

Japan – Measures Affecting the Importation of Apples

(WT/DS245)

**Executive Summary of the Oral Statements of the United States of America
at the Second Panel Meeting**

January 23, 2003

1. The experts' answers to the Panel's questions and the session with the experts on Monday and Tuesday were very useful in confirming the content of the scientific evidence relevant to this dispute. The views of the experts on the scientific evidence were clear and unequivocal and confirm the U.S. presentation on all key points relating to the science of fire blight transmission and the lack of any role for apple fruit:

- (1) The experts unanimously answered that there is *no scientific evidence* that mature apple fruit have ever been the means of introducing fire blight into a new area.
- (2) The experts unanimously stated that there is *no scientific evidence* that harvested mature apple fruit will be infected with fire blight.
- (3) The experts unanimously stated that there is *no scientific evidence* that mature apple fruit will harbor internal populations of fire blight bacteria (Dr. Smith added at the conclusion of his answer that the experts found any suggestion in the literature to the contrary unconvincing).
- (4) The experts unanimously confirmed that any epiphytic calyx populations will only rarely occur when fruit are harvested from orchards with severe fire blight and with nearby active sources of inoculum.
- (5) The experts unanimously stated that there is *no scientific evidence* that any epiphytic calyx populations can infect a mature apple fruit.
- (6) The experts unanimously stated that there is *no scientific evidence* that any hypothetically surviving epiphytic calyx populations can be vectored from a discarded apple fruit to a susceptible host.
- (7) In light of the scientific evidence (or lack thereof) on these key points and the scientific evidence that fire blight spread occurs through other means, the experts unanimously evaluated the risk of introducing fire blight and *Erwinia amylovora* to an importing country via imported mature apple fruit as "negligible" since, as Drs. Geider, Smith, and Hale emphasized at various times, scientists cannot state with absolute certainty that an event will *never* occur.

2. Under the standards of the WTO agreements, these answers on the content of the scientific evidence allow only one finding with respect to the claims in this dispute: Japan has acted inconsistently with its obligations under the WTO agreements.

3. Japan has failed to fulfill its commitments under Article 2.2 of the SPS Agreement not to maintain phytosanitary measures "without sufficient scientific evidence." As the experts have confirmed, there is *no* scientific evidence that mature apple fruit have ever transmitted fire blight and *no* scientific evidence that mature apple fruit could serve as a pathway for the fire blight disease. Where there is no such evidence, there cannot be "sufficient scientific evidence" or a "rational or objective" relationship between Japan's fire blight measures and the scientific evidence.

4. Japan has failed to fulfill its commitments under Article 5.1 of the SPS Agreement. The experts have written in their answers that Japan's assessment of risks does not evaluate the likelihood of entry, establishment, or spread of fire blight through imports of apple fruit. Dr. Hale noted that it appeared "Japan has prejudged the outcome of its risk assessment" and "has

not provided an evaluation of likelihood that the steps necessary for entry of fire blight bacteria would be completed”; Dr. Hayward also found that Japan had not assessed the likelihood of each of the steps comprising the probability of entry. Even Japan’s most recent effort to illustrate a hypothetical pathway for introduction of fire blight via mature apple fruit, Exhibit JPN-34, fails to evaluate the likelihood of each of those steps being completed and – most strikingly – proposes events (specifically, a calyx-infested fruit becoming infected and producing bacterial ooze) for which the scientific experts unanimously concur there is no scientific evidence.

5. Japan’s failure to identify the steps necessary for apple fruit to serve as a pathway for introduction of fire blight to Japan, to identify and evaluate the scientific evidence related to each step, and to evaluate the likelihood – *i.e.*, the probability – of entry, establishment, or spread of fire blight within Japan establishes that Japan has not made a proper assessment of risk within the meaning of Article 5.1 and Annex A of the SPS Agreement. Thus, Japan has failed to ensure that its fire blight measures are based on an assessment of the risks to plant life or health within Japan, inconsistent with Article 5.1.

6. Japan has also acted inconsistently with Article 5.2 of the SPS Agreement by failing to take into account certain information in its assessment of risks. For example, Japan has not taken into account the available scientific evidence that *mature* apple fruit have not been implicated in the spread of fire blight – despite decades of worldwide trade in apple fruit – and that necessary steps in its hypothetical pathway would *not* be completed, both points which were confirmed by the scientific experts.

7. Japan has failed to fulfill its commitments under Article 5.6 of the SPS Agreement. As the experts have stated, there is no scientific evidence that imports of mature apple fruit can serve to introduce *Erwinia amylovora* and fire blight into Japan. In fact, the experts unanimously characterized the risk of introduction of fire blight via apple fruit imports as “negligible” (reflecting, as Drs. Geider, Hale, and Smith made clear, the “uncertainty that theoretically always remains since science can never provide absolute certainty”¹). Because imports of mature apple fruit do not pose a real, as opposed to merely theoretical, risk to plant life or health within Japan, restricting importation of U.S. apples to *mature* fruit (*i.e.*, the exported commodity) is a measure that is reasonably available, achieves Japan’s appropriate level of protection, and is significantly less restrictive to trade than Japan’s current fire blight measures. Dr. Smith provided useful support for the conclusion that the alternative proposed by the United States meets Japan’s level of protection. After describing the risk of introduction of fire blight to Japan via imported mature apple fruit as negligible, Dr. Smith stated that this might imply that *no* measures could be taken by an importing country and that he could not agree with this. However, the *only* measure that Dr. Smith *did* identify as based on the scientific evidence was that imported apple fruit be “mature” and accompanied by a phytosanitary certificate. A requirement that U.S. apple fruit be

¹See *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (adopted February 13, 1998), para. 186 (“*EC – Hormones*”).

mature and therefore free of fire blight is, of course, the very measure that the United States has proposed as an alternative measure under its Article 5.6 claim.

8. Japan failed to notify changes to and information on its fire blight measures in 1997 and therefore acted inconsistently with the transparency obligations in Article 7 and Annex B of the SPS Agreement.

9. Japan has acted inconsistently with its obligations under GATT 1994 Article XI and Article 4.2 of the Agreement on Agriculture. The former provision prohibits Members from using prohibitions or restrictions on imports other than duties, taxes, or charges; the latter prohibits Members from maintaining any measures of the kind which have been required to be converted into ordinary customs duties, such as quantitative import restrictions or other similar border measures. The Japanese fire blight measures prohibit the importation of U.S. apples unless produced, harvested, and imported according to those measures. Thus, Japan has acted inconsistently with GATT 1994 Article XI and Article 4.2 of the Agreement on Agriculture.

10. Finally, we note that Japan has invoked Article 5.7 of the SPS Agreement as an alternative defense to our claim under Article 2.2, but Japan has failed to meet the requirements necessary under Article 5.7 to claim this qualified exemption. The experts have confirmed the lack of any role for mature apple fruit in the introduction of fire blight to new areas. In this case, therefore, the relevant information is not “insufficient”; there is more than enough evidence to make an “objective assessment” that imported mature apple fruit do not pose a risk within the context of the SPS Agreement to plant life or health within Japan. Given the quality and quantity of scientific evidence presented by the United States and the experts, Japan’s fire blight measures are not adopted “on the basis of available pertinent information”; there is no such pertinent information on which a measure can be based. Neither Japan’s participation in the joint U.S.-Japanese 2000 study nor its recent, unsuccessful experimental effort to recover endophytic bacteria from apple fruit can be considered an effort to obtain additional *necessary* information, particularly as neither study provides additional information with respect to steps in Japan’s hypothetical pathway that the experts have concluded will *not* be completed. For the same reason, Japan cannot be deemed to have reviewed its measure within a reasonable time. Thus, Japan has not demonstrated that the qualified exemption under Article 5.7 from Japan’s commitments under Article 2.2 is available to it.

11. In addition to providing expert opinion on the content of the scientific evidence, we note that some of the experts made suggestions on measures which might be adopted, but – as they themselves confirmed – are not based on the scientific evidence. Dr. Geider described his comments simply as an effort to present a “compromise” and to provide “transition time” for Japan to phase-in relaxed measures because “we do not feel we can squeeze Japan” into eliminating its fire blight measures. Similarly, Dr. Smith explained his comments as reflecting that a country revising its phytosanitary measures “would probably not want to remove everything at once”; when asked by Japan whether he was suggesting a “compromise,” Dr. Smith responded that prudence suggested not removing all fire blight measures in one step but that this

was not an answer “in scientific terms.” Drs. Geider, Smith, and Hale also suggested at various times that they were proposing measures that Japan might adopt until Japan had “confidence” to liberalize further.

12. When Dr. Smith suggested that WTO Members as sovereign states had the ability to look at the same evidence relating to risk and to take any measures they deem appropriate, the Panel Chairman correctly added “subject to their obligations under the SPS Agreement.” It is clear, at this point, that in presenting certain measures as a “compromise,” the experts were no longer commenting on matters within their expertise or mandate – that is, providing scientific and technical advice on the scientific evidence relating to fire blight and apple fruit. Developing “compromises” and other mutually-agreed solutions is the responsibility of the parties and not the scientific experts, and any decisions on compromises or transition time can only be in the hands of the parties. Moreover, it is not for the experts to assume the role of the Panel under the WTO agreements to make the ultimate legal determination of whether Japan’s fire blight measures meet the legal requirements set forth in the WTO agreements.

13. As reflected in the history of this matter we have previously put before you, we have not hesitated to offer compromises to Japan numerous times over the last 20 years and to propose alternative measures in order not to have to be before you today. However, the purpose of this proceeding is to determine the consistency or inconsistency of Japan’s measure with the WTO agreements. It will then be up to Japan to determine how it wishes to comply with the DSB’s recommendations and rulings. It is only with the benefit of legal findings that set out the respective rights and obligations of the parties to this dispute that future discussions between the parties can be constructive.

14. It is instructive to compare the hypothetical pathway described by Japan to the Panel with the scenario Japan put forward to the experts at the experts’ session. Japan claimed in its opening statement to the Panel that there had not, to that point, been an opportunity for it to discuss the scientific evidence relating to the entire hypothetical pathway that it had previously identified (Exhibit JPN-34). In fact, Japan chose *not* to put the hypothetical pathway of JPN-34 to the test before the scientific experts, declining the opportunity to confirm the scientific evidence with respect to each step identified in its hypothetical pathway and to confirm the likelihood of completing each step. We would speculate that Japan chose not to discuss its hypothetical pathway with the experts because Japan was aware that there is *no* scientific evidence establishing that each step – and therefore the pathway – would be completed.

15. We did largely walk the experts through Japan’s hypothetical pathway, and the experts’ view of the scientific evidence (set out in points (1) - (7) above) confirmed that there is *no* scientific evidence that the hypothetical pathway identified in Exhibit JPN-34 would be completed. Specifically, contrary to Japan’s exhibit: there is *no* scientific evidence that any epiphytic calyx infestation would result in infection of fruit; there is *no* scientific evidence that “mature, apparently healthy *but infected* fruit” exist; and, therefore, there is no scientific evidence that any imported fruit that may be contaminated with bacteria in the calyx could become

“infected,” resulting in “dissemination of bacterial ooze” when “placed in fields.” That is, Japan’s pathway is merely hypothetical because one must imagine that several events that have *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.

16. As noted, Japan did not focus the experts’ attention on this hypothetical pathway. Instead, Japan posed a different scenario, asking the experts to *assume* that an infected fruit would be harvested and imported. The experts made clear that harvested fruit are mature and therefore *not* infected; infected, immature fruit 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. Thus, Japan argued at the experts’ session that a negligible (in the experts’ estimation) risk of introduction of fire blight via an *infected, immature* apple fruit – which the experts stated would *not* be exported – justifies maintaining fire blight measures on *mature* (and therefore *not* infected) apple fruit. 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. 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.

17. 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 has conceded that exported U.S. apples are mature and apparently healthy. 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 scenario.

18. 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.

19. In sum, 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. Accordingly, we respectfully request that the Panel find, based on the application of the legal standards under the WTO agreements to the facts and scientific evidence in this dispute, that Japan has acted inconsistently with its WTO obligations.