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AUSTRALIA – CERTAIN MEASURES AFFECTING THE IMPORTATION OF FRESH FRUIT AND VEGETABLES

Request for the Establishment of a Panel by the Philippines

The following communication, dated 7 July 2003, from the Permanent Mission of the Philippines to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), and Article 6 of the Agreement on Import Licensing Procedures ("Licensing Agreement"), the Government of the Philippines, on 18 October 2002, requested consultations with the Government of Australia regarding certain measures restricting the importation of fresh fruit and vegetables, including fresh banana fruit, fresh papaya fruit and fresh plantain from the Philippines. The request was circulated to Members on 23 October 2002 in document WT/DS270/1. The Philippines and Australia held consultations on 15 November 2002 with a view to reaching a mutually satisfactory solution. However, the consultations have failed to settle the dispute. The Philippines therefore requests that the Dispute Settlement Body ("DSB") establish a panel to examine the matter.

The concerns of the Philippines relate to the Australian regime for the importation of fresh fruits and vegetables. This regime is centred around Section 64 of the Quarantine Proclamation 1998, which sets out that "(t)he importation into Australia of a fresh fruit or vegetable is prohibited unless a Director of Quarantine has granted the person a permit to import it into Australia". Thus, the importation of fresh fruit and vegetables into Australia is mandatorily prohibited, unless a Director of Quarantine grants a permit to import them into Australia.

The Philippines seeks examination by the panel of the *a priori* prohibition on importation of fresh fruit and vegetables into Australia. The Philippines also seeks examination by the panel of the procedures and criteria applied for deciding whether or not to grant a permit for importation of fresh fruit and vegetables. These derive from the Quarantine Proclamation 1998[1], associated quarantine legislation[2], the exercise of discretion granted to a Director of Quarantine to decide whether or not to grant a permit for importation of fresh fruit and vegetables, and the legislative and administrative

[1] Quarantine Proclamation 1998, of 7 July 1998, as amended (in particular, but not limited to, Section 64).

[2] The Quarantine Act 1908, No. 3, of 1 July 1909, as amended (in particular, but not limited to, Section 13).

frameworks providing guidance on the exercise of that discretion.[3] The measures at issue include the application of, as well as any amendments to, the foregoing. Collectively, these are the measures at issue (the "measures").

The products of concern are all fresh fruit and vegetables for which a Director of Quarantine has not yet made a decision whether or not to grant a permit for their importation into Australia, including: (i) fresh fruit and vegetables for which no request for the issuance of a permit to import ("import request") has been made, (ii) fresh fruit and vegetables for which an import request has been made but no assessment of quarantine risk has been commenced[4], and (iii) fresh fruit and vegetables for which an import request has been made and an assessment of quarantine risk has been commenced but not yet completed.[5]

1. The Philippines considers that the measures are inconsistent with Australia's obligations under the GATT 1994, the Licensing Agreement, and the SPS Agreement. In particular, the Philippines is of the view that:

2. The measures constitute prohibitions or restrictions on importation inconsistent with Article XI:1 of the GATT 1994.

3. The measures, as they relate to the application of the permit regime, are inconsistent with Article 3.5(f) of the Licensing Agreement as they result in the failure to process applications for import within the time periods specified in that article. These same measures likewise engender trade-restrictive and distortive effects on imports inconsistent with Article 3.2 of the Licensing Agreement.

4. The measures are not based on an assessment of risks as appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations, and are therefore inconsistent with Article 5.1, as well as paragraph 4 of Annex A, of the SPS Agreement. The measures are also inconsistent with Articles 5.2 and 5.3 of the SPS Agreement, as they are not based on a risk assessment taking into account the various factors listed therein.

5. The measures are not based on scientific principles, nor maintained with sufficient scientific evidence, in violation of Article 2.2 of the SPS Agreement.

6. The measures are more trade-restrictive than required to achieve Australia's appropriate level of protection and therefore in breach of Article 5.6 of the SPS Agreement.

7. The measures are not adapted to the phytosanitary characteristics of the areas from which the fresh fruit and vegetables originate or to which they are destined. In this context, Australia has not taken into account, in an assessment of the phytosanitary

[3] The legislative framework includes Section 64(2) and Section 70 of the Quarantine Proclamation 1998, as well as Section 5D of the Quarantine Act 1908. The administrative framework includes that in the *AFFA Draft Administrative Framework for Import Risk Analysis Handbook* (Canberra, 2001), the *AQIS Import Risk Analysis Process Handbook* (Canberra 1998), and the *AFFA Draft Guidelines to Import Risk Analysis* (Canberra, 2001).

[4] Including, but not limited to, Fresh Papaya Fruit from the Philippines (import request made pre-1994); and Fresh Plantain from the Philippines (import request made in 1995).

[5] Including, but not limited to, Fresh Banana Fruit from the Philippines (import request made in 1995, import risk analysis initiated in June 2000, however a decision has yet to be made on whether or not to grant a permit for importation).

characteristics of a region, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines developed by relevant international organizations. Furthermore, Australia does not recognize the concepts of pest- or disease- free areas and areas of low pest or disease prevalence. These are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement.

7. The measures are not based on international standards, guidelines or recommendations and are therefore inconsistent with Article 3.1 of the SPS Agreement.

8. The measures arbitrarily or unjustifiably discriminate between Members where similar conditions prevail, and are applied in a manner which constitutes a disguised restriction on international trade, hence they are inconsistent with Article 2.3 of the SPS Agreement. Furthermore, Australia maintains arbitrary and unjustifiable distinctions in the levels of phytosanitary protection that it considers appropriate in violation of Article 5.5 of the SPS Agreement.

9. Finally, were Australia to invoke Article 5.7 of the SPS Agreement in justification of its measures, they are not supported by the requirements necessary to allow for their provisional adoption and/or maintenance under that article. This includes the measures applied to fresh banana fruit, fresh papaya fruit, and fresh plantain from the Philippines.

In view of the above, the Philippines respectfully requests the DSB to establish a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 6 of the Licensing Agreement, and Article 11 of the SPS Agreement to examine this matter. The Philippines further asks that this request for a panel be placed on the agenda of the next meeting of the DSB scheduled on 21 July 2003.