

*Japan – Measures Affecting the Importation of Apples*

(WT/DS245)

Closing Statement of the United States

at the Second Meeting of the Panel

January 16, 2003

1. Mr. Chairman, members of the Panel, thank you for the opportunity to make these closing remarks. I'd like to use this statement to draw your attention to the hypothetical pathway described by Japan in its opening statement this morning and then contrast it to the pathway Japan put forward to the experts at the experts' session on Tuesday.

2. I was surprised to hear this morning in Japan's opening statement – and I'll quote – “[s]ince there has not been an opportunity to discuss the entire pathway with scientific evidence, I would like to take this opportunity to show how a pathway will be closed in light of scientific evidence and the input from the experts.” Japan, in fact, chose *not* to put its hypothetical pathway to the test before the scientific experts. As you will recall, Japan Exhibit-34 is the hypothetical pathway Japan put forward when the Panel asked parties to describe the pathway of events that would be necessary for fresh apples from the United States to result in establishment of fire blight in Japan. Japan had the opportunity in the experts' session to confirm the scientific evidence with respect to each step identified in its hypothetical pathway and to confirm the likelihood of completing each step.

3. One has to wonder why Japan has chosen not to discuss its hypothetical pathway with the experts. Japan did not do so, we speculate, because Japan was aware that there is *no* scientific evidence establishing that each step – and therefore the pathway – would be completed.

4. Fortunately, we did largely walk the experts through Japan’s hypothetical pathway. The experts confirmed that (1) there is a very low probability of epiphytic contamination of calyx; (2) there is a very low probability of epiphytic bacterial survival in the calyx through the step of commercial handling, storage, and transport; (3) there is *no* scientific evidence that epiphytic calyx infestation would result in infection of fruit; (4) there is *no* scientific evidence of “mature, apparently healthy but infected fruit,” because infected fruit have symptoms; therefore, (5) “infected” fruit would *not* be placed in fields; and, as a result, (6) there is no production or “dissemination of bacterial ooze.” As a result, the experts’ session confirmed that there is *no* scientific evidence to support the hypothetical pathway identified in Japan Exhibit-34. That is, the pathway is “hypothetical” because one must imagine that an event that has *never* been shown to occur and for which there is *no* scientific evidence will somehow occur. This is nothing more than relying on the theoretical uncertainty that always exists because science can never provide absolute certainty that an event will not occur. As the Appellate Body noted in *EC – Hormones*, theoretical uncertainty is not the sort of risk that is to be assessed under the SPS Agreement and that an SPS measure is to address.

5. Japan did not focus the experts’ attention on this hypothetical pathway. Instead, Japan asked the experts to *assume* that an infected fruit would be imported. The experts hesitated: they

noted that harvested fruit are mature – and therefore *not* infected – and would not pass through normal commercial processes of picking, sorting, storage, inspection, and export. Japan, however, insisted that the experts *assume* that an error would occur and that somehow an infected immature fruit would arrive in Japan. Dr. Geider then stated, “There’s always a low risk of something happening” – which I would note again is merely the theoretical uncertainty that always remains – and Dr. Hale reiterated, “Infected fruit are immature and therefore not harvested and exported.” Nonetheless, when Japan asked the experts in its first follow-up question (following the conclusion of the U.S. follow-up questions) what was the risk of fire blight introduction through infected fruit, all four experts said, “Negligible.” That is, as Dr. Geider explained, *even if* an infected, immature fruit somehow arrived in Japan, given all the events that have to occur for introduction of fire blight, the probability of introduction as a result of that hypothetical infected, immature fruit would be negligible.

6. Thus, what we learned at the experts’ session is that Japan is arguing that a negligible risk of introduction of fire blight via an *infected, immature* apple fruit – which the experts have stated would *not* be exported – justifies maintaining fire blight measures on *mature* (and therefore *not* infected) apple fruit. Mr. Chairman, members of the Panel, this is contrary to the IPPC Pest Risk Guidelines, which indicate that risk is to be assessed as to the exported commodity, and contrary to the SPS Agreement. Put differently, Japan’s justification for maintaining its current fire blight measures is *not* the risk posed by the exported commodity – mature apple fruit – but the risk posed by something *other than* that commodity.

7. Consider the scientific evidence: the experts confirmed that a harvested fruit will be horticulturally mature, and the experts confirmed that mature apples are not infected. U.S. law requires exported apples to be mature, and Japan concedes that exported U.S. apples are mature (and apparently healthy) (*see* Japan's Answer to Question 2 from the Panel following the first substantive meeting). Therefore, the scientific evidence indicates that exported U.S. apples are *not* infected and do not pose a risk of introducing fire blight to Japan, even according to Japan's own pathway.

8. Consider also that in our Article 5.6 claim, we have stated that Japan may restrict importation to mature fruit. This alternative measure is reasonably available, achieves Japan's level of protection (to prevent introduction of fire blight), and is less trade-restrictive than Japan's fire blight measures. Therefore, if Japan enforces its own measures, imported fruit will not be immature and will not be infected. Again, imported U.S. apple fruit will pose no risk of introduction of fire blight to Japan.

9. I feel that I have to comment on one further issue raised in one of Japan's oral answers to the Panel this afternoon. With respect to Japan's suggestion that the "mature, symptomless" criteria were not considered by Japan in its 1999 PRA because these criteria were not identified until the dispute settlement consultations in 2002, we note that these criteria have been identified in the scientific literature *since 1924*. (I'm referring to an experiment conducted by H.R. McLarty, a Canadian scientist who wrote that Australia was blocking imports of Canadian fruit on the theory that bacteria in the calyx of a harvested mature fruit might be able to introduce fire

blight into Australia. McLarty tried to determine whether he could recover epiphytic bacteria from the calyx of what he described as “mature” and “apparently healthy” fruit – he could not.)

10. These criteria were repeated in the literature in 1974, 1989, etc., which Japan knows well since Japan itself identified this literature and the “mature, symptomless” criteria in its 1999 PRA (section 1-1). However, as we have indicated to the Panel in our first written submission, Japan identified the criteria but *did not evaluate* whether such fruit posed a risk of fire blight introduction because, as we have amply demonstrated, mature apple fruit do not pose such a risk.

11. In sum, for the reasons set out in our various submissions to the Panel, and as I suggested this morning, the scientific evidence is clear and the results under the SPS Agreement are clear: the scientific evidence does not support *any* phytosanitary measure but a requirement that the exported commodity be what it is: a mature apple fruit.