**BEFORE THE**
**WORLD TRADE ORGANIZATION**
**APPELLATE BODY**

# *Japan - Measures Affecting the Importation of Apples*

**(AB-2003-4)**

## OTHER APPELLANT'S SUBMISSION OF THE UNITED STATES

September 12, 2003

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**WORLD TRADE ORGANIZATION**
**APPELLATE BODY**

# *Japan -- Measures Affecting the Importation of Apples*

**(AB-2003-4)**

## SERVICE LIST

APPELLEE

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On August 28, 2003, Japan appealed the findings of the Panel report on *Japan -- Measures Affecting the Importation of Apples*[1/] (hereinafter "Panel Report"). Pursuant to Rule 22(1) of the Working Procedures for Appellate Review, the United States will respond as Appellee to Japan's arguments on September 22, 2003. In this submission, pursuant to Rule 23(1), the United States seeks review of one other discrete issue of law covered in the Panel Report and related legal interpretations developed by the Panel.

2. Japan imposes several requirements on U.S. mature apple exports, ostensibly to protect Japanese plant life from the disease fire blight, a disease caused by the bacterium *Erwinia amylovora*. The Panel correctly found that these requirements, which it collectively considered the measure in question,[2/] are inconsistent with Japan's obligations under Articles 2.2 and 5.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"). The United States does not appeal from these conclusions of the Panel Report, but requests that the Report be modified to address the Panel's error as to the scope of the dispute.

3. Japan alludes to this error in its Appellant Submission, arguing that the Panel erred in offering findings on infected apples, with respect to which the United States presented no claims. While Japan's submission distorts the U.S. argument – the United States presented no claims with respect to immature apples, the only apples which might be infected[3/] – the United States agrees that the Panel should not have issued conclusions and findings with respect to immature apples. However, while Japan argues that the Panel error requires reversal of a Panel conclusion

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[1/] Panel Report, *Japan -- Measures Affecting the Importation of Apples,* WT/DS245/R, 15 July 2003 ("Panel Report").

[2/] Panel Report, para. 8.20.

[3/] As the Panel found, infected apples would not be mature apples (paragraph 8.128 of the Panel Report). Consequently, "infected apples" are a (small) subset of "immature apples." Presumably the vast majority of immature apples are not infected but instead ripen into mature (and thus symptomless) apples.

on completion of the last stage of the pathway (transmission to a host plant in Japan),[4/] the United States considers that the Panel error, though related, was different and more fundamental. The Panel incorrectly found that it was entitled to undertake an analysis of the measure with respect to products other than mature (and therefore symptomless) apples, although mature apples were the only product for which the United States pursued claims. As a result, the Panel incorrectly examined Japan's measure as applied to immature apples, including through consideration of unsupported assertions by Japan concerning the possibility of failures in U.S. control procedures designed to ensure that apple exports are limited to mature apples. The Appellate Body should reverse the Panel's legal findings and declare the Panel's statements derived from those findings to be without legal effect.

4. In particular, the Panel erred in justifying its conclusion in paragraph 8.34 through its assertion in paragraph 8.32 that a panel request not only limits a panel's jurisdiction, but defines it positively as well, apparently suggesting that panels may offer analysis and findings on claims not pursued by the complaining party. This approach would also relieve one or the other party of its burden of proof. In this connection, Japan offered no evidence whatsoever with respect to U.S. control procedures, and the measure at issue does not relate to control requirements.

5. It has been commonplace for panels not to offer findings or analysis on abandoned claims. To prevent prejudice, parties must be able to assume that they need not offer argumentation on such claims.

6. In addition, the Panel offers explanations in paragraphs 7.30 through 7.32 that it is entitled to address issues relating to control procedures. However, the question presented to the Panel was whether Japan's restrictions on mature, symptomless apples are consistent with the SPS Agreement, and not whether Japan could maintain restrictions on any other product.

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[4/] The United States will respond to Japan's arguments in this regard in its Appellee Submission.

Likewise, the Panel's logic in paragraphs 8.119 through 8.121 is equally flawed, suggesting without basis that an SPS measure must cover all forms of a product, and that this may somehow justify a panel's undertaking an analysis of claims not made. Thus, the Panel erred in concluding that it was legitimate to consider control procedures and immature fruit, as it did in paragraphs 8.154 to 8.162.

## II. IN THE ABSENCE OF CLAIMS BY THE UNITED STATES, THE PANEL HAD NO AUTHORITY TO EXAMINE THE MEASURE AS IT RELATES TO IMMATURE APPLES.

7. In its Appellant Submission, Japan correctly notes that, in the U.S. comments on the Panel's interim report, the United States explained that it advanced arguments only with respect to mature, symptomless apples. The United States pursued this approach because the United States is only seeking to export mature, and therefore symptomless, apples to Japan, and has both laws and extensive measures in place to limit apple exports to this commodity. Furthermore, neither in consultations nor in response to a U.S. request pursuant to Article 5.8 of the SPS Agreement (nor in its two written submissions) did Japan ever claim that its measure was justified as a measure to protect against the importation of immature, infected apples. Rather, Japan contended that its measure was necessary to address the supposed risk of "latent" bacterial presence in otherwise mature, symptomless apples – a risk not supported by scientific evidence, as the Panel concluded.[5/]

8. Notwithstanding that the United States limited its claims to mature apples, the Panel in its interim report concluded that it considered the measure at issue as applicable to all apple fruit,

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[5/] Panel Report, para. 8.136. Indeed, the fact that Japan had not previously put forward justifications relating to immature, infected apples indicated its confidence in the steps the United States had been taking in this regard. Only when, in the course of this proceeding, Japan faced the prospect of clear findings that there was no scientific evidence of endophytic bacterial presence in mature, symptomless apples did Japan suggest that it needs to address a risk from immature, infected apples which – hypothetically, for it offered no evidence – might elude the multiple layers of U.S. controls.

including immature apples, and that it therefore would examine issues relating to control procedures insofar as they might affect whether exported apples include immature, infected apples. In its comments on the interim report, the United States requested that the Panel limit its analysis to the product with respect to which it advanced claims – mature, symptomless apples. The United States argued:

> However, even if the panel request identified the product at issue as all U.S. apples and brought all such apples within the scope of the dispute, the United States advanced arguments only relating to mature, symptomless apples (that is, that such fruit did not pose a phytosanitary risk to plant life or health within Japan). Thus, the Panel need not reach the issue of other apple fruit with respect to which the United States presented no evidence.
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> It follows that it is not necessary for the Panel to find that Japan "may legitimately take measures" to address "the risk that something other than mature, symptomless apples [e.g., immature, infected fruit] may actually be imported." [Footnote omitted.] Further, as no challenge was made to these measures relating to apples other than mature apples, there is no basis for this finding by the Panel and therefore no basis for a finding on the consistency or inconsistency of these measures. We therefore respectfully request the Panel to remove its finding in paragraph 8.145 that Japan "may legitimately take measures" to address "the risk that an error in harvesting and processing of apples in the United States, or illegal actions, may lead to contamination of host plants in Japan by endophytic or epiphytic populations of bacteria harboured in or on imported apples."[6/]

9. The Panel declined the U.S. request, offering its reasons in paragraphs 7.30-32 of the Panel Report. The Panel also modified paragraph 8.32 to justify its conclusion in paragraph 8.34 to consider the measure at issue as applied to all apple fruit, and offered further explanations of its decision to consider immature fruit and control procedures in paragraphs 8.119 through 8.121. The Panel then undertook an analysis of apples "other than 'mature, symptomless apple fruit'" in paragraphs 8.154 to 8.162. The United States considers to be in error the Panel's legal and logical justifications for considering immature apple fruit and control procedures and considers

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[6/] U.S. Comments on the Panel's Interim Report (April 3, 2003), comments on paras. 8.25-8.33, 8.145.

that the Panel also erred in opining as it did in paragraphs 8.154 to 8.162, and in particular paragraph 8.161.

10. In paragraph 8.32, the Panel notes that the U.S. panel request referred to Japan's restrictions on the importation of "apples" rather than "mature, symptomless apples," and goes on to state that a panel request, "is not exclusively a limitation to [a panel's] jurisdiction, it defines it positively too."[7/] Leaving aside whether the panel request's reference to "apples" should be viewed as including apples not the subject of exportation, the Panel appears to be asserting that panels may offer analysis and findings on any claim initially raised in a panel request, even those that were never pursued by the complaining party. This conclusion is startling. Under the Panel's approach, a panel would become advocate and judge, creating arguments and seeking evidence and then making findings based on those arguments and evidence. However the function of dispute settlement panels is "to secure a positive solution to a dispute,"[8/] not to theorize about the arguments and evidence that might be presented by a party to a dispute if the party were to pursue a claim contained in a panel request. Nor is it the function of dispute settlement panels to conduct a *de novo* review and make findings on claims not pursued.

11. The Panel's approach also runs afoul of the Appellate Body's explanation in *Japan Varietals*, cited by Japan in its Appellant Submission at paragraph 18, that while panels have significant investigative authority, "this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case *based on specific legal claims asserted by it.*"[9/]

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[7/] Panel Report, para. 8.32.

[8/] Article 3.7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

[9/] Appellate Body Report, *Japan – Measures Affecting Agricultural Products,* adopted on 19 March 1999, WT/DS76/AB/R ("*Japan Varietals*"), para. 129 (emphasis added).

12. While this statement by its terms applies to the situation in *Japan Varietals*, in which the panel found in favor of the United States as complaining party on a claim it arguably did not assert, its logic applies more broadly. In the absence of evidence and arguments advanced by a party, a panel's analysis of an issue and any conclusions it draws from that analysis will necessarily be based on its own assumption of the burden of proof placed on *one or the other party*. In this connection, it is important to bear in mind that in this dispute Japan offered no evidence whatsoever, nor did the record otherwise contain any evidence, of the failure or likelihood of failure of U.S. procedures to ensure compliance with U.S. control requirements prohibiting the exportation of apples other than mature, symptomless apples. It is also important to bear in mind that the measure at issue in this dispute, as set forth in paragraph 8.25 of the Panel Report, includes no such control requirements; it did not, for example include any requirements which U.S. control procedures could be viewed as implementing. In other words, the Panel undertook an analysis of U.S. procedures not implicated by the measure at issue based on a record devoid of evidence on those procedures.

13. It has from the outset of the dispute settlement system been commonplace for panels not to offer findings or analysis on abandoned claims. In some instances, Panels have even made preliminary rulings that a claim has been abandoned.[10/] Whether or not such rulings have been made, parties have reasonably assumed that they need not offer argumentation on abandoned claims. For a panel to contravene that assumption risks prejudicing one or both parties.

14. In addition to the erroneous legal assertion in paragraph 8.32 of its authority to consider a claim not pursued by a complaining party, the Panel explained in paragraph 7.30 its view that, "the United States had to address the issue of control to support the assumption that it exports only mature, symptomless apples," that the United States provided such information, and that "we do not believe that we go beyond our terms of reference by considering the risk that apple

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[10/] *E.g.,* Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, adopted on 29 July 2002, WT/DS206/R, paras. 7.25-7.30.

fruit other than mature, symptomless apples could be exported to Japan." The Panel likewise states in paragraph 7.31 that it is "entitled to address" Japan's position that a risk of entry, establishment or spread could result from errors in control procedures, and that it "cannot agree" to concentrate its findings on mature, symptomless apples because the United States limits its claims, arguments and evidence to it. In paragraph 7.32, the Panel concludes its interim review explanation of why it did not limit its findings to mature, symptomless apples by stating that doing so "would disregard the position of Japan that the protection to be achieved by the measure should be equivalent to that of an import prohibition."

15. These considerations however cannot justify the Panel asserting authority it does not have. In the proceedings, the United States made no claim regarding immature apples. Accordingly, there was no claim for the Panel to review or on which to make findings. The question presented to the Panel was whether Japan's SPS restrictions on mature, symptomless apples are consistent with the SPS Agreement (for example, is there sufficient scientific evidence and are they based on a risk assessment). The question was not whether Japan could, consistent with the SPS Agreement, maintain restrictions on any other product.

16. The Panel's logic in paragraphs 8.119 through 8.121 is equally flawed. In paragraph 8.119, the Panel notes that the definition of "sanitary measure" in SPS Agreement, Annex A, paragraph 1 "does not limit the scope of application of phytosanitary measures to the product that the exporting country claims to export. In order to be effective, a phytosanitary measure should cover all forms of a product that may actually be imported." This statement is in error. The Panel provides no basis for this assertion, nor could it. It is impossible in the abstract to decide today what would be required under all SPS measures a Member might maintain on any product.[11/] Moreover, as a justification for analyzing claims not pursued by a complaining party, this is a *non sequitur*. The fact that an SPS measure may address risks associated with different

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[11/] For example, the Panel presumably was not implying that the phytosanitary measure at issue must also cover apples that are exported in the form of canned apples.

forms of a product does not mean that the measure conforms with a Member's SPS Agreement obligations with respect to all forms of a product. Further, it says nothing about whether a complaining party has made a claim with respect to all forms of a product, and whether a panel may undertake an analysis beyond the claims made.

17. Likewise, in paragraph 8.120, the Panel refers to the Appellate Body's statement that a risk assessment may consider all scientific risks, whatever their origin, including risks arising from control failures. Again, however, Japan's measures do not relate to control failures, and Japan never previously suggested that its measures were directed at control failures (including in its risk assessment). Thus, neither paragraph 8.119 nor 8.120 justify the Panel's conclusion in paragraph 8.121 that "it is legitimate" to consider "human/technical errors in the sorting of apples or illegal actions which would lead to the importation of infested/infected apples."

## III. CONCLUSION

18. For the above reasons, we request that the Appellate Body find that the Panel erred in making the findings described above.