Members must publish complete and precise information regarding the applicable rules and restrictions on the importation of food products. The manner in which this information is published must be adequate, to ensure that it enables Members to become acquainted with them.

24. The case at hand also illustrates the need for precise information on SPS regulations, to ensure that Members and traders are able to gain knowledge about the regulatory framework within which they must operate. Moreover, the challenges highlighted by Japan in this case point back to the object and purpose of transparency as a fundamental principle of the WTO, namely to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members for the benefit of all traders.

25. In its first written submission, Korea argues that Japan complains about a level of detail that goes beyond the publication requirement in Paragraph 1 of Annex B to the *SPS Agreement*. Moreover, Korea claims that “The fact that paragraph 3 anticipates that interested Members may have questions, confirms that publication under paragraph 1 does not require that publication include a description with the level of detail demanded in this case by Japan”.<sup>15</sup>

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<sup>13</sup> *Dominican Republic - Import and Sale of Cigarettes*, paragraph 7.414.

<sup>14</sup> *Thailand - Cigarettes (Philippines)*, paragraph 7.789.

<sup>15</sup> Korea's FWS, paragraphs 376 and 377.

26. Norway does not share this interpretation of the relationship between Paragraphs 1 and 3 of Annex B to the *SPS Agreement*. As set out above, it is in our view quite clear that the publication requirement in Paragraph 1 relates to the measure itself. We cannot, however, see that the obligations set out in Paragraph 3 affect or limit the scope of the publication requirement in Paragraph 1. Rather, Paragraph 3 complements Paragraph 1 in that it assures easy access, through one enquiry point, to relevant information on SPS measures. This includes, but is not limited to, information about the measure itself. Paragraph 3 has a much wider scope, in that it obliges Members to provide documents on proposed SPS measures, control and inspection procedures, risk assessment procedures etc.
27. Thus, the level of detail demanded by Japan is not in itself decisive for the content of the publication requirement. What must be published is the SPS regulation itself, irrespective of the level of detail in the regulation.

### III. CONCLUSION

28. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.