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## **1 ARTICLE 7**

### **1.1 Text of Article 7**

#### **Article 7**

##### *Transparency*

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.

### **1.2 Scope of application**

1. In *Japan – Agricultural Products II*, the Panel concluded that: "Japan, by not having published the varietal testing requirement, acts inconsistently with its obligations under paragraph 1 of Annex B of the SPS Agreement and, for that reason, with its obligations contained in Article 7 of that Agreement."<sup>1</sup> Japan appealed the Panel's ruling arguing that the "regulations" referred to in Annex B(1) are limited to legally enforceable instruments. Japan contended that the measure at issue (a varietal testing requirement, as set out in the Experimental Guide) was not a legally enforceable instrument and as such, fell outside the scope of Annex B(1). In rejecting this appeal, the Appellate Body noted that the list of instruments contained in the footnote to Annex B(1) is not exhaustive in nature.<sup>2</sup> The Appellate Body then concluded that the measure at issue was a phytosanitary regulation within the meaning of paragraph Annex B(1), and upheld the Panel's finding that Japan had acted inconsistently with Annex B(1) and consequently, with Article 7 of the SPS Agreement.<sup>3</sup>

2. The Panel in *Japan – Apples* relied on the standard set in *Japan – Agricultural Products II* and ruled that the measure at issue in that dispute was also a phytosanitary regulation within the meaning of Annex B(1) and as such, was to have been published promptly in such a manner to enable interested Members to become acquainted with them. The Panel reiterated the obligation of Members to promptly publish their phytosanitary regulations pursuant to Article 7 and Annex B of the SPS Agreement.<sup>4</sup>

3. In *Japan – Apples*, the Panel established a test, to determine whether changes made to the two instruments at issue in that case, which were subsequent to the entry into force of the SPS Agreement, should have been notified under Article 7, having regard to the two requirements under Annex B(5) of the SPS Agreement. Annex B(5) foresees the notification of SPS regulations if a number of conditions are cumulatively met, i.e.: (a) where a relevant international standard does not exist or the content of the proposed measure is not substantially the same as the content of an international standard, guideline or recommendation, and (b) if the regulation may have a

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<sup>1</sup> Panel Report, *Japan – Agricultural Products II*, para. 8.116.

<sup>2</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 104 and 105.

<sup>3</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 108.

<sup>4</sup> Panel Report, *Japan – Apples*, paras. 8.23 and 8.24.

significant effect on trade of other Members.<sup>5</sup> In this case, an international standard did not exist for the subject matter at issue. The Panel therefore was tasked with determining whether changes in the two instruments constituted changes that were to be notified under Article 7 because they may have a "significant effect on trade of other Members". The Panel applied a two-pronged test: (a) weighing the impact of the alleged changes in the measures on the conditions of market access, that is, would the exported product still be permitted to enter Japan if they complied with the prescription contained in the previous regulations; (b) if this is not the case, the Panel had to consider whether the change could be considered to potentially have a significant effect on the trade of other Members:

"[W]e must determine whether the changes identified above constitute changes which are required to be notified under Article 7 because, *inter alia*, they 'may have a significant effect on trade of other Members' in the context of the chapeau to Paragraph 5 of Annex B.

We consider that the most important factor in this regard is whether the change affects the conditions of market access for the product concerned, that is, would the exported product (apple fruit from the United States in this case) still be permitted to enter Japan if they complied with the prescription contained in the previous regulations.<sup>6</sup> If this is not the case, then we must consider whether the change could be considered to potentially have a *significant* effect on trade of other Members. In this regard, it would be relevant to consider whether the change has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time-consuming administrative formalities."<sup>7</sup>

4. In *EC – Approval and Marketing of Biotech Products*, on the basis of its finding that a generally applicable measure concerning the administration or operation of an SPS measure is not an SPS measure *per se* and therefore need not be published, the Panel ruled out notification requirements for this category of measures:

"Article 7 ... requires Members to notify changes in their 'SPS measures' and provide information on their 'SPS measures'. It does not require Members to notify changes in the administration of SPS measures and provide information on the administration of their SPS measures."<sup>8</sup>

### **1.3 Notification requirements**

#### **1.3.1 Obligation to "provide information on SPS measures"**

5. The Panel in *EC – Approval and Marketing of Biotech Products*, on determining the measures at issue under Article 6.2 of the DSU, considered the purpose of Article 7 and provided an outlook on whether the general reference to this provision, in the case at hand, could amount to a violation of the totality of the requirements under Annex B:

"Article 7 of the *SPS Agreement* imposes an obligation on Members to notify changes in SPS measures and to provide information on SPS measures in accordance with the provisions of Annex B of the *SPS Agreement*. Regarding the obligation to 'provide information' on SPS measures, we note that the Complaining Parties have specified in their Panel requests which particular provisions of Annex B they consider to have been violated. We therefore think it is clear that the reference to Article 7 cannot be taken as an indication that the Complaining Parties are alleging violations of *all* provisions of Annex B."<sup>9</sup>

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<sup>5</sup> Panel Report, *Japan – Apples*, para. 8.310.

<sup>6</sup> (*footnote original*) This approach is in line with the discussion of the concept of "significant effect on trade of other Members" in the notification procedures adopted and revised by the SPS Committee G/SPS/7/Rev.2, para. 7).

<sup>7</sup> Panel Report, *Japan – Apples*, paras. 8.313-8.314.

<sup>8</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1459.

<sup>9</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, sub-para. 85.

### **1.3.2 Obligation to "notify changes" in SPS measures**

6. The Panel in *Japan – Apples*, in interpreting the provisions under Article 7, ruled that "Article 7 of the SPS Agreement requires Members to notify 'changes' in their SPS measures"<sup>10</sup> and added on a further ground that it does "not believe that changes of legal instruments require, in all instances, notification."<sup>11</sup>

7. In *EC – Approval and Marketing of Biotech Products*, in the context of identifying the particular measures at issue, the Panel clarified the content of the obligation to "notify changes in SPS measures" provided under Article 7. The Panel ruled "that that obligation is very similar in nature to the other obligation set out in Article 7, that is to say, the obligation to 'provide information' on SPS measures in accordance with Annex B."<sup>12</sup>

### **1.4 Relationship with other provisions of the SPS Agreement**

#### **1.4.1 Annex B**

8. With respect to its relationship to Annex B, see above as well as the Section on Annex B.

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<sup>10</sup> Panel Report, *Japan – Apples*, para. 8.319.

<sup>11</sup> Panel Report, *Japan – Apples*. fn 425.

<sup>12</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, sub-para. 85.