Japan – Measures Affecting the Importation of Apples

(WT/DS245)

Comments of the United States of America

on Japan's Answers to the Additional Questions from the Panel

at the Second Substantive Meeting

January 31, 2003

1. General

1. <u>To both parties</u>: Do you consider that there is one "measure at issue (Japan's systemic requirement as a whole), or that there are nine separate "measures"? If you consider that each of the nine requirements to be a separate measure, must there be sufficient scientific evidence to justify each of these requirements individually?

1. Not surprisingly, the United States disagrees with Japan's conclusion that the United States has not satisfied its burden of establishing a *prima facie* case that Japan's measures are maintained without sufficient scientific evidence. Please see the U.S. response to this question for an explanation of the U.S. view that, whether considered as one measure or as nine requirements or restrictions, the Japanese fire blight measures are maintained without sufficient scientific evidence because there is *no* scientific evidence that harvested, mature U.S. apples, the exported commodity, could serve as a pathway for introduction of fire blight to Japan.

2. Japan's assertion that "the experts agreed" that a fire blight-free orchard requirement would "be reasonable" misrepresents both the context and the content of the experts' answers at the experts' session, and we invite the Panel to confirm this by examining the transcript. It is clear from the experts' comments that certain experts expressed views on what restrictions might be "reasonable" within the context of attempting to forge a "compromise" between the parties' views, to provide "transition time" for Japan to phase-in relaxed measures, to avoid "squeez[ing] Japan" into eliminating its fire blight measures, and to propose measures that Japan might adopt until Japan had "confidence" to liberalize further. Thus, as the United States has previously noted,[1] in discussing certain measures as candidates for a "compromise," the experts were no longer commenting on matters within their expertise or mandate in this proceeding. Not surprisingly, these comments were made in the context of Japan's follow-up questions at the experts' session, which were phrased in terms of what would be "reasonable" and not in terms of 'what is the content of the scientific evidence.' Thus, Japan was inviting the experts to comment on matters beyond their expertise and mandate to provide scientific and technical advice on the *scientific evidence* relating to fire blight and exported apple fruit.[2]

3. There can be no doubt, however, on the experts' views with respect to the content of the relevant scientific evidence:

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[1]U.S. Opening Statement at the Second Substantive Meeting, paras. 13-14. The Panel will note that Japan has *not* contradicted the U.S. presentation of these comments by the experts – even while attempting to characterize these comments as statements on the content of the scientific evidence relating to imported apple fruit, which by the experts' own admission they were not.

[2]*See, e.g.*, Letter from M. Cartland, Chairman of the Panel, to Dr. C. Hayward, para. 2 (Nov. 13, 2002) ("When replying to the questions, please keep in mind that the purpose of requesting this information from you is to further the Panel's understanding of the *scientific and technical facts* relevant to the dispute. . . . . Wherever reference is made to *scientific or technical facts* or comment is made on *scientific evidence or literature*, you are requested to provide references to the relevant studies.") (emphasis added).

• The experts *unanimously* stated that there is *no* scientific evidence that trade in apple fruit has ever been the means of introducing fire blight into a new area.

• The experts *unanimously* stated that there is *no* scientific evidence that harvested mature apple fruit will be infected with fire blight.

• The experts *unanimously* stated that there is *no* scientific evidence that harvested mature apple fruit will harbor internal populations of fire blight bacteria.

• The experts *unanimously* stated that epiphytic calyx populations on mature apple fruit will only rarely occur when fruit are harvested from orchards with severe fire blight and with nearby active sources of inoculum.

• The experts *unanimously* stated that there is *no* scientific evidence that any epiphytic calyx populations can infect a mature apple fruit.

• The experts *unanimously* stated that there is *no* scientific evidence that any epiphytic calyx populations on a harvested mature apple fruit (hypothetically surviving commercial handling, storage, transport, and discard conditions) can be vectored from a discarded apple fruit to a susceptible host.[3]

Thus, when asked *specific questions* about the *content* of the scientific evidence, the experts unanimously confirmed that there is no scientific evidence that any hypothetical pathway would be completed. The experts did *not* "agree" that the *scientific evidence* established that exported apple fruit would pose a phytosanitary risk to Japan. Should the Panel *agree* with the experts' view of the content of the scientific evidence, there would be only one possible finding with respect to the claims in this dispute: Japan has acted inconsistently with its obligations under the SPS Agreement.

2. Article 2.2

5. <u>To Japan</u>: You have indicated, in paragraph 46 of your second submission, that Japan "wishes to encourage the Panel to consider carefully, in line with the above interpretation, whether the "mature, symptomless" criteria would objectively achieve Japan's level of protection. (…) If the Panel is not convinced by the assurance of the criteria, the case under Article 2.2 must be dismissed, because the burden of proof lies with the United States". Could you please clarify, in light of that statement, whether, in your view, the panel should make an assessment, under Article 2.2, of whether the limitation of restrictions to the importation of mature symptomless apples would achieve Japan's appropriate level of protection?

[3] *See* U.S. Opening Statement at the Second Substantive Meeting, para. 2.

4. The United States disagrees with Japan's legal interpretation and refers the Panel to the U.S. response to additional question 7 from the Panel posing essentially the same question. Here, we limit our comments to the following points.

5. As suggested in the U.S. response to additional question 7, Japan's answer makes evident that Japan is attempting to import into the analysis of the U.S. claim under Article 2.2 of the SPS Agreement the concept of its appropriate level of protection from Article 5.6. A Member's "appropriate level of protection" forms an integral part of its commitment under Article 5.6 to ensure that any phytosanitary measure is no more trade-restrictive than required, taking into account technical and economic feasibility, to achieve its appropriate level of protection. As a result, in dispute settlement cases a complaining Member may make a *prima facie* case by showing, *inter alia*, that an alternative measure achieves the importing Member's appropriate level of protection. In this case, there is no basis for importing this concept into the U.S. claim under Article 2.2 that Japan's fire blight measures are maintained without sufficient scientific evidence.

6. Under Article 2.2, Japan must ensure that its fire blight measures are "not maintained without sufficient scientific evidence," which requires that there be a "rational or objective relationship" between the scientific evidence and the measure.[4] Thus, to make its *prima facie* showing, the United States may demonstrate that there is no "rational or objective relationship" between the SPS measure imposed on the exported commodity and the scientific evidence of a risk to plant life or health within Japan posed by such commodity. The United States has satisfied its burden by demonstrating (as confirmed by the scientific experts) that there is *no* scientific evidence that the exported commodity (harvested, mature apple fruit) poses a risk to plant life or health within Japan. Japan has failed to rebut the presumption created by this showing (for example, by presenting scientific evidence of a risk to plant life or health within Japan posed by imported U.S. apples). Japan's appropriate level of protection plays no part in this analysis.

7. Finally, the United States has more than adequately demonstrated – and the experts have confirmed – that the exported commodity consists of mature (and therefore symptomless) fruit.[5] It is Japan that has done no more than assert, without reference to *any* scientific evidence, the *possibility* that infected, immature fruit would be imported into Japan. Any evidence of a risk of introduction of fire blight by infected, immature fruit is *not* evidence of a risk posed by the exported commodity. Thus, there is not sufficient scientific evidence to maintain any fire blight measures on harvested, mature apple fruit. To prevent introduction of fire blight and achieve its

[4] *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 84 (Appellate Body report) ("*Japan – Varietals*").

[5] *See* U.S. Answer to Additional Question 3 from the Panel.

appropriate level of protection, Japan may simply maintain a measure limiting importation to that exported commodity.[6]

9. To Japan: How much scientific evidence is necessary to be "sufficient"? Is this primarily a quantitative matter, or is the "quality" of the evidence of importance? Would subsequent studies or the evolution of methodologies affect the "quality" of earlier studies? Could a single study providing "evidence" be considered sufficient if it is not supported - or is contradicted - by a greater volume of other studies?

8. Japan's answer misrepresents the U.S. position with respect to scientific evidence and Article 2.2. It is not the position of the United States that the legal requirement of "sufficient scientific evidence" under Article 2.2 relates to "each step of the pathway" identified by Japan rather than to Japan's fire blight measures.[7] However, for Japan to maintain any fire blight measure on imported U.S. apple fruit consistent with Article 2.2 and for Japan to base any fire blight measures on imported U.S. apple fruit on an assessment of risks within the meaning of Article 5.1 and Annex A, the imported commodity *must* pose a risk to plant life or health within Japan. That is, there must be a probability or likelihood of introduction of fire blight via that imported commodity.[8]

9. The scientific experts have confirmed that there is no scientific evidence that trade in apple fruit has ever spread fire blight. The experts also confirmed, through their answers to specific questions on the content of the scientific evidence, that there is no scientific evidence that *any* hypothetical pathway via the imported commodity would be completed because there is no evidence that *at least* one step in *each* such hypothetical pathway would be completed.[9] Thus, there is no probability or likelihood of introduction of fire blight via imported U.S. apple fruit, and such fruit do not pose a risk to plant life or health within Japan.

10. Japan cannot merely assert a theoretical possibility that each step and therefore the pathway as a whole would be completed (or, in the memorable words of Japan's first written submission, merely "envisage complex, intertwined potential pathways").[10] To do so would be to *presume* that imported apple fruit pose a phytosanitary risk without establishing a *probability* of introduction of fire blight via imported apple fruit.

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[6]*See* U.S. Answer to Second Additional Question from the Panel through its Fax of 20 January 2003 (paras. 47-48).

[7]*See, e.g.*, U.S. Answer to Additional Question 1 from the Panel (para. 2); U.S. Answer to Additional Question 6 from the Panel (paras. 12-13); U.S. Answer to Additional Question 7 from the Panel (para. 16).

[8]*See, e.g.*, U.S. Answer to Additional Question 8 from the Panel (paras. 18-19).

[9]*See, e.g.*, U.S. Answer to Additional Question 8 from the Panel (paras. 18 n.30, 20, 24).

[10]Japan's First Written Submission, para. 84 ("One can easily envisage complex, intertwined potential pathways from imported fruit to an orchard, *which have not been tested*.") (emphasis added).

11. The United States invites the Panel to examine the steps in Japan's hypothetical pathway (Exhibit JPN-34) and determine whether Japan has presented scientific evidence that each step in the pathway and therefore the pathway as a whole would be completed.[11] Specifically, the Panel should examine whether there is any evidence that a "mature, apparently healthy fruit" with epiphytic bacteria in the calyx (step one in Japan's pathway) may be infected by such bacteria – *the experts have said there is no such evidence.* The Panel should examine whether there is any evidence that "mature, apparently healthy, *but infected*" fruit (step three in Japan's pathway) can exist at all – *the experts have said there is no such evidence.*[12] The Panel should also compare these statements by the scientific experts on the content of the scientific evidence with the evidence Japan has identified.[13] Our review of the literature concords with that of the experts; *none* of the literature identified by Japan provides evidence that *either* of these steps in its hypothetical pathway can occur.[14] Thus, there is no scientific evidence that Japan's hypothetical

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[11]*See, e.g.*, U.S. Answer to Additional Question 16 from the Panel (para. 34); U.S. Answer to Additional Question 8 from the Panel (paras. 18, 20); U.S. Second Written Submission, paras. 9-15; U.S. Answer to Question 5 from the Panel; Exhibit USA-27 (U.S. comment on Exhibit JPN-14).

[12]Again, it follows that there is no scientific evidence supporting the succeeding steps in Japan's hypothetical pathway either – that is, "infected" fruit would not be placed in fields and there is no production or "dissemination of bacterial ooze."

[13]Identified to the Panel, not the experts, since Japan declined to put its hypothetical pathway as illustrated in Exhibit JPN-34 before the experts for their reaction. *See, e.g.*, U.S. Answer to Additional Question 8 from the Panel (paras. 22-23); U.S. Answer to Additional Question 16 from the Panel (para. 35).

[14]Viewed generously, in this proceeding, Japan has suggested three pieces of evidence relating to these two steps in its hypothetical pathway, but *none provides evidence that these steps would be completed.* The United States believes that Japan's failure to cite to any scientific evidence that specifically supports these two steps in its hypothetical pathway should be taken by the Panel as an admission that no such evidence exists.

First, Japan has suggested that van der Zwet *et al.* (1990) demonstrates "the presence of the bacteria in 'mature' apple fruit." Japan's Opening Statement at the Second Panel Meeting, para. 20; *see* Japan's Answer to Additional Question 13 from the Panel; Japan's Answer to Question 5 from the Panel; Japan's Second Written Submission, para. 60; Japan's First Written Submission, para. 203. The experts and the United States have explained that endophytic (internal) bacteria were *not* recovered from any "mature" fruit in this paper; in any event, this paper is neither evidence that epiphytic bacteria may *infect* a harvested, mature apple fruit *nor* evidence that there may *exist* any "mature, apparently healthy, but infected fruit."

Second, Japan has suggested that Thomson (1992) and Smith *et al.* (1986) demonstrate that "bacterial ooze [may be] exude[d] from discarded apple fruit in . . . fields." Japan's Opening Statement at the Second Panel Meeting, para. 21. As quoted by Japan, this evidence *on its face* relates to *cankers* and infected, *immature* fruit and thus does not provide any evidence relating to either of the two contested steps in Japan's hypothetical pathway.

Third, Japan has referenced Hale *et al.* (1987) as demonstrating "[r]ecovery of the bacteria . . . from apparently healthy fruit at the very late stage of development ('mature/immature')." Japan's Answer to Additional Question 13 from the Panel; *see* Japan's Answer to Question 5 from the Panel. This experiment did recover epiphytic bacteria from the calyxes of a small number of fruit harvested from a severely blighted orchard (but recovered *no* bacteria from any fruit harvested from *moderately* blighted orchards), but again the paper provides no evidence that epiphytic bacteria may infect a harvested, mature apple fruit or that there may exist any "mature, apparently healthy, but infected fruit."

pathway would be completed, and no probability or likelihood of introduction of fire blight to Japan via imported U.S. apple fruit.

12. Perhaps because Japan recognizes that the scientific experts consider that Japan's 1999 Pest Risk Assessment does *not* evaluate the likelihood or probability of introduction of fire blight via imported apple fruit,[15] Japan has now asserted the novel argument that "the 1996 Guidelines of the IPPC, which Japan could take into account at the time of 1999, do not require that each step of a pathway to be supported by scientific evidence." Thus, Japan appears to be attempting to excuse its failure to identify and evaluate scientific evidence relating to each step in its hypothetical pathway by claiming that this was not *necessary* as of 1999. Of course, this argument runs directly counter to Japan's earlier position in this dispute that the "procedure, main stages and main analytical items" of the 1996 and 2001 guidelines "are identical," that the 1999 Japanese Pest Risk Assessment was conducted "consistent with the relevant international guidelines" (that is, the 1996 guidelines), and that when the 2001 guidelines were issued "Japan re-examined the 1999 PRA, and reached a conclusion that the 1999 PRA is consistent with the 2001 Guidelines."[16] However, as the United States has previously argued,[17] Japan's obligation under Article 5.1 is to base its fire blight measures on imported apple fruit on an assessment of risks, that is, an evaluation of the likelihood or probability of introduction of fire blight via those imported fruit. The biology of *Erwinia amylovora* has not changed between 1996 and today; therefore, the same steps that are necessary today for an evaluation of the likelihood of introduction of fire blight via imported apple fruit were also necessary in 1999. There has *never* been scientific evidence that trade in apple fruit has spread fire blight, and there has *never* been scientific evidence that each step in any hypothetical pathway would be completed. Thus, the result is the same whether Japan was "taking into account" the 1996 or 2001 guidelines: there is no scientific evidence that the exported commodity (mature, and therefore symptomless, apple fruit) pose any phytosanitary risk to plant life or health within Japan.

13. Finally, the United States notes that Japan writes: "The pathway described in Exhibit JPN-14 or 34 as well as the 1999 PRA is *not just* hypothetical but reasonable, because the experts confirmed the presence of a real risk of dissemination, which means, by definition, that the pathway would be completed."[18] We are gratified to see Japan concede that its pathway is "hypothetical" but suggest that (for the reasons described) the experts did *not* confirm a "real risk of dissemination." The United States notes that Japan would not need to assert that the experts' answers mean, "by definition, that the pathway would be completed," had Japan simply presented its pathway to the experts. Japan did not because it preferred not to direct the experts' attention to the scientific evidence (Japan instead asked what measures would be "reasonable,"

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[15] *See, e.g.*, Response of Dr. Hale to Question 33 from the Panel.

[16] Japan's Answer to Question 11 from the Panel.

[17] *See* U.S. Answer to Question 45 from the Panel.

[18] Japan's Answer to Additional Question 9 from the Panel (emphasis added).

and certain experts responded with what they viewed as a "compromise"). But the experts *were* asked whether "the pathway would be completed" by the United States and by the Panel through questions relating to the scientific evidence for each step in Japan's hypothetical pathway. Those answers reveal that there is no such evidence, and therefore no probability, that Japan's hypothetical pathway would be completed.

3. Article 5.7

13. <u>To Japan</u>: In light of the US clarification that, in its view, the relevant scientific evidence has not changed and that the measures at issue have therefore been inconsistent with the SPS Agreement since its entry into force, could you please clarify further your arguments relating to
(a) the conditions under which you invoke article 5.7 that the measure(s) are provisional measure(s).
(b) the point in time as of which the measures have been "provisional" measures under Article 5.7 and
(c) how the conditions under that provision are, in your view, met, as of that time.

14. (a) In general, the United States would refer the Panel to its answer to additional question 14 for the U.S. view of the proper interpretation and application of Article 5.7 in this dispute. The United States does note Japan's argument that Japan's fire blight measures may be considered "provisional" because "only eight years have passed since the introduction of the current SPS measure." We recall the finding of the panel in *Japan – Varietals*, which noted that the "issue of varietal testing, and the question as to whether it can be scientifically justified, has thus been around for almost 30 years and, with respect to the specific products and pest at issue, for 20 years."[19] Here, the scientific experts have confirmed that the exported commodity consists of mature (and therefore symptomless) apple fruit. The mature, symptomless criteria have been referenced in the scientific literature for nearly 80 years (McLarty (1924)), and with increasing frequency throughout the last 30 (for example, Dueck (1974), Hale *et al.* (1987), Roberts *et al.* (1989), Thomson (1992), Hale *et al.* (1996), Roberts *et al.* (1998), Hale & Taylor (1999), Thomson (2000), and Roberts (2002)). The United States began its efforts to ease Japan's fire blight restrictions on U.S. apple fruit more than 20 years ago, continuously referencing the literature that mature, symptomless apple fruit do not transmit fire blight. Japan has nonetheless maintained fire blight measures on harvested, mature apple fruit and has made no effort to obtain scientific information relating to *any* of the steps in *any* hypothetical pathway that have not been demonstrated will be completed.[20]

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[19] *Japan – Varietals*, WT/DS76/R, para. 8.57 (panel report).

[20] For example, Roberts *et al.* (1998) noted that there was no scientific evidence of transfer or vectoring of epiphytic *E. amylovora* from fruit to susceptible hosts, and some affirmative evidence (Hale *et al.* (1996)) that this would *not* occur, but Japan made no effort to obtain relevant scientific information. Instead, Japan relied on its unsubstantiated conjecture that "mature, apparently healthy, but infected fruit" could *somehow* exist – again, without any evidence in support.

15. The United States believes that Japan has not even established that the requirements of the first sentence of Article 5.7 have been met.[21] However, should the Panel look beyond the first sentence of Article 5.7, then just as the *Japan – Varietals* panel found, *less than four years* after Japan's SPS Agreement obligations came into force, that Japan had not sought to obtain the information necessary for a more objective assessment of risk and to review its varietal testing requirement within a reasonable period of time, so too may this Panel conclude that, *more than eight years* after Japan's SPS Agreement obligations came into force, Japan has not sought to obtain the information necessary for a more objective assessment of risk and to review its fire blight measures within a reasonable period of time.

16. With respect to part (c) of the Panel's question, Japan provides a lengthy defense of its fire blight measures which it appears to assert is applicable under *either* Article 5.7 or Article 2.2. With respect to the eight pieces of "scientific evidence" identified by Japan, the United States would reiterate that Japan has not made an evaluation of the likelihood or probability that imported apple fruit would introduce fire blight to Japan; even a cursory review of Japan's "evidence" reveals that it does not relate to the steps in Japan's hypothetical pathway that have not been demonstrated would be completed.[22] Likewise, this "evidence" does not constitute "pertinent available information" within the meaning of the first sentence of Article 5.7 because it is, in certain instances, nothing more than speculative (items (1)-(6))[23] and, in others, not "pertinent" to the exported commodity (items (7)-(8)). Finally, with respect to Japan's assertion that the scientific experts found every one of Japan's fire blight measures to be "reasonable," we would refer the Panel to our previous comments on the experts' answers on the content of the scientific evidence.[24]

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[21]For example, Japan has not shown that there is insufficient scientific evidence to conclude that imported mature (and therefore symptomless) apple fruit pose no risk to plant life or health within Japan nor has Japan shown that its measures are based on available pertinent information. *See* U.S. Answer to Additional Question 14 from the Panel; U.S. Answer to Question 40 from the Panel.

[22]*See* U.S. Comment on Japan's Answer to Additional Question 9 from the Panel.

[23]For example, Japan asserts that one piece of "evidence" is the "[f]ailure in the export practice of Washington apple growers/shippers." However, the scientific experts have confirmed that there is no evidence that trade in apple fruit has spread fire blight, despite billions of fruit shipped over decades. Thus, Japan's "evidence" is irrelevant and nothing more than unfounded speculation.

[24]*See, e.g.*, U.S. Comment on Japan's Answer to Additional Question 9 from the Panel; U.S. Answer to Additional Question 8 from the Panel; U.S. Answer to Additional Question 16 from the Panel. In addition to previous U.S. comments on the experts' answers as to what might be "reasonable" as opposed to 'what is the scientific evidence relating to fire blight and apple fruit,' we note that Japan plainly misreports the experts' answers. For example, with regard to buffer zones, the experts did not "acknowledge[] that a buffer zone would lead to a higher level of security"; in fact, Dr. Hayward, consistent with his own written reply as well as those of Dr. Hale and Dr. Smith, specifically referenced Roberts (2002) as demonstrating that a buffer zone provides no additional phytosanitary security. Similarly, there was no "consensus" among the experts on chlorine treatment as Dr. Geider, Dr. Smith, and Dr. Hayward suggested that there was no scientific evidence of a need for chlorine treatment of exported fruit.

17. Despite Japan's protestations over the "ambiguity" of the "mature, symptomless" criteria (an argument it has not supported with *any* evidence), the United States notes that Japan's very answer reveals that it *relies on* the export of mature, symptomless fruit. Japan states that "[t]hese pieces of evidence demonstrate that a phytosanitary measure is needed to counter the 'risk' of dissemination arising from the ambiguity of the 'mature, symptomless' criteria and that the *accidental or intentional failure* on the part of American growers/shippers to ship apple fruit of the adequate quality." However, Japan's fire blight measures do not counter the unestablished and hypothetical risk of accidental or intentional shipment of immature, infected fruit. That is, even under the measures Japan has had in place for the past eight years, a U.S. grower or shipper complying with *all of* the Japanese fire blight measures might still *accidentally or intentionally* include an immature, infected fruit in a bin containing fruit intended for export to Japan – or in a container with any other product being exported to Japan – or even inoculate a harvested, mature fruit with *Erwinia amylovora*. Japan's fire blight measures would not protect against the risk of *that* occurring. However, as Japan has implicitly acknowledged by implementing the current measures, Japan is protected against hypothetical risks such as these precisely because the exported commodity *is* the exported commodity.[25]

4. Article 5.1

16. <u>To both parties</u>: Independently of your respective assessments of the likelihood of transmission of fire blight through apple fruit, could you please indicate in light of your respective pictorial exhibits of the pathway, whether you agree on the identification of the various steps that would need to be completed in order to establish the pathway?

18. Contrary to Japan's answer, the United States has reviewed the 1999 Japanese Pest Risk Analysis and has not been able to find a description of any hypothetical pathway that identifies the various steps that would need to be completed in order for imported apple fruit to serve as a pathway. As indicated in the U.S. answer to this question, the United States also does not believe that the parties are in agreement on the identification of the necessary steps because the hypothetical pathway identified by Japan in Exhibit JPN-34 identifies steps for which there is no

[25]There are economic and legal incentives in the United States to ensure that the exported commodity consists of the harvested, mature (and therefore symptomless) fruit. Growers have no economic incentive to pick, handle, and store infected, immature fruit because they are paid on the basis of the fruit that meet quality requirements set by contract (such as grading standards). More fundamentally, they know that failure to meet these quality standards could place their future business at risk. Shippers have no economic incentive to send infected, immature fruit abroad; in fact, they have an incentive to maintain strict quality control of their product (and not to incur unnecessary shipping costs) rather than not be paid by Japanese importers/distributors. Because growers/shippers have a collective interest in maintaining high quality standards, there is an additional layer of review by U.S. Federal-State inspectors to enforce grading and conditions standards.

scientific evidence, and the hypothetical pathway identified by Japan at the experts' session is not even based on a risk posed by the exported commodity.[26]

17. To both parties: Article 5.1 requires an assessment "as appropriate to the circumstances". Could you please comment on what are, in your view, the relevant circumstances to be taken into account in this instance under this provision?

19. Japan's answer does not alter the United States' view that Japan's assessment of risks is not "appropriate to the circumstances" because it does not evaluate the likelihood – *i.e.*, the probability – of entry, establishment, or spread of fire blight through imports of harvested, mature apple fruit.[27] With respect to Japan's claim in its answer that "[a]s of the time of the 1999 PRA, [the mature, symptomless criteria] was not an option which Japan could have considered," the United States suggests that these are criteria which Japan could have and must have considered. First, as the experts confirmed and Japan has conceded,[28] the exported commodity consists of mature (and therefore symptomless) apple fruit.[29] Thus, in order to impose a phytosanitary measure on the exported commodity, Japan was required to evaluate the likelihood of introduction of fire blight, and therefore the risk to plant life or health within Japan, posed by that commodity. By its own admission, it did not.[30] Second, the "mature, symptomless" criteria have long been known in the literature on fire blight and apple fruit and have long been suggested *not* to pose a risk of fire blight spread – as the 1999 Japanese PRA acknowledged in Section 1-1. Thus, Japan should have evaluated the risk of introduction of fire blight via fruit satisfying these criteria.[31]

6. Factual issues

23. To Japan: Please comment on the US reply to the Panel's question regarding the five items arising from the joint study which was conducted in 2000 (paras 72 - 76 of the US replies to the panel's questions).

20. In light of Japan's decision to fulminate about the United States' lack of "efforts to remove Japan's anxiety about the risk of introduction of fire blight" and the United States'

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[26] *See* U.S. Answer to Additional Question 17 from the Panel.

[27] *See* U.S. Answer to Additional Question 17 from the Panel.

[28] *See* Japan's Answer to Question 2 from the Panel.

[29] *See* U.S. Answer to Additional Question 3 from the Panel.

[30] *See* Japan's Answer to Question 59 from the Panel ("The difference in the level of risk between apple fruit and other [plant] parts or between host plants *is not stated* in Section 2-2-4-1 of the 1999 PRA.") (emphasis added).

[31] Japan again asserts that only the 1996 IPPC guidelines were available at the time of its 1999 Pest Risk Analysis; the reason for this repeated assertion is evident in Japan's answer to additional question 9 from the Panel. For the U.S. response, see U.S. Comment on Japan's Answer to Additional Question 9 from the Panel.

"simple negligence" in not maintaining "data on occurrence situation of the pest with which the importing country, Japan, has serious concern," the United States invites the Panel to consider (1) the lack of any scientific evidence that mature (and therefore symptomless) apple fruit – whether or not harvested from areas with fire blight – have transmitted or could serve as a pathway to introduce fire blight; (2) the United States' chronology of its extraordinary efforts to allay the "anxiety" felt by Japan (at least that related to the science of fire blight and apple fruit), including the United States' willingness to repeat, at significant time and expense, published experiments confirming key scientific evidence that internal bacteria are not recovered from harvested, mature fruit (*see* Roberts (2002)), merely so that Japanese scientists could see the results with their own eyes;[32] and (3) the U.S. reply to question 28 from the Panel explaining the irrelevance of these questions by Japan as well as Japan's awareness of the answers to those questions at the time they were asked.[33]

24. <u>To Japan</u>: Please describe any measures applied by Japan to ensure that travelers entering Japan, by air or sea, do not bring any plants or plant material which may be contaminated with *E. amylovora*.

21. The experts have stated unequivocally that the exported commodity consists of mature and therefore symptomless apple fruit because this is the only fruit that is commercially saleable. Therefore, there is no evidence that any importer would import infected, immature apple fruit. However, given a possible criminal penalty of "three years in prison with labor or of [a] 1,000,000 yen fine" for not complying with the existing Japanese fire blight measures, an importer would have to be nothing less than a saboteur not to be deterred from importing commercially useless fruit.[34] Indeed, if these criminal penalties are sufficient to deter an importer from importing fruit not meeting Japan's current fire blight measures, they are more than sufficient to deter an importer from importing fruit not meeting the mature, symptomless criteria. Thus, given the economic and legal incentives on *importers* to comply with Japan's current fire blight measures, the United States believes that such importers would insist that only foreign growers / shippers willing to export only mature, symptomless apple fruit would supply Japan. This would ensure that a mature (and therefore symptomless) requirement imposed by Japan would function effectively.

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[32]*See* Exhibit USA-1. We also note, in this regard, that Japanese authorities assured the United States that the repetition of these experiments in the presence of Japanese scientists would alleviate Japan's anxieties and lead to modification of the measures if as, occurred, they confirmed earlier results.

[33]*See* U.S. Answer to Question 28 from the Panel (paras. 72-76).

[34]Japan's answer refers to "tourists" and "foreign growers or shippers" but not importers. It would appear that the penal provisions described by Japan would also apply to importers. Under's Japan's Plant Protection Law, these penal provisions apply to "[a]ny person" who does not comply with Japan's fire blight measures in "[v]iolation of . . . Article 7 (Prohibition on import), paragraph 1," or in "[v]iolation of the conditions of permit under the provisions of Article 7, paragraph 3." *See* Plant Protection Law No. 151 (May 4, 1950), Article 39 (Penal Provisions) (Exhibit JPN–20).