

November 23, 2004

Mr. Michael Cartland  
Chairman

*Japan - Measures Affecting the Importation of Apples (WT/DS245):*

*Recourse by the United States to Article 21.5 of the DSU*

World Trade Organization

Centre William Rappard

154 Rue de Lausanne

1211 Geneva 21

Dear Mr. Chairman:

Pursuant to the Panel's letter of 16 November 2004, the United States is pleased to offer the following comments on the Panel's proposed questions to the scientific experts. Where the United States is suggesting changes in the language of the question, it has reprinted the question with any additional language in redline (and double underlined), and any deletions in ~~strikeout~~.

(1) In its draft questions, the Panel has several times requested that the experts identify the "likelihood" that a particular event or risk might occur. The United States notes that the role of the experts should be limited to an analysis of the scientific evidence at issue in this dispute. It is Japan's obligation under Article 5.1 of the SPS Agreement to base its measures on a proper risk assessment, and it is not the experts' role to conduct or provide a risk assessment (which is defined in the SPS Agreement as "the evaluation of the *likelihood* of" certain events (emphasis added)). Therefore, the United States suggests that the experts be asked if they are aware of any scientific evidence or studies demonstrating that a certain event would occur rather than the "likelihood" that an event may occur in Questions 3, 23 and 27. Similarly, the United States suggests that the experts be explicitly asked to relate their answers to scientific evidence, in keeping with their role in this proceeding, in Questions 10, 12 and 16.

(2) In addition, the United States requests that in each instance in which the experts are asked to discuss available scientific evidence, literature or developments they also be prompted to provide citations to the evidence or literature on which they base their answers. (Questions 3, 4, 8, 10, 12, 14, 16, 18, 23, 27).

(3) In Question 3, the United States requests that the Panel direct the experts to the U.S. Comments on Japan's Answer to Panel Question 8, in which the United States discusses the relevance of Japan's new Azegami II study as well as the concept of differentiated versus undifferentiated abscission zones. Further, as discussed above, we request that the reference to "likelihood" be revised, and that the experts be prompted to provide citations:

With respect to the Azegami study (2005), ~~what is the likelihood~~ are you aware of any

scientific evidence or studies demonstrating that the abscission layer of apple would be damaged or cut under natural conditions? What is the likelihood of "risk of latent infection" of mature apple fruit? Does the scientific evidence demonstrate the existence of latent infection occurring in mature apple fruit under natural conditions? Please provide citations to the evidence and literature on which you base your answers. In your reply, please address paras 17-21 of US oral statement, paras. 19-21 of US second submission (including US Exhibit 21), US and Japan's replies to Question 8 of the Panel, and US reply to Question 3 of Japan and US Comments on Japan's Answer to Panel Question 8. Please also address New Zealand's comments on post-maturity infection (para. 47 of New Zealand third party submission and replies to Questions 1 and 2 from Japan ).

(4) In Question 6, the current question directs the experts to Roberts (1989) and Dueck (1974). The United States would request that Roberts (2002) be included as a study pertinent to this debate. Further, the United States suggests that the experts be directed to paragraph 27 of the U.S. second submission in addition to the U.S. reply to Question 5 of Japan:

Is there a clear physiological distinction between the core and the cortex of an apple? Please comment on Japan's arguments that previous studies regarding the existence of *E. amylovora* inside of apple fruit relied on examinations only of the core of apples and not of the cortex. Please comment on the relevance, if any, of the studies by Roberts (1989), Roberts (2002) and Dueck (1974) in this regard. (see US reply to Question 5 of Japan and US Second Submission at para. 27).

(5) In Question 9, the current question directs the experts to Japan's Reply to Question 23 of the Panel. The United States suggests that the experts also be directed to the U.S. Comments on Japan's Answer to Panel Question 23, in which the United States discusses the relevance of the Norelli study:

In the September 2004 PRA, Section 2-3-1-1(2)(A) indicates that "...the physiological activity of the bacteria inside the trees does not appear to be declining during the seasons (sic)". However, the section then makes reference to Norelli et al. (2001) which mentions that "... the bacterial activity is still recognizable during the late growing season". That bacteria can still be found does not appear to confirm a statement of no decline in bacterial activity. Please explain. (see Japan's reply to Question 23 of the Panel and US Comments on Japan's Answer to Question 23).

(6) In Question 10, the current question requests that the experts "Please comment on the relevance of a border zone regarding the fire blight status of an orchard (or sub-orchard)." The United States suggests that the question be revised to read "Please comment on any scientific evidence or literature relating to border zones and their effect on the fire blight status of an orchard (or sub-orchard)." Further, as discussed above, we request that the experts be prompted to provide citations:

Japan contends that the fire blight freedom requirement is applicable not necessarily at the orchard level but at a sub-orchard (production site) level as long as this sub-unit is surrounded by a fire blight-free border zone (para. 43 of Japan's second submission and the Operational Criteria). How is an orchard defined for export purposes? Is this based on international agreement(s) or common practice, or does it differ for different fruits, and/or different countries? Please comment on any scientific evidence or literature relating to the relevance of border zones and their effect on regarding the fire blight status of an orchard (or sub-orchard). Does it depend on the "varieties" of apple trees in terms of their susceptibility to fire blight? Please provide citations to the evidence and literature on which you base your answers. (see US and Japan's replies to Question 5 of the Panel).

(7) In Question 12, the current question asks "Is there a commonly accepted definition of what is a 'blighted' orchard . . .?" The United States suggests that this question be revised to read "Is there a commonly accepted definition in the scientific literature of what is a 'blighted' orchard . . .?" Further, as discussed above, we request that the experts be prompted to provide citations:

Is there a commonly accepted definition in the scientific literature of what is a "blighted" orchard with respect to fire blight? A "severely blighted" orchard? Please provide citations to the evidence and literature on which you base your answers. (see Japan's reply to Question 14 of the Panel).

(8) In Question 13, the United States suggests revising the question as follows to more precisely address the relevant question before the Panel:

Does the available scientific evidence demonstrate that imports of mature apple fruit from severely blighted orchards will complete a pathway for introduction of fire blight into an orchard? contribute to the risk of spread of fire blight

(9) In Question 16, the United States suggests revising the second sentence of the question to read "Is there any scientific evidence demonstrating that contaminated fruit boxes would infect/infest apple fruit that is shipped in these boxes?" Further, as discussed above, we request that the experts be prompted to provide citations:

In the 2004 PRA (p. 19), Japan makes reference to potential contamination via fruit boxes. Is there any scientific evidence demonstrating that contaminated fruit boxes may would infect/infest apple fruit that is shipped in these boxes? Please comment in light of your responses to Question 31 from the Original Panel proceeding. Please provide citations to the evidence and literature on which you base your answers. (see also US and Japan's replies to Question 10 of the Panel).

(10) In Question 20, the United States requests that the experts also be directed to the U.S. Comments on Japan's Answer to Panel Questions 18, in which the United States discusses the Tsukamoto green bottle fly vector study:

Do you concur with Japan's contention that the conditions to which the flies were subjected to in the Tsukamoto study (2005b) relate to "plausible ecological conditions" (see para. 33 of [Japan's second written submission](#), and [Japan's reply to Question 18 of the Panel and US Comments on Japan's Answer to Panel Question 18](#)). Please explain.

(11) In [Question 21](#), the United States requests that the experts also be directed to the U.S. Comments on Japan's Answer to Panel Questions 19, in which the United States discusses the Tsukamoto green bottle fly vector study:

Please comment on the probability estimates for long-distance dissemination of *E. amylovora* presented in Kimura (2005) (Exhibit JPN-10). In your reply, please also comment on paras. 26-32 of US second submission, paras. 56-62 of New Zealand's third party submission, including the reference to Taylor *et al* (2003), ~~as well as on the US and Japan's replies to Question 20 of the Panel and the US Comments on Japan's Answer to Panel Question 19.~~

(12) In [Question 23](#), as discussed above, we request that the reference to "likelihood" be revised, and that the experts be prompted to provide citations:

~~Please comment on the likelihood of~~ Is there any scientific evidence demonstrating that crows or jungle crows ~~serv~~serve as vectors for the transmission of *E. amylovora* (please see page 25 of Japan's September 2004 PRA and para. 27 of US oral statement). Please provide citations to the evidence and literature on which you base your answers.

(13) In [Question 27](#), as discussed above, we request that the reference to "likelihood" be revised, and that the experts be prompted to provide citations:

If less than 5% of a shipment of apple fruit is damaged, and such a shipment may contain ~~infected/infested apples, please comment on the likelihood~~ is there any scientific evidence that this would result in apple fruit from that shipment providing a pathway for the introduction, establishment and spread of fire blight in Japan (pages 22-23 of [September 2004 PRA](#)). Please provide citations to the evidence and literature on which you base your answers.

We thank the Panel for this opportunity to comment on the Panel's proposed questions to the technical/scientific experts. A copy of these comments is being provided directly to Japan.

Sincerely,

Legal Advisor

cc: H.E. Mr. Shotaro Oshima, Permanent Mission of Japan