Japan – Measures Affecting the Importation of Apples **(WT/DS245)**

Recourse by the United States to Article 21.5 of the DSU

Preliminary Ruling Request of the United States of America

September 27, 2004

I. Introduction

1. In its first written submission, Japan declares that its measures taken to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") include the "Operational Criteria" to its Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America ("Detailed Rules"), "which were to be discussed and agreed with the United States."[1] However, the Operational Criteria are not within the Panel's terms of reference for several reasons. First, they are not a measure – they are at most a proposed measure not yet in effect; "Japan intends to adopt" them.[2] Moreover, since the Criteria are not currently in effect, they were not "taken" by the time of the establishment of the Panel and so could not be within the Panel's terms of reference.

2. Accordingly, the United States respectfully requests that the Panel make a preliminary ruling that the Operational Criteria are not a measure taken to comply and are therefore not within the terms of reference of this Article 21.5 proceeding, and that the Panel will consequently not consider the Operational Criteria in determining whether Japan's measures taken to comply with the DSB's recommendations and rulings are consistent with Japan's WTO obligations. Further, the United States respectfully requests that the Panel issue its determination prior to the meeting with the parties to be held on October 28-29, 2004.

II. The Operational Criteria Are Not a Measure Taken to Comply and Are Therefore Not Within the Terms of Reference of the Panel in This DSU Article 21.5 Proceeding

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[1] First Written Submission of Japan ("Japan First Submission"), para. 1.

[2] Japan First Submission, para. 10.

3. The DSU provides a means to resolve disputes arising from "*measures taken* by another Member."[3] More particularly, Article 21.5 proceedings are to address "disagreement[s] as to the existence or consistency of *measures taken* to comply with the recommendations and rulings [of the DSB]."[4] No GATT or WTO panel, or the Appellate Body, has ever issued findings on a proposed measure, nor, under the DSU, is there any authority for a panel to make such "advisory rulings". As the panel in *United States - Lumber Preliminary Determinations* stated with respect to a request to make findings on an event which had yet to occur, "The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application."[5]

4. Indeed, the principle of compliance embodied in Article 21.5 would be rendered meaningless if it were found to be satisfied by the mere introduction of draft legislation or draft regulations. Beyond the practical challenges of determining which of the often competing draft versions of measures is the appropriate measure for Article 21.5 review, to base the resolution of a dispute on an aspiration that a proposed measure will one day be taken, and in anything like its current form, would serve only to frustrate the aim of securing a positive solution to a dispute found in DSU Article 3.7. Ultimately, a mere "promise" to comply in the future is no defense to the claim that a Member has failed to comply with its WTO commitments. Nor would it be consistent with the obligation to comply within a reasonable period of time ("RPT") established

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[3] *See* DSU Art. 3.3.

[4] DSU Art. 21.5 (emphasis added). Likewise, in connection with initial panel proceedings, DSU Article 4.2 provides for consultations on "measures . . . taken."

[5] Panel Report, *United States - Preliminary Determinations With Respect to Certain Softwood Lumber From Canada,* adopted on 1 November 2002, WT/DS236/R, para. 7.157.

under Article 21.3. If it is not taken by the end of the RPT, then the Member has failed to comply within the RPT.

5. Indeed, Japan itself confirmed the United States' understanding that the measures taken to comply with the DSB's recommendations and rulings included the amended Detailed Rules – but not the Operational Criteria – when it described the new measure as follows on July 29, 2004:

> On 30 June 2004, Japan amended and implemented its *Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America* to comply with the Dispute Settlement Body (DSB) recommendations and rulings in the dispute *Japan - Measures Affecting the Importation of Apples*, adopted by the DSB on 10 December 2003.[6]

6. The Criteria were not among the "measures taken to comply with the recommendations and rulings" which Japan notified to the WTO,[7] nor did Japan refer to them in its July 29 request for arbitration under Article 22.6 of the DSU[8] nor in its July 30 DSB statement.[9]

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[6] Request by Japan for Arbitration under Article 22.6 of the DSU, dated 29 July, 2004 (WT/DS245/13). We understood that Japan considered that it had complied with its WTO obligations as of June 30, 2004, through the revised measures implemented on that date (none of which reference the Operational Criteria). Were it otherwise, there would be no disagreement that Japan had failed to implement the DSB's recommendations and rulings by the conclusion of the reasonable period of time, this DSU Article 21.5 proceeding would be unnecessary, and the only necessary proceedings would be those under DSU Article 22.6 to confirm that the level of suspension the United States proposed is equivalent to the level of nullification or impairment. Moreover, as of July 30, 2004, the date this Panel's terms of reference was set, no additional measures were implemented or even suggested. Therefore, the Panel may only consider whether those measures implemented as of July 30 comply with the DSB's recommendations and rulings. Any consideration of whether measures implemented subsequent to July 30 comply with the recommendations and rulings is thus not within the terms of reference of this Panel.

[7] Japan's notification to the SPS Committee refers solely to its Plant Protection Law and the Detailed Rules. It makes no mention of the Operational Criteria. *See* G/SPS/N/JPN/118 (29 June 2004).

[8] *See* Request by Japan for Arbitration under Article 22.6 of the DSU, dated July 29, 2004 (WT/DS245/13), in which Japan states that "On 30 June 2004, Japan amended and implemented its *Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America* to comply with the Dispute Settlement Body (DSB) recommendations and rulings in the dispute *Japan - Measures Affecting the Importation of Apples*, adopted by the DSB on 10 December 2003." Again, this July 29 correspondence makes no reference to any additional revised portion(s) of Japan's import regime for U.S. apples.

[9] DSB Statement by Japan, dated 30 July 2004 (Exhibit USA-17).

Notwithstanding that Japan apparently intended to discuss and agree to the Criteria with the United States, it did not do so, and the United States first learned of the Criteria when it received Japan's first submission.[10]

7. Further, as noted above, Japan presently only "intends to adopt"[11] the Operational Criteria. They are not yet in effect, nor could they have been in effect at the time the Panel was established on July 30, and despite Japan's expression of its intentions, at this time the future implementation of the Operational Criteria is only "possible." Under the circumstances, the Operational Criteria are not a measure subject to dispute settlement, let alone a measure taken to comply with the recommendations and rulings of the DSB. On this basis alone, the Panel should find that they are not within the terms of reference of this dispute.

III. Conclusion

8. Having taken measures to comply with the recommendations and rulings of the DSB by the conclusion of the reasonable period of time, June 30, Japan now appears to want to have its implementation evaluated based on an additional "measure" presented and elaborated upon for the first time following the U.S. first submission, but still not yet in effect, apparently with the option of being able to further adjust this "measure" as this proceeding unfolds.[12] However, the purpose of this proceeding is not to consider whether potential future measures might comply

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[10] To the extent footnote 20 of Japan's first submission is read to suggest that these procedures were agreed upon as part of Japan's revised measure, it is incorrect.

[11] Japan First Submission, para. 10.

[12] Japan emphasizes that the Operational Criteria are themselves a moving target when it states, "It is Japan's intent to further modify the criteria depending on further evidence and the results of the present Panel . . . ." Japan First Submission, para. 11.

with Japan's WTO obligations; it is to determine whether the measures Japan has already taken to comply - as set forth in the U.S. panel request, are consistent with the provisions of the WTO Agreement cited in that request.

9. As the United States will discuss in its rebuttal submission, the Operational Criteria, even if they were in place and a "measure," would not render Japan's measures consistent with the WTO agreements. Accordingly, the purpose of this request for a preliminary ruling is not to omit a measure that is relevant for the determination of compliance. Rather, the purpose of this preliminary ruling request is to conserve the time and resources of the Panel and the United States so that we may all focus on what are "measures" taken to comply. In an expedited Article 21.5 proceeding, neither the parties nor the Panel should divert time and resources to the consideration of extraneous matters. Further, this preliminary ruling request seeks to address the systemic issue raised by Japan's Operational Criteria, namely that proposed measures that are not in effect are not a proper subject for dispute settlement.

10. For the foregoing reasons, the United States requests that the Panel find that the Operational Criteria are not a measure subject to dispute settlement, and are not within the terms of reference of the Panel in this Article 21.5 proceeding.