

*Japan – Measures Affecting the Importation of Apples*

(WT/DS245)

**Reply of the United States of America  
to the Request by Japan for Preliminary Rulings**

October 16, 2002

## I. INTRODUCTION

1. In its first written submission, Japan requested the Panel to make preliminary rulings under paragraph 10 of the Panel’s working procedures on two issues: first, “to remove . . . two communications” referred to in the U.S. first submission “from this dispute settlement procedure”;<sup>1</sup> and second, to remove all provisions of the WTO agreements that are not addressed in the U.S. first submission “from the scope of the proceedings of the present Panel.”<sup>2</sup> By fax dated October 9, 2002, the Panel invited the United States to give its response to the Japanese request by October 16, 2002. For the reasons set forth below, there is no basis for either request. Accordingly, the United States respectfully requests that the Panel reject Japan’s requests for preliminary rulings.

## II. JAPAN’S OBJECTION TO CERTAIN EVIDENCE IS UNFOUNDED

2. Japan objects to two pieces of written evidence in the U.S. first written submission, specifically, a Declaration by Dr. Tom van der Zwet,<sup>3</sup> formerly of the Appalachian Fruit Research Station in West Virginia, U.S.A., and a letter by Professor Sherman Thomson<sup>4</sup> of Utah State University in Utah, U.S.A. These two individuals were authors on a 1990 paper entitled “Population of *Erwinia amylovora* on External and Internal Apple Fruit Tissues,” published in the journal *Plant Disease*.<sup>5</sup> These communications, in response to questions to the authors posed by the United States, clarify certain data that were either unclearly presented or not presented in the original paper – for example, whether fruit harvested in certain experiments were immature or mature. As explained in more detail in the U.S. first written submission, these communications clarify that in one key experiment (1) no endophytic (internal) bacteria were recovered from any harvested fruit that were mature (in West Virginia) or possibly mature (in Utah)<sup>6</sup> and (2) epiphytic (external) bacteria were recovered from only one fruit from Utah that “may have been nearly mature” and from no mature fruit in West Virginia.<sup>7</sup> Japan raises two objections to this evidence, which the United States addresses in sequence.

3. First, Japan states that the United States should have presented the information to Japan at the consultations held on April 18, 2002, under Article 4 of the *Understanding on Rules and*

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<sup>1</sup> First Written Submission of Japan, paras. 29-32.

<sup>2</sup> First Written Submission of Japan, paras. 33-34.

<sup>3</sup> U.S. First Written Submission, Exhibit USA-18.

<sup>4</sup> U.S. First Written Submission, Exhibit USA-19.

<sup>5</sup> See U.S. First Written Submission, Exhibit USA-17 (T. van der Zwet et al., *Population of Erwinia amylovora on External and Internal Apple Fruit Tissues*, *Plant Disease* 74: 711-16 (1990)).

<sup>6</sup> See U.S. First Written Submission, para. 33 & fn. 68.

<sup>7</sup> See U.S. First Written Submission, para. 35 & fn. 80.

*Procedures Governing the Settlement of Disputes* (“DSU”) and that, “[s]hould the Panel determine that the [sic] Japan’s measure would *not* be consistent with the SPS Agreement based *wholly* or *in part* on these communications, Japan would be denied of an opportunity to settle the matter in good faith through bilateral consultations.”<sup>8</sup>

4. As a factual matter, the dates of the communications in question make clear that the United States did not have this information during the consultation period and therefore could not have shared it. The declaration of Dr. van der Zwet is dated July 16, 2002, and the letter of Professor Thomson is dated August 23, 2002. The United States requested consultations on March 1, 2002. The 60-day consultations period ended on April 30, 2002, and the United States requested the establishment of a panel on May 7, 2002. This Panel was established on June 3, 2002, and composed on July 16, 2002. Therefore, there is no basis for Japan to assert that “the United States failed to share the information with Japan throughout this [consultations] period”<sup>9</sup> since these communications were not available to the United States during that period.

5. Further, there is no legal basis for Japan’s objection. The United States appreciates Japan’s desire to give full effect to Article 4.3 of the DSU, under which “the Member to which the request [for consultations] is made shall . . . enter into consultations in good faith.” However, Japan would not “be denied of an opportunity to settle the matter in good faith through bilateral consultations” should the Panel utilize these communications in its findings. Japan is now aware of the content of these communications and apparently grasps their relevance to the 1990 van der Zwet *et al.* paper; therefore, Japan would be denied an opportunity “to settle the matter in good faith” only if Japan *itself* chooses not to settle the matter. The United States notes that a “solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred” to action under the dispute settlement procedures,<sup>10</sup> and that these procedures envision the development of mutually satisfactory solutions to disputes.<sup>11</sup> As indicated at the April WTO dispute settlement consultations, the United States remains willing to settle this dispute on the basis of the scientific evidence at any time.

6. Second, Japan argues that, “in principle, due process requires that an expert’s opinion be subjected to cross-examination.” Japan states that “it has been an implicit assumption [of dispute settlement proceedings] that parties should not introduce evidence in an unfair manner,” and “[f]airness in this matter requires that the findings of an already published paper should be

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<sup>8</sup> First Written Submission of Japan, para. 30.

<sup>9</sup> First Written Submission of Japan, para. 30.

<sup>10</sup> DSU, Article 3.7.

<sup>11</sup> *See, e.g.*, DSU, Article 11 (“Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”).

revised or qualified *only* by another published paper.” Japan then proceeds to question the objectivity and evidentiary value of the two communications in question.<sup>12</sup>

7. Again, there is no legal basis for Japan’s objection. Japan has simply invented the “principle,” “assumption,” and rule for “fairness” on which it claims to rely. Japan cannot cite to *any* provision of the DSU or the Panel’s working procedures, or to *any* dispute settlement panel or Appellate Body report, to support its arguments that the Panel’s consideration of these communications would run counter to “due process” or “fairness.” Japan simply does not want the Panel to know that the experiments conducted by Dr. van der Zwet and Professor Thomson, as reported in the 1990 paper, provide *no* support for Japan’s contention that mature fruit can serve to transmit the fire blight disease as the experiments were primarily conducted on *immature* fruit and therefore are not relevant to the exported commodity. It is Japan that would frustrate due process by keeping relevant evidence from the Panel.

8. The Panel’s working procedures require the Parties to “submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions,”<sup>13</sup> and the United States has complied. The working procedures and the DSU also provide Japan ample opportunity to comment on the communications,<sup>14</sup> an opportunity of which Japan has already commenced to avail itself;<sup>15</sup> Japan may also comment through its rebuttal submission and in two meetings with the Panel. Furthermore, the Panel *itself* is charged under DSU Article 11 with making an “objective assessment of the matter.” Thus, the Panel will weigh the evidentiary value of these communications in light of the original 1990 paper, comments by Japan, and the expert advice provided by any scientific experts consulted by the Panel. In short, while Japan obviously does not want the Panel informed that findings of the 1990 van der Zwet *et al.* paper on which it relies relate to immature fruit and therefore are irrelevant in this dispute, Japan is not entitled to fabricate baseless procedural grounds to exclude the evidence from the Panel’s consideration.

9. The United States also notes that this purported evidentiary rule mandated by “due process” and “fairness” is not practiced by Japan itself. Japan’s suggested rule is that an expert’s opinion always be subjected to cross-examination and, therefore, that the findings of a published paper should only be revised or qualified by another published paper.<sup>16</sup> Japan also asserts that “there is no assurance of objectivity [in] these *unpublished, private* communications.” However,

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<sup>12</sup> First Written Submission of Japan, para. 31.

<sup>13</sup> Panel Working Procedures, para. 11 (August 5, 2002).

<sup>14</sup> *See, e.g.*, Panel Working Procedures, paras. 4, 5, 7, 9; DSU Article 12.1, Appendix 3.

<sup>15</sup> First Written Submission of Japan, paras. 29-32, 54-59, 68.

<sup>16</sup> Of course, published scientific papers are not inherently subject to “cross-examination” but only to peer-review. Thus, under Japan’s rule for expert opinion, the use of published papers in dispute settlement would therefore appear to be a violation of “due process” or “fairness.”

Japan does not object to its *own* presentation of unpublished evidence, which has not been subjected to any cross-examination,<sup>17</sup> *even* when that evidence explicitly relates to “an already published paper.”<sup>18</sup> It is difficult, moreover, to see how the Panel would be assisted in discharging its function under DSU Article 11 to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case” by *striking* from consideration unpublished evidence that relates to previously published evidence while *considering* unpublished evidence that does not relate to “the findings of an already published paper.” The United States does *not* object to Japan’s introduction of previously unpublished evidence in its first written submission; rather, we are examining this evidence and look forward to the opportunity to comment on its interpretation and validity in further proceedings before the Panel.

10. Finally, the United States notes Japan’s statement that “the United States should have, and could have, obtained and disclosed these pieces of evidence to Japan earlier.”<sup>19</sup> The United States can appreciate that these clarifications by the two lead authors of a piece of evidence upon which Japan appears to rely heavily would cause some discomfit. However, as noted above, the United States did not *have* this evidence until these proceedings were underway. The authors have demonstrated their willingness to respond to requests for clarifications of their 1990 paper. Japan appears to have been relying on an inaccurate reading of the original paper as a basis for its fire blight measures. Accordingly, it is *Japan* that “should have, and could have, obtained” clarification of the 1990 paper long ago because under Article 2.2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”), it is Japan that is charged in the first instance with examining the scientific evidence. Under Article 2.2, Japan must not maintain its fire blight measures “without sufficient scientific evidence.”

### III. THE PANEL SHOULD REJECT JAPAN’S REQUEST TO STRIKE CERTAIN CLAIMS

11. In Japan’s second preliminary ruling request, Japan asks the Panel “to remove all those provisions that the United States has not addressed in its Submission, namely, Article XI of GATT of 1994, Article 4.2 of the Agreement on Agriculture, and Articles 2.3, 5.3, 5.5, 6.1 or 6.2 of the SPS Agreement, from the scope of the proceedings of the present Panel.” Japan argues that no bilateral consultations took place in respect of Article 4.2 of the *Agreement on Agriculture* and Article 5.5 of the SPS Agreement; thus, “[s]ince the United States made no

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<sup>17</sup> See, e.g., First Written Submission of Japan, para. 124 (quoting “communication” of Dr. J.P. Paulin to Biosecurity Australia as reported in Australia’s “Draft Import Risk Analysis on the Importation of Apples (*Malus x domestica* Borkh) from New Zealand”; Exhibit JPN-10 (para. 25: reference for economic losses of fire blight outbreak in Melbourne, Australia, based on unpublished, anonymous “personal communication”); Exhibit JPN-33 (unpublished, anonymous document entitled “Occurrence Level of Fire Blight in 2000 When the Japan-U.S. Joint Experiment was Carried Out”).

<sup>18</sup> See, e.g., First Written Submission of Japan, Exhibit JPN-16 (unpublished, anonymous paper entitled “Verification of Roberts *et al.* (1998) for probability of introduction and establishment of *Erwinia amylovora*”).

<sup>19</sup> First Written Submission of Japan, para. 30.

attempt even to discuss these two provisions with Japan, the United States does not make any claim under these provisions in the U.S. Submission.” Japan also argues that the United States does not “make any claim under Articles 2.3, 5.3, 6.1 or 6.2 [of the SPS Agreement] in its Submission.” Neither of these arguments are grounds to find these claims to be outside the terms of reference of this dispute, and there is no basis for the Panel to remove claims that are within the Panel’s terms of reference as established by the Dispute Settlement Body (DSB). Thus, the Panel should reject Japan’s request.

12. To the extent Japan is arguing that the United States has made no claim as to Articles 4.2 and 5.5 because the United States has not consulted on these articles with Japan, there is no requirement in the DSU to consult on a particular claim in order to include that claim in a panel request and to have such a claim form part of the panel’s terms of reference. The purpose of consultations is to provide a better understanding of the facts and circumstances of a dispute; logically, then, a party may identify new claims in the course of consultations.<sup>20</sup> This Panel was established by the DSB with standard terms of reference pursuant to DSU Article 7.1; thus, the Panel’s terms of reference are “[t]o examine, in light of the relevant provisions of the covered agreements cited by the United States in document WT/DS245/2, the matter referred to the DSB by the United States in that document.”<sup>21</sup> Because both Article 4.2 of the *Agreement on Agriculture* and Article 5.5 of the SPS Agreement are named in the U.S. panel request,<sup>22</sup> both are within the Panel’s terms of reference.<sup>23</sup>

13. As to Japan’s second argument that the United States has not made a claim with respect to several provisions in its panel request because it has not advanced arguments in its first written submission (Japan makes a similar point with respect to Articles 4.2 and 5.5), Japan’s argument is premature. As the Appellate Body has noted, “[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party’s first written submission to the panel.”<sup>24</sup> In its recent *Chile – Price*

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<sup>20</sup> This interpretation is buttressed by the different requirements for consultation and panel requests. Under DSU Article 4.4, a consultation request “shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.” Under DSU Article 6.2, a panel request “shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”

<sup>21</sup> WT/DS245/3.

<sup>22</sup> WT/DS245/2.

<sup>23</sup> See, e.g., *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, para. 8.4(i) (in response to Japan’s request for a preliminary ruling, the panel found that a U.S. claim under Article 7 of the SPS Agreement was within the panel’s terms of reference because it was cited in the U.S. panel request, even though it had not been cited in the U.S. consultation request).

<sup>24</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 145 (25 September 1997); see *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, para. 158 (published 23 September 2002) (“*Chile – Price Bands*”).

*Bands* report, the Appellate Body reaffirmed that the question whether a complaining party has articulated a claim under a provision within the panel’s terms of reference cannot be determined from the first written submission alone. Rather, the Appellate Body found that one must examine the complaining party’s answers to panel questions and its rebuttal submission in order to determine whether the complaining party articulated a claim.<sup>25</sup> Therefore, the Panel should not determine at this juncture whether the United States has made a claim under each of the provisions named by Japan.

14. In short, these provisions are within the Panel’s terms of reference, which were established by the DSB. The Panel is not able to alter its terms of reference, and there is no basis for Japan’s request to “remove” them from the “scope of the proceedings.”

#### IV. CONCLUSION

15. The United States cannot help but note that, while it is accustomed to seeing multiple attempts to manufacture procedural obstacles in domestic court litigation, it is surprised to see Japan engaging in these types of procedural maneuvers in WTO proceedings. As explained in detail above, in its first preliminary ruling request Japan appears to be inventing a rule of evidence that has no basis in the DSU or the Panel’s working procedures, has never been recognized in any WTO proceeding, would preclude the Panel from considering relevant evidence, and is not practiced by Japan itself. With respect to Japan’s second preliminary ruling request, none of the arguments advanced by Japan provides a basis to remove claims that are properly within the Panel’s terms of reference.

16. For the foregoing reasons, the United States respectfully requests that the Panel reject Japan’s requests for preliminary rulings.

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<sup>25</sup> *Chile – Price Bands*, WT/DS207/AB/R, paras. 154-57, 159-62.