Japan – Measures Affecting the Importation of Apples

(WT/DS245)

Opening Statement of the United States

at the Second Substantive Meeting of the Panel

January 16, 2003

1. Mr. Chairman and members of the Panel, my name is Juan Millán, and on behalf of the United States of America, I would like to thank you once again for agreeing to assist in this dispute. We found the experts' answers to the Panel's questions and the session with the experts on Monday and Tuesday to be very useful in confirming the content of the scientific evidence relevant to this dispute.

2. The views of the experts on the scientific evidence were clear and unequivocal and confirm the U.S. presentation on all key points relating to the science of fire blight transmission and the lack of any role for apple fruit. Let me summarize those key points:

- First, the experts unanimously answered that there is *no scientific evidence* that mature apple fruit have ever been the means of introducing fire blight into a new area.

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

- Third, the experts unanimously stated that there is *no scientific evidence* that mature apple fruit will harbor internal populations of fire blight bacteria (Dr. Smith added at the conclusion of his answer that the experts found any suggestion in the literature to the contrary unconvincing).

- Fourth, the experts unanimously stated that there is *no scientific evidence* that any epiphytic calyx populations can infect a mature apple fruit. (I should note that the experts also unanimously confirmed that these epiphytic calyx populations will only rarely occur when fruit are harvested from orchards with severe fire blight and with nearby active sources of inoculum.)

- Fifth, the experts unanimously stated that there is *no scientific evidence* that any hypothetically surviving epiphytic calyx populations can be vectored from a discarded apple fruit to a susceptible host.

- Finally, in light of the lack of *any* affirmative scientific evidence on these key points and the scientific evidence that fire blight spread occurs through other means, the experts unanimously evaluated the risk of introducing fire blight and *Erwinia amylovora* to an importing country via imported mature apple fruit as "negligible" since, as Drs. Geider, Smith, and Hale emphasized at various times, scientists cannot state with absolute certainty that something will *never* occur.

3. Mr. Chairman and members of the Panel, under the standards of the SPS Agreement, these answers on the content of the scientific evidence allow only one finding with respect to the claims in this dispute: Japan has acted inconsistently with its obligations under the SPS Agreement.

4. Japan has failed to fulfill its commitments under Article 2.2 of the SPS Agreement. Under this provision, WTO Members have committed not to maintain phytosanitary measures without sufficient scientific evidence. As the experts have confirmed for you, there is *no*

scientific evidence that mature apple fruit have ever transmitted fire blight and *no* scientific evidence that mature apple fruit could serve as a pathway for the fire blight disease. Where there is no such evidence, there cannot be "sufficient evidence" or a "rational or objective" relationship between Japan's fire blight measures and the scientific evidence. Thus, by maintaining its fire blight measures without "sufficient scientific evidence," Japan has acted inconsistently with Article 2.2.

5. Japan has failed to fulfill its commitments under Article 5.1 of the SPS Agreement. The experts have written in their answers that Japan's assessment of risks does not evaluate the likelihood of entry, establishment, or spread of fire blight through imports of apple fruit. Dr. Hale noted that it appeared "Japan has prejudged the outcome of its risk assessment" and "has not provided an evaluation of likelihood that the steps necessary for entry of fire blight bacteria would be completed"; Dr. Hayward also found that Japan had not assessed the likelihood of each of the steps comprising the probability of entry. Even Japan's most recent effort to illustrate a hypothetical pathway for introduction of fire blight via mature apple fruit, Exhibit JPN-34, fails to evaluate the likelihood of each of those steps being completed and – most strikingly – proposes events (specifically, a calyx-infested fruit becoming infected and producing bacterial ooze) for which the scientific experts unanimously concur there is no scientific evidence.

6. Japan's failure to identify the steps necessary for apple fruit to serve as a pathway for introduction of fire blight to Japan, to identify and evaluate the scientific evidence related to each step, or the lack thereof, and to evaluate the likelihood – *i.e.,* the probability – of entry,

establishment, or spread of fire blight within Japan establishes that Japan has not made a proper assessment of risk within the meaning of Article 5.1 and Annex A of the SPS Agreement. Thus, Japan has failed to ensure that its fire blight measures are based on an assessment of the risks to plant life or health within Japan, inconsistent with Article 5.1.

7. Japan has also acted inconsistently with Article 5.2 of the SPS Agreement by failing to take into account certain information in its assessment of risks. For example, Japan has not taken into account the available scientific evidence that *mature* apple fruit have not been implicated in the spread of fire blight – despite decades of worldwide trade in apple fruit – and that necessary steps in its hypothetical pathway would *not* be completed, both points which were confirmed by the scientific experts.

8. Japan has failed to fulfill its commitments under Article 5.6 of the SPS Agreement. As the experts have stated, there is no scientific evidence that imports of mature apple fruit can serve to introduce *Erwinia amylovora* and fire blight into Japan. In fact, the experts unanimously characterized the risk of introduction of fire blight via apple fruit imports as "negligible" (reflecting, as Drs. Geider, Hale, and Smith made clear and as the Appellate Body in *EC – Hormones* has suggested, the "uncertainty that theoretically always remains since science can never provide absolute certainty"[1]). Because imports of mature apple fruit do not pose a real, as opposed to merely theoretical, risk to plant life or health within Japan, restricting importation of

[1] *See European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (adopted February 13, 1998), para. 186 ("*EC – Hormones*").

U.S. apples to *mature* fruit (*i.e.*, the exported commodity) is a measure that is reasonably available, that achieves Japan's appropriate level of protection, and is significantly less restrictive to trade than Japan's current fire blight measures. Thus, Japan's measures are inconsistent with Article 5.6 of the SPS Agreement.

9. I'd like to note that, at the end of the follow-up questions posed by the United States, Dr. Smith provided useful support for the conclusion that the alternative proposed by the United States meets Japan's level of protection. After describing the risk of introduction of fire blight to Japan via imported mature apple fruit as negligible, Dr. Smith stated that this might imply that *no* measures could be taken by an importing country and that he could not agree with this. However, once he had been focused on the scientific evidence relating to fire blight and mature apple fruit – as opposed to possible "compromises" (an issue I will return to shortly) – the *only* measure that Dr. Smith *did* identify as based on the scientific evidence was that imported apple fruit be "mature" and accompanied by a phytosanitary certificate. A requirement that U.S. apple fruit be mature and therefore free of fire blight is, of course, the very measure that the United States has proposed under its Article 5.6 claim as an alternative measure that is reasonably available to Japan, achieves Japan's appropriate level of protection (no matter *how* conservative that is), and is less trade-restrictive than the current Japanese fire blight measures.

10. Japan failed to notify changes in and information on its fire blight measures in 1997 and therefore acted inconsistently with the transparency obligations in Article 7 and Annex B of the SPS Agreement.

11. In addition, Japan has acted inconsistently with its obligations under GATT 1994 Article XI and Article 4.2 of the Agreement on Agriculture. GATT Article XI prohibits Members from using prohibitions or restrictions on imports other than duties, taxes, or charges; similarly, Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining, resorting to, or reverting to any prohibited measures, such as quantitative import restrictions, that impede market access. The Japanese fire blight measures prohibit the importation of apples from the United States unless produced, harvested, and imported according to Japan's fire blight restrictions. Thus, Japan has acted inconsistently with GATT Article XI and Article 4.2 of the Agreement on Agriculture.

12. Finally, we note that Japan has invoked Article 5.7 of the SPS Agreement as an alternative defense to our claim under Article 2.2 but Japan has failed to meet the requirements necessary under Article 5.7 to claim this qualified exemption. The experts have confirmed the U.S. presentation of the scientific evidence on all key points relating to the science of fire blight transmission and the lack of any role for mature apple fruit. In this case, therefore, the relevant information is not "insufficient"; there is more than enough evidence (as explicated by the experts) to make an objective assessment that imported mature apple fruit do not pose a risk within the context of the SPS Agreement to plant life or health within Japan. Given the quality and quantity of scientific evidence presented by the United States and the experts, Japan's fire blight measures are not adopted "on the basis of available pertinent information." There is no such pertinent information on which a measure can be based. Neither Japan's participation in the joint U.S.-Japanese 2000 study nor its most recent, unsuccessful effort to recover endophytic

bacteria from apple fruit by cutting open the pedicels of such fruit and inoculating them with high numbers of bacteria can be considered an effort to obtain additional *necessary* information, particularly as neither study provides additional information with respect to steps in the hypothetical pathway that the experts have concluded will *not* be completed. For the same reason, Japan cannot be deemed to have reviewed its measure within a reasonable time. Thus, Japan has not demonstrated that the qualified exemption under Article 5.7 from Japan's commitments under Article 2.2 is available to it.

13. In addition to providing expert opinion on the content of the scientific evidence, we note that some of the experts made suggestions on measures which might be adopted, but – as they themselves confirmed – are not based on the scientific evidence. Dr. Geider described his comments simply as an effort to present a "compromise" and to provide "transition time" for Japan to phase-in relaxed measures because "we do not feel we can squeeze Japan" into eliminating its fire blight measures. Similarly, Dr. Smith explained his comments as reflecting that a country revising its phytosanitary measures "would probably not want to remove everything at once"; when asked by Japan whether he was suggesting a "compromise," Dr. Smith responded that prudence suggested not removing all fire blight measures in one step but that this was not an answer "in scientific terms." Drs. Geider, Smith, and Hale also suggested at various times that they were proposing measures that Japan might adopt until Japan had "confidence" to liberalize further.

14. When Dr. Smith suggested that WTO Members as sovereign states had the ability to look

at the same evidence relating to risk and to take any measures they deem appropriate, Mr. Chairman, you correctly added "subject to their obligations under the SPS Agreement." It is clear, at this point, that in presenting certain measures as a "compromise," the experts were no longer commenting on matters within their expertise or mandate – that is, providing scientific and technical advice on the scientific evidence relating to fire blight and apple fruit. Developing "compromises" and other mutually-agreed solutions is the responsibility of the parties and not the scientific experts. Any decisions on compromises or transition time can only be in the hands of the parties. Moreover, it is not for the experts to assume the role of the Panel to make the ultimate legal determination of whether Japan's fire blight measures meet the legal requirements set forth in the WTO agreements. These are matters that the WTO agreements reserve to the Panel.

14. As reflected in the history of this matter we have previously put before you, we have not hesitated to offer compromises to Japan numerous times over the last 20 years and to propose alternative measures in order not to have to be in this room with you today. However, when such efforts proved fruitless, we felt compelled to make recourse to the dispute settlement procedures to seek a legal, and not a "compromise," ruling. The purpose of this proceeding is to determine the consistency or inconsistency of Japan's measure with the WTO agreements. It will then be up to Japan to determine how it wishes to comply with the DSB's recommendations and rulings. It is only with the benefit of legal findings that set out the respective rights and obligations of the parties to this dispute that future discussions between the parties can be constructive.

15. Mr. Chairman, members of the Panel, we respectfully request that you find, based on the application of the legal standards under the WTO agreements to the facts and scientific evidence in this dispute, that Japan has acted inconsistently with its WTO obligations.