November 1, 2002

Mr. Michael Cartland
Chairman
Japan - Measures Affecting the Importation of Apples
World Trade Organization
Centre William Rappard
154 Rue de Lausanne
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Dear Mr. Chairman:

At the Panel's first substantive meeting with the Parties in the dispute, *Japan – Measures Affecting the Importation of Apples* (WT/DS245), the Panel requested that the United States respond to arguments related to Japan's preliminary rulings request made, respectively, by Australia and the European Communities ("EC") in their oral statements to the Panel as third parties in this dispute. My authorities have instructed me to make the following comments. The United States is also providing a copy of this letter directly to Japan.

As the arguments made by these third parties are addressed to different issues, the United States will address each argument in turn.

Arguments of Australia

The Panel has asked the United States to comment upon the argument made by Australia in paragraph 10 of its oral statement. In this paragraph, Australia first argues that a complaining party may not "claim inconsistency [with Article 2.2] on the basis that the measure is not based on sufficient scientific evidence, if the claims relating to the *sufficiency* of evidence include evidence that was not available to the respondent party at the time of the initiation of the WTO complaint." Australia then argues that "a WTO member apprised of new scientific evidence must be allowed the opportunity to reassess the risk in terms of the relevance of the evidence to the factors enumerated in Article 5.2" of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement")

The United States first notes what Australia does *not* argue: there is no argument that the Panel may *not* consider evidence that was not available to the responding party at the time the WTO dispute was initiated. That is, Australia does not support Japan's arguments that the declaration by Dr. van der Zwet and the letter by Professor Thomson may *not* be considered as

relevant factual evidence by the Panel and that these communications should be "remove[d] . . . from this dispute settlement procedure."[1]

There is good reason for Australia not to make such an argument. A rule that factual evidence not available at the initiation of the dispute settlement proceeding could *not* be considered by a panel would bar evidence that could be relevant to the Panel's factual determinations. For example, Japan has brought forward numerous pieces of "evidence" that were not available before its first written submission,[2] despite a U.S. request – made prior to the establishment of the Panel – pursuant to Article 5.8 of the SPS Agreement that Japan provide "an explanation of the reasons for" its measures, including specific requests that Japan "identify the scientific evidence upon which [each fire blight] restriction is based" and "provide any scientific studies or reports that support [each such] restriction."[3] Similarly, much of the information requested by the Panel of the parties and the technical/scientific experts would be barred from consideration by the Panel, notwithstanding Article 13 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

As the United States has previously remarked, in the case of the two communications Japan wishes to see "removed" from this proceeding, Japan simply does not want the Panel to receive further confirmation that the experiments conducted by Dr. van der Zwet and Professor Thomson, as reported in the 1990 paper, provide *no* support for Japan's contention that mature fruit can serve to transmit the fire blight disease. The experiments were primarily conducted on *immature* fruit, and, contrary to Japan's misreading of the paper, no endophytic bacteria were recovered from inside of any mature fruit. Pointedly, Australia does not endorse Japan's effort to keep relevant evidence from the Panel's consideration.

Instead, Australia appears to argue that scientific evidence produced after the initiation of a WTO dispute settlement proceeding cannot support a claim that there is insufficient scientific evidence to maintain an SPS measure. Put differently, the argument would be that a claim that scientific evidence is insufficient cannot rest on scientific evidence produced after the claim is made. However, the situation Australia posits does not arise in this dispute, and the issue is therefore not presented.

The United States' claim that the Japanese fire blight measures are maintained without sufficient scientific evidence does not rest or even rely on the van der Zwet declaration and Thomson letter. Rather, Japan's fire blight measures are inconsistent with Article 2.2 because there has never been any scientific evidence that mature apple fruit transmits the fire blight

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[1]First Written Submission of Japan, paras. 29-32.

[2]*See* Exhibits JPN-1, JPN-2, JPN-6, JPN-10, JPN-12, JPN-13, JPN-14, JPN-16, JPN-22, JPN-23, JPN-31, JPN-32, and JPN-33.

[3]Letter from David Shark, Permanent Mission of the United States, to Ambassador Koichi Haraguchi, Permanent Mission of Japan (April 4, 2002) (Question 1) (Exhibit USA-24).

disease. As we have stated to the Panel at the first substantive meeting with the parties, even if the 1990 van der Zwet *et al.* paper said everything that Japan claims it does, this paper would only provide evidence of bacterial presence on or in apple fruit. It would *not* provide scientific evidence that apple fruit transmits the disease or could serve as a pathway because it does not contain evidence relevant to each step necessary for entry to be completed.

What the van der Zwet declaration and Thomson letter provide, however, is unmistakable confirmation that Japan has misread the 1990 paper, attempting to exploit its ambiguities to assert erroneously that endophytic bacteria have been recovered from mature fruit. It bears repeating that, on its face, the paper does *not* support Japan's reading because, for example, the fruit harvest dates suggest that the geographic experiment largely involved immature fruit, the distance experiment explicitly involved developing fruit, and the storage experiment simply did not test for internal bacteria. The declaration and letter by the authors of the 1990 paper thus confirm that endophytic bacteria have *not* been recovered from mature fruit. Thus, this evidence goes to an assessment of Japan's mistaken argument that bacteria may be associated internally with mature fruit; the evidence does *not* go to the U.S. claim that mature apple fruit are not a pathway for the fire blight disease.

Australia's second argument is that a Member that learns of new scientific evidence "must be allowed the opportunity" to reassess risk in accordance with the factors in Article 5.2 of the SPS Agreement. If Australia means to suggest that an exporting Member may not pursue dispute settlement until the importing Member is given an opportunity to reassess risk, the United States respectfully disagrees. Such a rule would upset the balance of rights and obligations of WTO Members under the covered agreements. As stated in Article 3.3 of the DSU, "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." Nothing in the SPS Agreement requires that the United States, which has unsuccessfully attempted to work with Japan to relax its current fire blight measures for nearly 8 years, must forego dispute settlement when Japan is not in compliance with its WTO obligations. However, nothing prevents Japan from reassessing risk pursuant to Article 5 of the SPS Agreement in light of the scientific evidence provided by Drs. van der Zwet and Thomson; the United States would welcome such an effort while this dispute settlement proceeding is ongoing.

If Japan has read the 1990 van der Zwet *et al.* paper carefully (as one must assume since Japan relies so heavily on it), Japan has been well aware of the ambiguities and inconsistencies in that paper. Nonetheless, Japan has not attempted to clarify those issues with the authors in the 12 years since the paper was published. To desist with this proceeding would simply provide a further opportunity for delay with no guarantee that Japan would remedy its WTO-inconsistent fire blight measures.

Arguments of the European Communities

The EC, in paragraphs 3-6 of its oral statement, takes issue with the lack of argumentation in the U.S. first written submission on all of the claims identified in its panel request. The EC argues that whether the United States has stated all of its claims "raises the further issue of whether the US has been able to submit a *prima facie* case that Japan has violated certain provisions." Second, the EC argues that not stating all claims in a first written submission may prevent a responding party from using all stages of the panel proceeding to defend itself.

Again, it is first valuable to note what the EC does not include in this litany: the EC does *not* endorse Japan's argument that the Panel should "remove" certain legal claims that were named in the U.S. panel request. The EC does *not* argue that not including certain provisions in a request for consultations would preclude the complaining party from making a claim under such provisions in its panel request. The EC also does *not* argue that not providing argumentation in a complaining party's first written submission should result in a panel "striking" such claims from a dispute settlement proceeding. Indeed, none of the arguments are grounds for finding claims included in the U.S. panel request to be outside the terms of reference of this dispute; there is simply no basis for the Panel to "remove" claims that are within the Panel's terms of reference as established by the Dispute Settlement Body.

With respect to the first point that the EC does make, the United States agrees that the issue of whether a complaining party has presented arguments relating to all of its claims goes to whether that party has satisfied its burden of establishing a *prima facie* case with respect to those claims. This point supports the United States' view that it would be premature for the Panel to determine at this juncture whether claims have been made on all of the provisions cited in the U.S. panel request. As the EC acknowledges, there is no requirement in the DSU requiring a complaining party to set out its arguments on all of its claims in its first written submission.[4] The Panel should defer its examination of whether arguments have been made and whether these arguments are sufficient to satisfy the U.S. burden of establishing a *prima facie* case until it drafts its report at the conclusion of all submissions, as has long been the prevailing practice of GATT and WTO panels.

With respect to the second EC point, as is implicit in the Appellate Body's statements that there is no requirement that arguments on all claims be set out in a complaining party's first written submission, there is no prejudice to a responding party's rights of defense so long as the complaining party's arguments are, in the course of the proceedings, made clear, and the responding party is given sufficient opportunity to respond. The United States has advanced argumentation in its oral statements to the Panel on Article 4.2 of the *Agreement on Agriculture* and Article XI of the *General Agreement on Tariffs and Trade 1994*, and Japan has had one

[4] *See European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 145 (25 September 1997).

opportunity, and will have more, to respond to those arguments. Thus, there is no prejudice to Japan's rights of defense by not asserting arguments on all of the claims within the Panel's terms of reference in the U.S. first written submission.

Conclusion

We thank the Panel for the opportunity to respond to these arguments of Australia and the European Communities. For the foregoing reasons as well as those set out in its October 16 reply to Japan's request for preliminary rulings, the United States respectfully requests that the Panel reject Japan's requests for preliminary rulings.

Sincerely,

Steven Fabry
Senior Legal Advisor

cc: H.E. Mr. Yasuaki Nogawa, Permanent Mission of Japan