***** CHECK AGAINST DELIVERY *****

STATEMENT OF THE UNITED STATES
AT THE ORAL HEARING OF THE APPELLATE BODY

United States – Measures Affecting the Importation of Apples
(AB-2003-4)

October 13, 2003

1. Mr. Chairman and members of the Division, the United States appreciates this opportunity to present its views at this hearing. I will speak briefly, and limit myself to highlighting several of the arguments set forth in our written submissions and addressing certain claims in Japan's appellee submission. I will be glad to address any specific points with the Division thereafter.

2. Mr. Chairman, while the issues before the Appellate Body in this proceeding are necessarily limited to issues of law and legal interpretation, I would nevertheless like to begin today by focusing on an essential fact – that mature apples have never been found to transmit fire blight, nor is there any evidence that they could. In fact, there is substantial evidence to the contrary.

3. This fact ultimately rendered the Panel's decision a simple one. While it was obviously necessary for the Panel to correctly enunciate the legal standards at issue in this dispute – which it did – the facts of this dispute by and large did not require the Panel to explore new legal ground, but merely to apply the standards found in various SPS Agreement provisions, as previously clarified by the Appellate Body and panels.

4. Confronted with simple, unfavorable facts, Japan has gone to great lengths on appeal to argue for untenable SPS Agreement interpretations that would allow it to maintain its measure in the absence of any scientific evidence, and to reargue the facts in the guise of claimed legal error. However, the only way for Japan to prevail in the face of the facts of this dispute would be to find that the SPS Agreement imposes no obligations at all. The Appellate Body must reject this.

Article 2.2

5. In connection with Article 2.2, the Appellate Body has previously clarified that, for a measure "not to be maintained without sufficient scientific evidence," there must be a rational relationship between the measure and the scientific evidence. This is precisely the standard the Panel enunciated and applied. And, as the Panel found, the evidence indicates that mature apple fruit has not and does not transmit fire blight. It is susceptible neither to infection nor internal contamination, and will experience external contamination only in rare instances, and even then not in numbers capable of transmitting fire blight. Further, in the unlikely event such bacteria were to survive packing, handling, and shipping, and be imported into Japan, there is no vector for any hypothetically surviving bacteria to be conveyed to a host plant.

6. There is, very simply, no rational relationship between this evidence and Japan's measure. If mature fruit do not transmit fire blight, then it is not rational to maintain multiple inspections, a buffer zone and the various elements of Japan's measure to protect against non-existent or hypothetical risks associated with exports of mature fruit.

7. Japan seeks to avoid this simple, but clear, result by continuing to argue that the Panel erred in its factual finding that mature apple fruit has not and does not transmit fire blight. It argues that the Panel failed to undertake its fact-finding in a manner consistent with DSU Article 11, based not on any egregious error in fact-finding by the Panel, but on the Panel's failure to accord the same weight as Japan to the van der Zwet (1990) study and to the trans-oceanic occurrence of fire blight transmission. The Panel fully explained why it, and the experts, agreed with U.S. arguments on the meaning and significance of the van der Zwet study. The Panel also fully considered that the examples of trans-oceanic transmission to which Japan refers lacked significance, particularly in light of scientific studies on the specific questions of whether mature fruit can be infected by or harbor *E. amylovora* bacteria, and given the absence of any evidence that apple fruit were involved. Japan simply wishes to reweigh evidence the Panel correctly and appropriately considered, in a manner fully consistent with DSU Article 11.

8. Japan similarly attempts to reverse the Panel's fact-finding by positing formulations on the burden of proof and the Article 2.2 obligations that have no basis in the text of the SPS Agreement, and which would, if accepted, render the Agreement a nullity. The Appellate Body correctly rejected in *Salmon* the notion that a panel must accept a Member's characterization of the facts. Likewise, there is no basis for Japan's contention that a complaining party can only meet its burden with respect to an Article 2.2 breach by demonstrating that the scientific record contains no unresolved "uncertainty," a task which Japan itself describes as "impossible." Rather, Article 2.2 requires that the complaining party establish a *prima facie* case that there is not a rational relationship between the measure and the scientific evidence. Again, the answer to

that question in this dispute is straightforward, and flows from the basic fact that mature fruit do not transmit fire blight.

9. Further, Japan is incorrect when it appears to suggest that it met its obligation under Article 2.2 because it completed a valid risk assessment. Apart from the fact that its risk assessment does not meet the requirements of Article 5.1, Japan is incorrect that performing a risk assessment is sufficient to meet its Article 2.2 obligation not to maintain its measure without sufficient scientific evidence. The Appellate Body pointed out in *Hormones* that Article 5.1 may be viewed as a specific application of the *basic obligations* contained in Article 2.2,[1] and noted in *Japan Varietals* that the scope of Article 2.2 is not to be limited "in favor of" Article 5.1.[2] In response to similar arguments by Japan, the Appellate Body stated in *Japan Varietals*, "There is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the *SPS Agreement*, that requires or sanctions such limitation of the scope of Article 2.2."[3]

10. The Panel's findings with regard to Article 2.2 flow from a proper application of the legal standard in Article 2.2, and from the straightforward fact that mature apple fruit do not transmit fire blight. The findings should be upheld.

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[1] *Hormones* Appellate Body Report, para. 180.

[2] *Japan Varietals* Appellate Body Report, para. 82.

[3] *Japan Varietals* Appellate Body Report, para. 82.

Article 5.7

11. The Panel likewise correctly found that Japan had failed to meet the requirements of the first clause of the first sentence of Article 5.7. On appeal, Japan resurrects its argument at the interim review stage that the Panel had not properly considered that evidence might be "insufficient" if evidence relating to "segments of issues" is inadequate. However, the Panel emphasized in the interim review section of its report that if such specific issues were relevant, then there would not be sufficient "relevant scientific evidence." The Panel's approach more than accommodates Japan's concerns. Japan simply is dissatisfied with the weight accorded to the evidence it cites.

12. In addition, Japan is incorrect in its belief that it can evaluate the sufficiency of scientific evidence under Article 5.7 and elsewhere, based on an examination of "uncertainties" rather than "scientific evidence." The SPS Agreement speaks of scientific evidence, not of "uncertainty." If, as here, there is voluminous evidence on fire blight disease and its transmission, and, in particular, on the absence of transmission risks associated with mature apples, there is more than sufficient evidence to assess the risk posed from mature apples, and the requirement of the first sentence of Article 5.7 will therefore not be met. Japan's citation to alleged "uncertainties" – including speculation about risks associated with removal of its measures – do not change this analysis. The Panel's Article 5.7 finding was correct, and the Appellate Body should uphold it.

Article 5.1

13. Likewise, the Panel correctly concluded that Japan's risk assessment failed to meet the requirements of Article 5.1. Japan's risk assessment was deficient in numerous respects, including, as the Panel found, that it failed to address the risks associated with the exported commodity, apple fruit, that it failed to assess the probability, and thus likelihood, of entry, establishment and spread of fire blight, and that it failed to evaluate risk according to the phytosanitary measures which might be applied, since the risk assessment only sought to justify existing measures.

14. Regarding Japan's failure to address risks associated with the exported commodity, the Panel agreed with Japan in the interim review section of the report that a risk assessment may consider risks associated with multiple hosts of a bacteria. However, the Panel also correctly concluded that if the risk assessment is to serve as the basis for a measure on a product, the risk assessment must address the risks associated with that product. Japan failed to do so.

15. Japan's arguments on whether it addressed "probabilities," rather than "possibilities," of fire blight transmission are based on the Panel's alleged disregard of DSU Article 11's requirement of an "objective assessment" in considering Japan's explanations to the Panel, a claim Japan failed to notify in its notice of appeal. Furthermore, Japan's arguments fail to rise to the level of a breach of Article 11; it again is merely taking issue with how the Panel weighed the facts.

16. Finally, Japan does not even dispute that it failed to consider alternatives to its existing measure in its risk assessment, arguing instead that it did not have to. The Panel was correct to conclude, as has the Appellate Body in previous disputes, that Japan was required to do so. The Panel was also correct to conclude that Japan breached Article 5.1, and the Appellate Body should uphold this finding as well.

Immature Fruit

17. Mr. Chairman, I began this presentation by highlighting the central fact in this case – that mature apple fruit have never been found to transmit fire blight, nor is there any evidence that they could. I would now like to focus on another fact that should be borne in mind: as Japan's argumentation in this dispute makes clear, Japan has never accepted the first fact.

18. For over a decade, and throughout this dispute, Japan has insisted that mature, "apparently healthy" fruit could nevertheless harbor internal and external populations of bacteria which could transmit fire blight. This second fact explains the nature of our bilateral discussions with Japan, and the U.S. focus in this dispute on mature fruit. Japan's measures have been justified to the United States as directed against the fruit the U.S. exports to Japan – commercial grade, mature fruit. At the consultations, the United States followed up on the first question in its written Article 5.8 request (Exhibit US-24) with question 3 of Exhibit US-7, specifically asking Japan to identify the risks to which each of its requirements responded. In its responses, Japan did not assert that it considered immature fruit a risk or that control failures might result in

importation of immature fruit.

19. Japan largely maintained this posture in the proceedings before the Panel. Indeed, in Exhibit JPN-34, where Japan sets out the alleged pathway for transmission of fire blight to Japan, the first step involves a "mature, apparently healthy" apple. The word "immature" does not appear, let alone a description of a mechanism by which an immature fruit might be exported. Nor has Japan elsewhere provided any evidence that it would be exported.

20. Nor are the measures themselves directed at immature fruit or a risk of control failures relating to such fruit, as the United States explained in paragraph 17 of its submission of January 31, 2003, commenting on Japan's answers to questions. To the contrary, the absence in these measures of elements relating either to potential failures of control procedures generally or to immature fruit specifically highlight the fact that Japan has not considered this pathway to pose a risk of fire blight introduction. This is not surprising, given the commercial and legal incentives not to ship immature fruit, and the numerous steps taken in the United States, as outlined in Exhibit US-25, which ensure that only commercial grade, mature apples are sold.

21. Indeed, Japan's detailed requirements for apple imports in Exhibit JPN-23 include none relating to screening for immature fruit. The only such requirement is found in the U.S. export work plan for apples, a U.S. document approved by Japan, and which is provided in Exhibit JPN-4. There, under paragraph XII.1 on page 5, it is stated, "The apples will be inspected such that fruit shall meet U.S. Standards for Export." These grade standards include the requirement that

the fruit be mature. This has been sufficient for Japan.

22. As Dr. Hale explained at the experts session, it would be "ridiculous" to suggest that countries would export anything but the highest quality (and thus obviously mature) apples.[4] In light of all of these considerations, it should have come as no surprise to any party to this proceeding that the United States directed its argumentation to the exported commodity, mature fruit, which Japan had consistently argued posed a fire blight risk.

23. Mr. Chairman, we have laid out in our other appellant submission why, as a matter of law, the Panel erred in extending its analysis to immature fruit, but I wanted first to explain the background for this issue and for the way in which the United States structured its arguments before the Panel.

24. When the United States referred to apple fruit in its panel request, there could have been no confusion that it intended to challenge Japan's measures on the product the United States exports, mature apples. Nevertheless, even if this reference were, through an implausible assumption, read to suggest that the United States originally wanted to export immature apples and therefore included them in the scope of the dispute, the argumentation in this dispute precluded the Panel from issuing findings and conclusions with respect to that product.

[4] Panel Report, para. 271.

25. The United States clearly addressed its claims to mature apples, as Japan implicitly acknowledges when its states at paragraph 7 of its appellee submission that "the United States made no claim regarding infected apples." If a claim is not made with respect to a product, a Panel cannot make findings with respect to such a non-existent claim without improperly assuming the role of advocate. Japan states that the United States confuses the fact-finding authority of the Panel with the requirement of a *prima facie* case,[5] but this ignores the more fundamental point that there is no *prima facie* case required with respect to a claim not made, and a Panel may not make a *prima facie* case on behalf of either party. The United States made no claim that any Japanese measure on immature apples – let alone the measure in question, which does not relate to immature apples – is inconsistent with Japan's SPS Agreement obligations. This is a legal, not a factual, claim.

26. In this connection, it is worth recalling the circumstances in *Japan Varietals*, in which the Appellate Body found at paragraphs 125-126 not simply that the panel had engaged in fact-finding on behalf of the United States as complaining party, but had made findings with respect to a *claim* the United States did not make. While the facts underlying that panel's Article 5.6 finding were apparent from the record, it was the failure of the United States to specifically *argue* that those facts constituted a breach of Article 5.6 that led the Appellate Body to reverse the panel. In other words, because the United States had not made the claim in question, the panel could not make the finding.

[5] Appellee Submission of Japan, para 8.

27. Yet Japan now suggests that, so long as a panel's finding does not favor the complaining party, that panel may make findings on claims not made. This self-serving and one-sided position is not plausible. If a claim is not made, there can be no finding with respect to that claim, on behalf of either party. Panels have had no trouble applying this principle, and parties to all previous disputes have justifiably understood and relied on the fact that if a claim is not pursued, they need not offer argumentation.

28. Japan argues that, for a complaining party to prevail with respect to an Article 2.2 claim, it "must establish that there is not sufficient scientific evidence for *any* of the perceived risks underlying the measure, or that the measure is otherwise not supported by sufficient scientific evidence."[6] Leaving aside Japan's otherwise erroneous formulation of the burden under Article 2.2, and Japan's dubious assertion that its measure is in fact directed at risks associated with immature fruit, this statement is simply incorrect. A complaining Member may pursue a claim with respect to any product it wishes, and this defines the scope of the panel's findings, both in the sense of the findings the panel may make, and the significance of the findings.

29. For example, assume that an importing Member's measure is directed at risks associated with importation of antelopes and iguanas, and that another Member only exports, and only wishes to export, antelopes. Nothing in the DSU, the SPS Agreement, or the WTO Agreement requires the exporting Member to pursue a claim with respect to iguanas. If the exporting

[6] Appellee Submission of Japan, para. 9.

Member prevails with respect to its claims on antelope exports, the measure will be WTO-inconsistent as applied to that product. This would be no less true if the exporting Member's panel request originally specified antelopes *and* iguanas, but that Member only pursued claims with respect to antelopes. The panel could only issue findings with respect to the measure as applied to antelopes.

30. As Japan itself notes, "the scope of the dispute is delineated by the measure in question, not by the specific kinds of risks underlying the measure."[7] Japan should also have noted the Appellate Body's statement in *Salmon* that the SPS measure at issue in that dispute could "*only* be the measure which is *actually* applied to the product at issue."[8] The product at issue here is defined not simply by the panel request, but by the claims pursued, and those were limited to mature apples.

31. There are other problems with Japan's suggestion that a complaining party must address all perceived risks underlying a measure. For example, it assumes that, at the time the complaining Member drafts its panel request, it is aware of all the risks a responding Member "perceives," which itself assumes the responding Member has disclosed them. Alternatively, if a responding Member may raise previously undiscussed risks over the course of a dispute, this would invite opportunistic, post-hoc argumentation. In this connection, Japan states that it

[7] Appellee Submission of Japan, para. 4.

[8] *Salmon* Appellate Body Report, para. 103 (underlining added).

"consistently asserted" that its measure targets risks including control failures.[9] However, a review of the cited portions of Japan's submissions indicates that Japan first raised the issue in passing in the "facts" section of its first submission, in explaining its position (ultimately rejected) that the mature, symptomless criteria are ambiguous, non-objective and not reliable.[10] Japan did not raise the issue in its legal arguments, where it detailed how it had assessed risks in accordance with the SPS Agreement.

32. In addition, the remaining references in Japan's appellee submission largely cite to information Japan raised, for the first time in its comments on the experts' answers – that is, after the second submission – relating to alleged control failures involving *codling moth larva,* and not *immature fruit*. Again, Japan failed to identify control risks or immature fruit in either its risk assessment or its pathway, and its measures do not address these issues.

33. In the end, however, issues relating to Japan's shifting justifications and failure to present evidence and argumentation related to control failures for immature fruit are not relevant to the legal error that the Panel committed, which was to undertake an analysis of claims not made. As requested in the U.S. appellant submission, the Appellate Body should find that the Panel erred in offering reasoning and conclusions relating to immature fruit.

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[9] Appellee Submission of Japan, para. 27.

[10] Appellee Submission of Japan, paras. 115 & 117.

Conclusion

34. Mr. Chairman, I have not addressed in this statement Japan's arguments concerning "new risks" and "new risk assessments" which suggest that Japan may intend not to implement should it fail to prevail in this dispute. I would only emphasize again the basic fact that the exported commodity, mature apple fruit, does not transmit fire blight. This was true ten years ago, and it is true now. It was apparent from the literature ten years ago, and it is even more apparent now. There has never been evidence that the billions of apple fruit traded have ever been responsible for fire blight transmission, even when that trade has been undertaken with no controls whatsoever. Japan can no doubt craft new *theories* purporting to justify its continued application of burdensome and prohibitively expensive restrictions on apple exports, but the SPS Agreement requires scientific evidence, not speculation.

35. We have engaged in good faith with Japan for over ten years with respect to its fire blight requirements, understanding that if Japan were satisfied that the exported product, mature apples, does not pose a risk of fire blight transmission, Japan would at least relax its completely unwarranted measures. Indeed, in agreeing in 1999 that it would relax its restrictions if the joint U.S.-Japan research study confirmed earlier experimental results, Japan further acknowledged this point. The agreed-upon research protocol included neither an internal evaluation of immature fruit nor an examination of the possibility that immature fruit might accidentally or intentionally be included in shipments. Yet Japan indicated that it was willing on the basis of the experimental results to relax its restrictions. In other words, Japan was satisfied that U.S. control

procedures would not permit immature fruit to be exported to Japan. It recognized that the relevant product was the product exported, mature fruit.

36. We continue to hope that, whatever the outcome of this dispute, Japan will in good faith conform its fire blight measure to the scientific evidence and its obligations under the SPS Agreement. For the reasons set forth in the Panel Report, that measure is inconsistent with Japan's obligations under SPS Agreement Articles 2.2 and 5.1, and Japan has not met the requirements of Article 5.7. For the reasons set forth in our statement today and our written submissions, we respectfully request that the Appellate Body reject Japan's arguments that the Panel's findings are in error.