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JAPAN – MEASURES AFFECTING THE IMPORTATION OF APPLES

Recourse to Article 21.5 of the DSU by the United States

Request for the Establishment of a Panel

The following communication, dated 19 July 2004, from the delegation of the United States to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 10 December 2003, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *Japan - Measures Affecting the Importation of Apples* (WT/DS/245). Having found Japan's phytosanitary measure for imported US apples to be inconsistent with its obligations under the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), the DSB recommended that Japan bring its measure into conformity with that agreement.

On 10 February 2004, the United States and Japan concluded an agreement pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") (WT/DS245/9) that the reasonable period of time available to Japan to implement the DSB's recommendations and rulings would expire on 30 June 2004. Accordingly, Japan adopted new measures, ostensibly to comply with the DSB's recommendations and rulings, on that date.

The United States considers that Japan has failed to implement the DSB's recommendations and rulings by failing to bring its phytosanitary measure on imported US apples, which restricts the import of such apples in connection with fire blight or the fire blight disease-causing organism, *Erwinia amylovara*, into compliance with its obligations under the SPS Agreement. The United States therefore requests that a panel be established pursuant to Article 21.5 of the DSU.

Japan's new measures retain almost all of the phytosanitary restrictions of the original measure, which was found by the Appellate Body and Panel to be inconsistent with Japan's obligations under the SPS Agreement. The restrictions include:

1. the prohibition of imported apples other than those produced in designated orchards in the US States of Washington and Oregon;

2. the prohibition of imported apples from orchards in which any fire blight is detected;

3. the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected in a "buffer zone" surrounding the orchard;

4. the requirement that export orchards be inspected for the presence of fire blight for purposes of applying the above-mentioned prohibitions;

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5. a post-harvest surface treatment of exported apples with chlorine;

6. production requirements, such as chlorine treatment of the interior of the packing facility;

7. post-harvest separation of apples for export to Japan from those apples for other destinations;

8. a requirement that US plant protection officials certify or declare that the apples are free of quarantine pests, not infected/infested with fire blight, and have been treated with chlorine; and

9. a requirement that Japanese officials confirm that the certification, orchard designation and chlorine treatment have been properly administered and inspect the disinfestation and packing facilities.

The measures through which Japan now maintains its restrictions on imported US apples are:

1. the Plant Protection Law (Law No. 151; enacted 4 May 1950), as amended;

2. the Plant Protection Law Enforcement Regulations (Ministry of Agriculture, Forestry and Fisheries Ordinance No. 73; enacted 30 June 1950), as amended;

3. Ministry of Agriculture, Forestry and Fisheries Notification No. 354 (dated 10 March 1997); and

4. related detailed rules and regulations, including the "Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America" (as amended on 30 June 2004).

Japan's phytosanitary measures on imported US apples appear to be inconsistent with its obligations under the SPS Agreement, the *General Agreement on Tariffs and Trade 1994*, and the *Agreement on Agriculture*. The provisions of these agreements with which Japan's measures appear to be inconsistent include:

1. Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 6.1 and 6.2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*;

2. Article XI of the *General Agreement on Tariffs and Trade 1994*; and

3. Article 4.2 of the *Agreement on Agriculture*.

Accordingly, there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB between the United States and Japan, within the terms of Article 21.5 of the DSU. The United States therefore seeks recourse to Article 21.5 of the DSU in this matter.

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