WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/174
1 September 2004

(04-3627)

Dispute Settlement Body
30 July 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 30 July 2004

Chairperson: Ms Amina Mohamed (Kenya)

Subjects discussed: Page

1. Japan – Measures affecting the importation of apples

(a) Recourse to Article 21.5 of the DSU by the United States: Request for the establishment of a panel (WT/DS245/11)

1. The Chairperson drew attention to the communication from the United States contained in document WT/DS245/11.

2. The representative of the United States said that on 3 June 2002, the DSB had established a panel at the request of the United States to examine Japan's phytosanitary measure concerning imported US apples. Both the Panel and the Appellate Body had found Japan's measure to be inconsistent with its obligations under the SPS Agreement. On 10 December 2003, the DSB had adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body. The DSB's recommendations and rulings included the recommendation that Japan bring its measure on imported US apples into conformity with its obligations under the SPS Agreement. The United States and Japan had been unable to reach an agreement regarding the WTO-consistency of newly revised measures that Japan had implemented on 30 June 2004, in its attempt to comply with the DSB's recommendations and rulings. Almost all of the elements and restrictions of Japan's original, WTO-inconsistent measure were maintained in the revised measures, indicating that Japan had failed to take into account the findings of the Panel, as upheld by the Appellate Body, the testimony of the scientific experts and available scientific evidence in implementing its revised measures. Those findings had confirmed that mature apples did not transmit fire blight. In the view of the United States, Japan remained out of compliance with its obligations under the SPS Agreement. As a result, the United States was requesting that a panel be convened pursuant to Article 21.5 of the DSU to examine Japan's newly revised measures. Pursuant to the sequencing agreement between the United States and

Japan that had been circulated to Members in document WT/DS245/10, the United States and Japan had agreed that the panel would be established at the present meeting.

3. The representative of Japan recalled that on 10 December 2003, the Panel and the Appellate Body Reports concerning Japan's phytosanitary measures on fire blight on US apples had been adopted. The Reports had found that Japan's measures on fire blight were inconsistent with the SPS Agreement. Thus, the DSB had recommended that Japan should bring its measures into conformity with its obligations under the SPS Agreement. Following the adoption of the Reports, on 9 January 2004, Japan had informed the DSB of its intention to implement the DSB's recommendations and rulings in a manner consistent with Japan's obligations under the SPS Agreement. In January 2004, Japan and the United States had held a consultation regarding the reasonable period of time for Japan to implement the DSB's recommendations and rulings. On 30 January 2004, the parties had agreed that such a period of time should be six months and 20 days, expiring on 30 June 2004. Since then, both parties had held three rounds of consultations on Japan's phytosanitary measures on fire blight so as to find a mutually agreed solution. However, the United States had failed to recognize the need for any measure against fire blight, insisting that mature apple fruit could not serve as a pathway for the entry of fire blight. Faced with such insistence by the United States, the parties had been unable to reach agreement on the amendment of measures proposed by Japan.

4. On 30 June 2004, Japan had amended the measures in question and had introduced new measures on its own initiative, so as to implement the DSB's recommendations and rulings within the reasonable period of time. Japan's new measures were as follows: (i) abolishing the 500 meter-width buffer zone and introducing 10 meter-width border zone; (ii) reducing the number of orchard inspections from three times a year to only once in a fruitlet season; and (iii) surface disinfection of fruit. Japan had thus amended its phytosanitary measures in conformity with the findings of the Panel and the Appellate Body thereby implementing the DSB's recommendations and rulings of the DSB in good faith.

5. Japan had notified its amended measures by way of a notification under the SPS Agreement (G/SPS/N/JPN/118), circulated on 29 June 2004. Japan believed that its amended measures were based on sufficient scientific evidence and that they were consistent with the SPS Agreement. Japan was deeply disappointed that the United States did not recognize the measures taken by Japan as fully complying with the DSB's recommendations and rulings. However, Japan recognized that the United States, like all WTO Members, was entitled to requesting the establishment of an Article 21.5 panel under the DSU. Thus, Japan and the United States had agreed to follow the procedures set out in document WT/DS245/10. Accordingly, Japan agreed to the establishment of an Article 21.5 compliance panel at the present meeting.

6. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the United States in document WT/DS245/11. The Panel would have standard terms of reference.

7. The representatives of Australia, the European Communities, New Zealand and Chinese Taipei reserved their third-party rights to participate in the Panel's proceedings.

2. Japan – Measures affecting the importation of apples

(a) Recourse to Article 22.2 of the DSU by the United States (WT/DS245/12)

8. The Chairperson drew attention to the communication from the United States contained in document WT/DS245/12.

9. The representative of the United States said that on 19 July 2004, the United States had requested authorization to suspend concessions or other obligations with respect to Japan under the covered agreements at a level of US$143.4 million on an annual basis. This level of suspension was equivalent to the level of nullification or impairment of benefits accruing to the United States that had resulted from Japan's failure to bring its phytosanitary measure on imported US apples into compliance by 30 June 2004, the end of the reasonable period of time. The amount reflected the significant harm caused to the US economy by Japan's measure. Pursuant to the sequencing agreement between the United States and Japan, on 29 July 2004, Japan had objected to the US proposed level of suspension, thereby referring this matter to arbitration pursuant to Article 22.6 of the DSU. Thus, no further action was required of the DSB. Indeed, Article 22.6 of the DSU did not refer to any decision by the DSB. Nevertheless, the United States had no objection if the DSB wished to take note of that fact and confirm that it may not consider the US request for authorization, which was the item on the agenda of the present meeting, since, as in the past, the parties had already agreed that the matter was being referred to arbitration. At the present meeting, the United States wanted to take the opportunity to confirm to Members that pursuant to the sequencing agreement, once the arbitrator was constituted, the United States and Japan would request the arbitrator to suspend its proceedings until the completion of the Article 21.5 proceedings. The United States continued to hope that Japan will comply promptly with its WTO obligations, so that there was no need for the United States to resort to the withdrawal of concessions or other obligations.

10. The representative of Japan said that his country disagreed with the allegations by the United States that it had failed to implement the DSB's recommendations and rulings in this case. Japan's objection to the authorization of the level of suspension of concessions or other obligations had been conveyed to the DSB by the letter dated 29 July 2004, without prejudice to Japan's position with respect to the WTO-consistency of its implementing measures, which would be examined by the Article 21.5 panel proceeding. Japan believed that the level of suspension proposed by the United States was not equivalent to the level of the nullification or impairment of benefits accruing to the United States. As his delegation had stated, Japan had already amended its measures and the new measures were consistent with the WTO Agreement. Therefore, in accordance with the provisions of Article 22.6 of the DSU, Japan requested that this matter be referred to arbitration. According to the confirmed procedures, as set out in document WT/DS245/10, both Japan and the United States would request the Article 22.6 arbitrator, at the earliest possible moment, to suspend its work until the adoption of the Article 21.5 compliance panel report.

11. The DSB took note of the statements and it was agreed that the matter raised by Japan in document WT/DS245/13 is referred to arbitration, as required by Article 22.6 of the DSU.