

Japan – Measures Affecting the Importation of Apples

(WT/DS245)

Closing Statement by the United States

at the First Substantive Meeting of the Panel

October 22, 2002

1. Mr. Chairman and members of the Panel, by this point you are well aware of the United States' view of this dispute. There is no scientific evidence that mature apple fruit transmit the fire blight disease. The scientific literature is emphatic on this point, and the billions and billions of apple fruit traded worldwide makes this an especially compelling finding. When there is no scientific evidence that mature apples have been implicated in transmission of the disease, there cannot be "sufficient evidence" or a "rational or objective" relationship between the measure and the scientific evidence.

2. Japan's question of when did the evidence become insufficient is predicated on their having been sufficient evidence at some point – as if the evidence were in doubt and had suddenly tipped over to insufficiency. But the evidence has always been the same: there has never been any scientific evidence that mature apple fruit transmit the disease.

3. We have suggested that scientific evidence that apple fruit transmit fire blight could consist of evidence that fruit have transmitted the disease and evidence that fruit are a pathway for transmission. On the first point, Japan does not appear to contest that there is no evidence that apple fruit have ever transmitted the disease. On the second point, we note that our question to Japan at yesterday's session was an opportunity for Japan to cite the scientific evidence on which it relies to establish that each step of the hypothetical pathway would be completed. These steps have been identified by the IPPC as necessary to establish the probability of entry of a pest or disease.

4. Japan's answer was very revealing. Japan cited to some evidence that, in rare and extreme circumstances, bacteria could be associated (but only externally) with mature apple fruit. Thus, Japan presented information on step 2 of the IPPC analysis of entry but did not identify scientific evidence relating to the probability of each of the other steps in the hypothetical pathway.

5. Mr. Chairman and members of the Panel, this is not enough. Japan cannot simply "envisage" a likelihood that steps 3, 4, and 5 of the IPPC analysis of entry would be completed – that is, that bacteria would survive commercial handling, storage, and transport; that bacteria would survive consumption and/or discard; and that bacteria would be vectored to a susceptible

plant host, at a receptive stage, with infection occurring. Japan *must* have scientific evidence rather than mere speculation. Because Japan does *not* have scientific evidence that each step in the pathway would be completed, there is no scientific evidence that imports of mature apple fruit present a genuine, as opposed to hypothetical, risk of transmission of fire blight. Thus, there is not sufficient scientific evidence for Japan to maintain its fire blight measure under Article 2.2 of the SPS Agreement.

6. We also note that in response to the United States' question regarding the scientific evidence relating to each step in the hypothetical pathway, Japan could have simply relied on and cited to the scientific evidence in its 1999 Pest Risk Analysis. Japan did not do so because the 1999 document does not *contain* an analysis of the probability of each step in the hypothetical pathway being completed. Thus, Japan's response to our question also confirms that Japan has not evaluated the likelihood – i.e., the probability – of entry, establishment, or spread of fire blight on mature apple fruit. By failing to make a proper assessment of risks and to base its fire blight measures on such an assessment, Japan has acted inconsistently with Articles 5.1 and 2.2 of the SPS Agreement.

7. Finally, we wish to return briefly to the issue of the Declaration by Dr. van der Zwet and the letter by Professor Thomson. Mr. Chairman, at yesterday's session, we had some difficulty understanding Japan's question because we were not sure of Japan's intent; that is, this could have been an innocuous question by Japan on process or could have been a suggestion by Japan that the United States had somehow acted in bad faith. We hope not the latter. If Japan was merely interested in the issue of the procedure by which these documents were produced, we are happy to clarify the sequence of events. In the case of Dr. van der Zwet, specific questions were put to Dr. van der Zwet through telephone calls and e-mail. The United States recorded Dr. van der Zwet's oral answers in writing and returned them to Dr. van der Zwet, asking for his review as well as whether he would be willing to make public his clarifications to the 1990 paper. Dr. van der Zwet agreed that his answers could be made public; he reviewed the answers, made changes to clarify his answers further, signed the document, and mailed it to the U.S. Government. In the case of Professor Thomson, specific questions were put to him via e-mail. Dr. Thomson replied via email, and again the United States asked whether he would be willing to make public his clarifications to the 1990 paper. Professor Thomson agreed and his e-mail answers were put in letter form. Professor Thomson reviewed the letter, also made changes to clarify his answers further, signed the document, and faxed it to the U.S. Government. So, as indicated yesterday, in each case the document was signed by the respective author as expressing his view in his own words. Further, we note that Japan could have, at any time, asked for the same clarification from the authors; instead, it chose to *rely* on the ambiguous presentation in the 1990 paper.

8. But, Mr. Chairman and members of the Panel, what is the more important issue to this case is whether the *content* of these letters is accurate and true. We believe that these documents contain accurate data; we therefore more than welcome the suggestion by the Panel that it contact the authors to confirm the accuracy of the information each has presented. Or, Japan could agree

to Professor Thomson serving as a scientific expert to the Panel in order to pose direct and specific questions to him regarding the substance of his letter *and* the 1990 paper *and* any subsequent characterizations of that paper by him – all issues which appear to be of relevance to Japan.

9. In the end, we regret that this issue seems to be another tactic by Japan to distract attention from the key issue in this dispute: the absence of any evidence that mature apple fruit transmits the disease. Consider that *even if* the 1990 van der Zwet *et al.* paper had produced results exactly as Japan claims – which we know the paper did not – Japan would still not have *scientific evidence* that mature apple fruit have ever transmitted fire blight, Japan would still not have *scientific evidence* that each step in the hypothetical pathway would be completed, and Japan would still not have assessed the *likelihood* that each step in the hypothetical pathway would be completed. As a result, Japan’s fire blight measures are inconsistent with Japan’s obligations under the SPS Agreement. We look forward to responding to your written questions and to meeting with you in just over one month’s time.