***Japan – Measures Affecting the Importation of Apples* (WT/DS245)**
Recourse by the United States to Article 21.5 of the DSU

U.S. Comments on Meeting With the Experts

January 13, 2005

1. Good afternoon Mr. Chairman and members of the Panel. On behalf of the United States I would like to thank you once again for agreeing to assist in this compliance proceeding. As we will discuss in greater detail, the experts' written answers and their comments at yesterday's session were useful in confirming that the scientific evidence relevant to this dispute does not support Japan's measures, any more than it did during the original panel proceedings.

2. The views of the experts on the scientific evidence are clear, and fully support the position of the United States. For this proceeding, Japan generated – and relies heavily – on several new studies to, in essence, make up for the shortcomings of the case it presented to the original panel over two years ago. Indeed, Japan has taken every opportunity to highlight the importance of these new studies to its arguments throughout the course of this proceeding.

3. By relying on the new studies, Japan has essentially narrowed the focus of this proceeding to the question of whether or not these new studies in fact presented scientific evidence that should cause the Panel to revisit or alter the findings on the scientific evidence made by the original panel, and adopted in the DSB's recommendations and rulings. As evidenced by the unequivocal opinions of the experts, there is no need to do so. The original panel's findings on the scientific evidence are as legitimate a litmus test for Japan's revised measures as they were for Japan's original import regime on U.S. apple fruit.

4. My comments on the expert session will address the following issues: first, the experts' responses as they concern Japan's new studies and the conclusions Japan has drawn regarding

fire blight and apple fruit from those studies; second, how the experts' opinions specifically relate to Japan's revised measures; third, the closing statements of the experts on this matter; and, finally, the effect of the experts' opinions on the evaluation of Japan's revised measures pursuant to the Articles 2.2, 5.1 and 5.6 of the SPS Agreement.

Japan's New Studies

Mature, Symptomless Yet Latently Infected Apple Fruit

5. At the start of its proposed hypothetical pathway Japan posits the existence of a mature, symptomless yet latently infected apple fruit. After reviewing both Azegami studies purporting to demonstrate the existence of such a fruit, the experts agreed that there is still no scientific evidence demonstrating that such fruit actually exists. Dr. Hale noted in his opening statement and later reiterated in response to a question from the United States that, despite having examined Japan's new studies, there was still no evidence of mature, symptomless latently infected fruit. Subsequently, he commented that there is simply "no proof" of such a fruit. Dr. Smith concurred that there was no convincing evidence that latent infections occur naturally in mature apple fruit. Dr. Geider noted that it would be very unlikely that such a mature, symptomless yet latently infected fruit would exist, and answered the U.S. question as to whether the scientific evidence demonstrates its existence with a simple "No." Finally, Dr. Hayward commented that not only was there no evidence of such a thing as a mature, symptomless yet latently infected apple fruit, but that previous studies which evaluated internal tissues of mature fruit harvested from heavily blighted trees (Roberts 1989, 2002; Dueck, 1974) were methodologically appropriate yet did not detect any fire blight bacteria within the surveyed fruit.

Completion of the Pathway for Introduction of Fire Blight

6. The experts further agreed that the scientific evidence, including the new studies offered by Japan during these proceedings, does not demonstrate that the pathway for introduction of fire blight via mature, symptomless apple fruit has been or would be completed. Dr. Hale remarked that apple fruit have not been shown to be responsible for the spread of fire blight despite "millions of tons" of apple fruit having been shipped world-wide, and in response to the second question posed by the Panel concerning the Japanese environment, simply stated that mature, symptomless apple fruit will not complete the pathway and that there is "no proof" of the pathway possibly being completed. Dr. Smith noted that a pathway must be completed from beginning to end, and that even if one assumed the hypothetical existence of a mature, symptomless yet latently infected fruit, there is still no scientific evidence of a vector to transmit the bacteria from the fruit to host materials.

7. Dr. Hayward commented that he was unconvinced by the studies put forward by Japan regarding completion of the pathway via apple fruit, further noting that there were two good studies conducted by Hale and Taylor which demonstrated that under realistic orchard conditions *E. amylovora* was not transmitted from infested, discarded apple fruit to susceptible host tissues by splashing rain, insects or air currents. Regarding completion of the pathway specifically, he commented that he was not aware of any scientific evidence demonstrating such an occurrence and noted that due to the fact that there is no such thing as a mature, symptomless yet latently infected fruit, and no evidence that the pathway would be completed, the potential for Japan's pathway to be completed was "vanishingly low." Dr. Geider noted that there is no scientific evidence demonstrating transmission of fire blight bacteria from apple fruit, commenting later in

response to a question from Japan that the proposed pathway was so unlikely that it could be disregarded.

8. Japan has argued, among other things, that its infection and pathway studies help reconcile all available evidence. Of course, Japan "reconciled" the new studies with the "old" scientific evidence in part by mischaracterizing several previous studies. In particular, Japan contended that earlier studies which did not detect fire blight bacteria in mature fruit harvested directly from blighted trees – the Roberts (1989, 2002) and Dueck (1974) studies – had failed to look for the bacteria in the proper place, the "flesh" tissues. The experts, however, have confirmed that these earlier studies did examine the cortex, or "flesh" tissues, of the apple fruit surveyed. In fact, each study explicitly describes this methodology. As a result, there is simply no way to reconcile Japan's claims of the existence of a mature, symptomless yet latently infected apple fruit, or that a pathway for introduction of fire blight via apple fruit exists, with the studies previously examined by the Panel.

Experts Responses to Specific Elements of Japan's Measures

Fire Blight-Freedom and Buffer Zones

9. The Panel asked the experts whether there is any scientific evidence that justifies a requirement that apple fruit be "sourced from an orchard free of fire blight" and whether or not border or buffer zones are necessary to preserve this status. Dr. Hayward commented that the most relevant scientific study relating to the need for fire blight-free orchards was the Roberts (2002) experiment, and that he was aware of no scientific justification for sourcing fruit from fire blight-free sites. Concerning border zones, he noted that, again pursuant to the results of the Roberts study, the scientific evidence demonstrates that buffer zones provide no additional

"help". Dr. Hale noted that in his 1987 study, he in fact harvested fruit from severely blighted orchards, and that even in this scenario, bacteria were only found in limited numbers on the fruit calyx. He added that the bacteria located in the calyx does not then enter the internal tissues of the fruit. Finally, he noted that a fire blight-free restriction is not scientifically justified based on the Roberts (2002) study and the fact that there was no infection of mature apple fruit even when harvested from heavily blighted trees. Regarding buffer zones, Dr. Hale commented that they provide "no further phytosanitary protection."

10. Dr. Geider noted, when prompted by the Panel to answer the question in terms of scientific evidence, that the risk of transmission of fire blight from apple fruit was "low". Later in the session, Dr. Geider clarified that the hypothetical and scientifically unsubstantiated risk of transmission of fire blight via apple fruit was "low to zero." He explained that he was classifying the risk as such because, in his role as a scientist, he could never make a statement of "absolute zero" risk.

Severely Blighted Orchards

11. Regarding the export of mature, symptomless apple fruit from severely blighted orchards, the experts confirmed that, while under commercial practices such fruit would not likely be exported, the scientific evidence does not demonstrate that mature, symptomless apple fruit harvested from such orchards would present a scientific risk of introducing fire blight into Japan. Dr. Hale noted that Roberts (2002) demonstrated that there was no infection of mature apple fruit or internal presence of *E. amylovora* even when those fruit were harvested from heavily blighted trees. The only bacterial presence on fruit from severely blighted orchards in New Zealand was calyx infestation on a small percentage of fruit which would not subsequently lead to infection.

Dr. Hayward, while noting that he was unhappy with the concept of exporting fruit from severely blighted orchards, similarly noted that the pertinent study on the matter was Roberts (2002), and that he accepted its results.

12. Drs. Smith and Geider both commented that they would not export apple fruit from severely blighted orchards. However, when queried as to the scientific evidence on which he based his opinion, Dr. Geider noted that there was no strict scientific basis for his statement, but that he premised it on the "practical concern" that it would not be worth the effort of growers to harvest apple fruit from severely blighted trees. Dr. Smith, while commenting that mature apple fruit should not be taken from severely blighted orchards for "commercial reasons," also did not cite any scientific evidence to support such a restriction.

13. It is important to note at this juncture that Japan has argued that the result the United States seeks to obtain from this proceeding is the ability to export whatever manner of apple fruit – diseased, not-diseased, immature, mature – it so desires. This is of course not the United States' purpose. We simply seek to be able to export to Japan the commodity that American apple growers and packers have exported world-wide for decades – mature, symptomless apple fruit – and to be able to do so without unnecessarily trade-restrictive measures blocking those shipments. The United States does not expect to be exporting fruit from severely blighted orchards as a practical commercial matter. However, it is imperative that American apple growers, packers and shippers not be forced to undertake the burden of inspections against something which the scientific evidence does not identify as a risk.

Post-Harvest Controls

14. The experts further confirmed that Japan's post-harvest controls are not supported by the

scientific evidence relating to apple fruit and fire blight. Concerning Japan's contention that healthy apple fruit can be infected with fire blight from contact with infected fruit – an assertion Japan presents in support of its post-harvest procedures for apple exports – the experts agreed that there is no evidence that this is in fact the case, and confirmed that there is no evidence that spread of fire blight infection has ever occurred through trade in apple fruit. Drs. Smith, Hayward and Hale commented that they were not aware of any evidence demonstrating that healthy fruit can become infected through contact with infected fruit, and that there was no evidence at all that the disease had ever spread through trade in apple fruit. Each of the experts agreed that surface disinifestation of apple fruit is unnecessary in light of the scientific evidence relating to apple fruit and fire blight. Dr. Hayward queried why there would be such a requirement given the fact that there is no evidence of epiphytic populations of the bacteria capable of initiating the disease.

Experts' Closing Statements

15. The experts, having reviewed Japan's studies, closed the expert session with the following telling remarks regarding exported apple fruit and fire blight. Dr. Smith concluded that it seemed to be the unanimous conclusion of the experts that in light of the low probability that such a thing as a latently infected mature, symptomless apple fruit exists, and the low probability that apple fruit would transmit fire blight even if showing symptoms of the disease, that the "main concern" was therefore that mature, symptomless apple fruit be exported. A moment earlier, Dr. Smith noted that a phytosanitary inspection alone might be all that is necessary to ensure that exported fruit were mature, symptomless fruit. Dr. Hayward having earlier described the risk of completion of the hypothetical pathway as "vanishingly low",

commented that scientific studies as a general rule must be properly refereed and placed in the public forum before being considered of consequence.

16. Dr. Hale, concurring with Dr. Hayward that new studies should be placed before the international fire blight community, particularly in light of the fact that it is one of the most studied bacterial diseases, concluded by noting again that there is no scientific evidence demonstrating the existence of a mature, symptomless yet latently infected apple fruit, nor was there evidence that the pathway for introduction of fire blight via apple fruit would be completed. Finally, regarding the potential for spread of fire blight via contaminated apple fruit, and as we noted before, Dr. Geider concluded that the hypothetical and scientifically unsubstantiated risk was "low to zero", classifying the risk as such because, pursuant to his role as a scientist, he could never make a statement of "absolute zero" risk.

Analysis Under the SPS Agreement

17. Mr. Chairman and members of the Panel, these answers on the scientific evidence allow only one finding with respect to the claims in this proceeding: Japan continues, through its revised measures, to act inconsistently with its obligations under the SPS Agreement. Further, the scientific evidence, as it has recently been confirmed by the experts, supports only one phytosanitary measure: a Japanese restriction of imported apple fruit to mature, symptomless apple fruit. By necessity, any measure extending beyond or adding to this restriction would be maintained without sufficient scientific evidence and would be more trade restrictive than necessary in meeting Japan's appropriate level of protection.

18. Japan does not contest the scientific evidence amassed in the decades' worth of studies evaluated in the course of the original panel proceedings. Rather, Japan suggested that its new

studies somehow changed the conclusion that its measures are maintained without sufficient scientific evidence. Thus, the scientific focus of this dispute is simply to evaluate whether Japan's new studies presented the necessary scientific evidence to demonstrate that its measures are not maintained without sufficient scientific evidence within the meaning of Article 2.2 of the SPS Agreement, and whether Japan's revised PRA – heavily reliant on conclusions drawn from the new studies – reasonably supported the restrictive measures Japan put in place within the meaning of Article 5.1 of the SPS Agreement. As demonstrated by the statements of the experts on the scientific evidence and the experts' criticisms of Japan's pathway and infection studies, Japan's new studies have accomplished neither of these goals. Japan's revised measures are therefore maintained in breach of Articles 2.2 and 5.1 of the SPS Agreement.

19. On examination of the scientific evidence relating to mature apple fruit and fire blight, it is clear that the scientific evidence does not rationally relate to Japan's nine-element revised measures and that Japan's fire blight measures are more trade-restrictive than required to achieve its appropriate level of protection. Available scientific evidence demonstrates that mature apple fruit, even when harvested from severely blighted orchards, will not be infected with fire blight. A small percentage of mature apple fruit harvested from severely blighted orchards have been reported to be epiphytically infested with fire blight bacteria. In the event that such an infested, mature fruit were harvested and exported, the scientific evidence fails to demonstrate that the epiphytic infestation would ever lead to infection of the apple fruit or that the pathway for introduction of fire blight via the apple fruit would be completed.

20. In short, the scientific evidence, as evaluated by the experts, points to an alternative measure that is significantly less trade-restrictive than Japan's revised measures, is reasonably

available taking into account technical and economic feasibility, and achieves Japan's appropriate level of protection: a Japanese restriction of imports to mature apple fruit. In light of this less trade-restrictive alternative, Japan thus maintains its revised measures also in breach of Article 5.6 of the SPS Agreement.

Conclusion

21. In conclusion, I would simply reiterate that the experts' session proved a useful tool for examining the scientific evidence as it relates to apple fruit and fire blight. That evidence is clear, and the analysis of Japan's measures relating to apple fruit and fire blight under the SPS Agreement is clear. The scientific evidence supports only one phytosanitary measure, that of requiring that the U.S. exported commodity be what it already is: a mature apple fruit.

22. Thank you.