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

Answers of the United States of America
to Additional Questions from the Panel

January 25, 2005

A. **To both parties:**

Q1. *Please list the information that is provided on export certificates and phytosanitary certificates accompanying exported apples from the U.S. to Japan.*

1. For the Panel's reference, the United States has attached the following documents: (1) a completed Export Form Certificate ("export certificate") issued for an apple shipment to Japan (Exhibit USA-25); (2) a clean copy of an export certificate (Exhibit USA-26); (3) a completed phytosanitary certificate issued for an apple shipment to Japan (Exhibit USA-27); and (4) a clean copy of a phytosanitary certificate (Exhibit USA-28).

2. Export certificates contain the following information: (1) the name of the shipper; (2) a detailed description of the shipment; (3) the name of the Authorized Certification Official ("ACO") issuing the certificate; and (4) a "Remarks" section, where the ACO will note that the exported apple fruit meet the criteria of the U.S. Export Apple Act ("Export Apple Act" or "the Act").

3. Phytosanitary certificates contain the following information: (1) the name of the receiving plant protection organization; (2) the place of certificate issue; (3) the inspection date; (4) any disinfection/disinfestation treatments; (5) the name and address of the exporter; (6) the name and address of the consignee; (7) a description of the commodity; (8) the grower lot number; (9) place of origin; (10) means of conveyance; (11) point of entry; (12) additional declarations (in this case, a note that the shipment was treated (methyl bromide and cold storage for codling moth and chlorine disinfection for *Erwinia amylovora*) pursuant to Japan's import regime for U.S. apple fruit); and (13) signature of the USDA authorized inspector.

(a) *What of the information is required to satisfy U.S. requirements for apple exports?*

4. Pursuant to the Export Apple Act, all apple fruit must be inspected and graded against the guidelines set out in the Act. Several quality criteria, such as absence of injury/damage, firmness, maturity, color and absence of internal defects must be met in order to satisfy apple fruit grading requirements. If, and only if, these criteria are met, then the ACO, who is an employee of the Federal or State government acting as an official USDA representative, will issue an export certificate for the apple fruit. Once the ACO has determined that the inspected

apple fruit meet the criteria of the Act, he or she will note this fact in the "Remarks" section of the export certificate. Apple fruit may not legally be exported without this accompanying document. In addition, the export certificate contains the name of the shipper, a detailed description of the shipment, and the name of the ACO.

5. As noted by the United States in its second written submission, the Export Apple Act and its grading standards are but one of numerous requirements and practices that assure that exported apple fruit are mature. For example, commercial considerations require that growers, packers and shippers, through their pre- and post-harvesting procedures, test apple fruit for maturity and subject fruit to visual and sensitive electronic scanning for grading and defects that would result in the culling of any hypothetically immature fruit.

(b) *What additional information is included in order to meet Japan's current (revised) requirements for apple imports?*

6. Unlike the export certificate, which addresses quality issues pursuant to the Export Apple Act, the information listed on a phytosanitary certificate addresses plant health concerns, and the specific requirements that must be met on the certificate are dictated by the importing country. In other words, unlike quality requirements under the Export Apple Act, the United States does not have a fixed, required form for a phytosanitary certificate. Rather, these certificates will vary on both commodity-by-commodity and country-by-country bases.

7. The attached phytosanitary certificate, used for an apple export to Japan pursuant to the import regime for apple fruit and countersigned by a MAFF inspector, documents the Japanese requirements of cold treatment and methyl bromide for codling moth as well as chlorine treatment for *Erwinia amylovora*.

8. It should also be noted that the United States is unaware of any changes to the information required on a phytosanitary certificate as a result of Japan's revisions to its measures.

B. **To the U.S.:**

Q2. *Are export certification requirements determined by the U.S. government or by commercial exporters?*

9. As noted in the answer to Question 1 above, standards for exported apple fruit are established by the U.S. Government and set out in the Export Apple Act and its regulations. The export certificate is a declaration, issued by an authorized government representative, that the exported apple fruit meets these U.S. Government standards.

(a) *How are export certificates granted and by whom (by U.S. government, by commercial exporters, or by independent certification entities)?*

10. Export certification requirements addressing quality/maturity standards for exported apple fruit are dictated by the Export Apple Act. Export certificates are only issued by an Authorized Certification Official, who must be an employee of the Federal or State government. This individual acts as an authorized representative of the United States Department of Agriculture. Export certificates may not be granted or issued by exporters or independent entities.

(b) *What conditions have to be satisfied in order to obtain such a certificate?*

11. An export certificate may only be issued if the sampled apple fruit meet the requirements of the Export Apple Act. One percent of the boxes in each shipment of apple fruit are selected for inspection. Fifty fruit from each of those boxes are then examined by the ACO. As noted in response to Question 1 above, the Act requires that exported fruit be inspected for, *e.g.*, injury/damage, firmness, maturity, color and internal defects.

Q3. *In Japan's response to the Panel's question No. 12 to the parties (11 November 2004), Japan indicates that U.S. apple orchards were inspected in 2001, however the U.S. chose not to export apples to Japan that year or in following years. Please explain the situation of U.S. apple exports to Japan.*

12. In order to export apple fruit to Japan, U.S. apple growers and shippers must satisfy each of the numerous requirements of Japan's import regime for U.S. apple fruit. Participation in this program was (and is) complicated, burdensome and costly, ultimately exposing the grower to the cost-prohibitive risk that a grower's harvest will be rejected or declared ineligible for export to Japan due to a failure to meet any one of Japan's scientifically unjustified requirements. First of all, under the program (both old and revised versions), apple growers from the vast majority of the United States are simply ineligible to ship to Japan. Only growers in the States of Washington and Oregon are even permitted to apply. Beyond that, such growers must register their acreage and pre-pay all costs for export orchard and buffer zone designation and inspections in the early spring (*i.e.*, they must commit to and pay for participation in the Japan export program well before the first apple blossom opens); must ensure that buffer zones free of fire blight host materials surround the acreage; and must submit to inspections for fire blight-freedom by U.S. and Japanese inspectors. Apple shippers must then fumigate facilities, disinfect eligible apples, and perform several other required post-harvest steps.

13. Each of these elements imposes significant costs on the growers and shippers. Against these costs, growers and shippers assume the risk that their entire investment will be lost as a result of a single fire blight detection that, given the nature of the program, could be on a plant that is not even within the grower's legal or physical control (*e.g.*, if he or she did not own the area serving as the buffer zone) or other orchard inspection requirements that also lack a basis in the scientific evidence. Japan's submissions in this proceeding appear to bear this concern and risk out, describing as they do a scenario where a single blight strike on a single tree would lead to disqualification of an entire orchard due to an inspector's unscientific hunch that the entire orchard would be severely or heavily blighted.

14. By the 2001 growing season, the vast majority of U.S. growers determined that the expected costs and risks associated with the Japanese import regime for U.S. apple fruit substantially outweighed any potential benefits of participating in the program.[1] In fact, in the 2001 growing season, there were only two orchards (of a single grower) registered for export to Japan. Also at this time, growers realized that, despite hopes that the results of the 2000 Joint-Study conducted by the United States Department of Agriculture and MAFF representatives would lead to an easing of Japan's fire blight restrictions, Japan refused to relax these cost-prohibitive, unscientific measures.[2] As noted at the second meeting with the Panel, as a result, the number of growers interested in exporting to Japan dwindled. Further, although it is true that MAFF inspectors visited orchards in 2001, it is essential to bear in mind that orchard inspections, while one of the most burdensome elements of Japan's import regime, are but a single part of the overall cost of exporting apple fruit to Japan, and it was (and is) the overall cost that makes the export of apples to Japan cost-prohibitive. For example, at growers' expense, Japanese inspectors would fly back to the United States for further inspections. In short, Japan's import regime had the predictable effect of stopping exports and protecting Japanese growers. U.S. apple growers and shippers no longer sought to export apple fruit to the Japanese market due to the inherent costs and risks involved.

Q4. *In Japan's comments on the experts' response, Japan notes (paragraph 12) that the United States had not provided information requested by Japan from the Foreign Notice of Non-Compliance" database.*

(a) *Could the United States please remind the Panel of the contents of this database?*

15. The Foreign Notification of Non-compliance database contains notifications received by USDA's Animal and Plant Health Inspection Service of shipment rejections for phytosanitary reasons. The database, which USDA is in the process of computerizing, contains a limited time period of electronic entries, but paper records of non-compliance dating back to the 1950s. Non-compliance reports contain the following information: name of the importer; name of the exporter; type of commodity; quantity of commodity; reason for notification; date of notification; date received; and date inspected.

16. In order to perform as thorough a search as possible in the limited time available, USDA

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[1]See Exhibit-USA-29 (attached), and Exhibit USA-1 from the original panel proceeding, in which the United States set out a chronology of its attempts to export apple fruit to Japan.

[2]The results of the 2000 Joint-Study are described in R.G. Roberts, *Evaluation of buffer zone size and inspection number reduction on phytosanitary risk associated with fire blight and export of mature apple fruit*, Acta Horticulturae 590 (2002) (Exhibit USA-9). The 2000 Study evaluated more than 30,900 fruit harvested from severely blighted trees. No *E. amylovora* was isolated from the harvested fruit.

officials searched the computerized records to ascertain whether U.S. apple shipments had ever been rejected due to discovery of fire blight, and queried Federal, State and industry representatives responsible for overseeing apple export programs as to whether they were aware of non-compliance reports or otherwise had knowledge of apple shipment rejections due to discovery of fire blight symptoms or immaturity. The computerized search and interviews confirmed that U.S. apple exports had not been rejected for these reasons.

17. As noted by the United States at the second meeting with the Panel, Japan has failed to present any evidence of the failure of U.S. quality controls for apple fruit and fire blight. Instead, Japan seeks for the United States to prove the negative, *i.e.*, that it does not in fact export a commodity that it simply doesn't export – immature apple fruit. The United States described in great detail in its written submissions the various pre- and post-harvest procedures in place which ensure that exported apple fruit is mature fruit.

(b) *Why has the information contained in the database not been made available to Japan and the Panel?*

18. The records contained in both the computerized and hard copy non-compliance reports contain confidential information such as the names of importers and exporters, and there are no procedures for publishing or releasing this information. Moreover, the hard copy records relate to individual exportations, and are not compiled in a manner such that they could be made available as anticipated by the question. It was for this reason that the United States performed the interviews and analysis in the manner that it did.

Q5. *Japan has stated that a second incident occurred in which codling moth was found in a shipment of apples to Chinese Taipei from the U.S. How can the U.S. ensure that through the operation of the U.S. Apple Export Act only mature symptomless apple fruit will be exported to Japan?*

19. Interception of codling moth in exported U.S. apple fruit is simply not pertinent to an evaluation of whether U.S. commercial quality controls for fire blight in apple fruit have ever failed, *i.e.*, whether the U.S. has ever shipped anything other than mature, symptomless apple fruit. The Appellate Body confirmed the original panel's finding of this fact in its report, noting that, in the original proceeding, "Japan indicated that the only evidence relating to the export control procedures of the United States that it submitted to the Panel related to a case of codling moth larvae found in apples shipped from the United States to the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu. In our view, there was no reason for the Panel to infer from this that apples other than mature, symptomless ones have ever been exported from the United States to Japan." In other words, Japan's evidence regarding a detection of codling moth in exports to Taiwan does not provide any evidence concerning export or quality controls on

apple fruit and fire blight, and the scientific evidence thereof.[3] As was the case in the original proceeding, Japan has again failed to present any evidence of the failure of U.S. quality controls as they relate to fire blight and apple fruit in this compliance proceeding or, for that matter, that a failure of maturity or fire blight-related quality controls anywhere in the world has ever been responsible for the introduction of fire blight.[4]

20. Fire blight and codling moth have very little in common. Fire blight is a plant disease, and the scientific evidence demonstrates that mature apple fruit are not infected; codling moth is a plant pest, known to employ mature fruit as a potential pathway. Codling moth is an internal feeder of apple fruit, and its presence in a fruit is much more difficult to ascertain than fire blight – the exterior of a codling moth infested fruit, for example, might have only a pin-prick sized hole, whereas, a hypothetically infected apple fruit would "fail to develop fully, turning brown to black, shrivel[], and becom[e] mummified."[5] Thus, the discovery of codling moth in apple fruit exported to Taiwan is irrelevant to the question of U.S. quality controls vis-a-vis fire blight.

21. The Export Apple Act, in conjunction with overarching commercial considerations, ensures that only mature apple fruit are exported from the United States. Apple fruit that fail to meet the Act's requirements will not be issued an export certificate, and may not legally be exported. As noted in the U.S. answers to Panel Questions 1 and 2(b) above, exported fruit must meet the Act's criteria concerning, among other things, maturity, color and firmness. Further, commercial considerations operate to prevent the exportation of immature fruit (*i.e.*, the hypothetical shipment of immature apple fruit would be extremely damaging to U.S. export interests and the reputations of individual growers and inspectors, as well as U.S. apple fruit on the global marketplace). When coupled with the requirements of the Export Apple Act, these considerations create a scenario where we simply do not encounter the export of immature apple fruit.

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[3]Further, the United States notes that Taiwan does not impose fumigation requirements for codling moth like those in place for Japan.

[4]To the contrary, in the original panel proceeding, the panel noted that the experts categorically stated that there was no evidence to suggest that mature apple fruit had ever been the means of introduction (entry, establishment and spread) of fire blight into an area free of the disease." Panel Report, *Japan – Measures Affecting the Importation of Apples,* WT/DS245/R, 15 July 2003 ("Panel Report"), para. 8.149. *See also* R.G. Roberts, *et al*. *The potential for spread of* Erwinia amylovora *and fire blight*, Crop Protection 17: 19-28, 20-24, at 22 (1998) (noting that dissemination of *E. amylovora* by apple fruit and subsequent establishment of new infections has never been demonstrated).

[5]*See* Panel Report, para. 2.1.