JAPAN – MEASURES AFFECTING THE IMPORTATION OF APPLES

Report of the Appellate Body
WT/DS245/AB/R

Adopted by the Dispute Settlement Body on 10 December 2003

Japan, *Appellant/Appellee*
United States, *Appellant/Appellee*
Australia, *Third Participant*
Brazil, *Third Participant*
European Communities, *Third Participant* New Zealand, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *Third Participant*

Present:
Lockhart, Presiding Member
Baptista, Member
Sacerdoti, Member

TABLE OF CONTENTS

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135

Short Title	Full Case Title and Citation
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Apples	Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, 15 July 2003
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003

Short Title	Full Case Title and Citation
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, 10 November 2003
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

I. INTRODUCTION

1. Japan and the United States appeal certain issues of law and legal interpretations in the Panel Report, *Japan – Measures Affecting the Importation of Apples* (the "Panel Report").[1] The Panel was established to consider a complaint by the United States concerning certain requirements and prohibitions imposed by Japan with respect to the importation of apple fruit from the United States.

2. Following consultations that failed to resolve the dispute, the United States requested on 7 May 2002 that a panel be established to examine the matter on the basis of "measures" maintained by Japan that "restrict[] the importation of US apples in connection with fire blight or the fire blight disease-causing organism, *Erwinia amylovora*."[2] On 3 June 2002, the Dispute Settlement Body (the "DSB") established the Panel with the following terms of reference, in accordance with Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"):

> … To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document

[1] WT/DS245/R, 15 July 2003.
[2] Request for the Establishment of a Panel by the United States, WT/DS245/2, 8 May 2002.

> WT/DS245/2, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements. [3]

Australia, Brazil, the European Communities, New Zealand, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu reserved their right to participate before the Panel as third parties.

3. Before the Panel, the United States claimed that Japan was acting inconsistently with Articles 2.2, 5.1, 5.2, 5.6, 5.7, and 7 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*") and Annex B thereto; Article 4.2 of the *Agreement on Agriculture*; and Article XI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). [4] In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 15 July 2003, the Panel found that Japan's phytosanitary measure:

(i) is maintained "without sufficient scientific evidence", inconsistent with Japan's obligation under Article 2.2 of the SPS Agreement;

(ii) does not qualify as a provisional measure under Article 5.7 of the SPS Agreement because it was not imposed in respect of a situation "where relevant scientific evidence [was] insufficient"; and

(iii) is not based on a "risk assessment" within the meaning of Article 5.1 of the SPS Agreement. [5]

4. As to the claims of inconsistency with Article 7 of the *SPS Agreement* and Annex B thereto, the Panel found that the United States had failed to establish a *prima facie* case under those provisions. Furthermore, having found the measure to be inconsistent with Japan's obligations under Articles 2.2, 5.7, and 5.1 of the *SPS Agreement*, the Panel determined that resolution of several of the remaining claims under other provisions was unnecessary, as such findings would not assist the DSB in making its recommendations and rulings so as to allow for prompt compliance by Japan. Therefore, in an exercise of judicial economy, the Panel declined to rule on the United States' claims under Articles 5.2 and 5.6 of the *SPS Agreement*, Article 4.2 of the *Agreement on Agriculture*, and Article XI of the GATT 1994. [6] In the light of its findings, the Panel recommended that "the Dispute Settlement Body request Japan to bring the phytosanitary measure in dispute into conformity with its obligations under the *SPS Agreement*." [7]

---

[3] Constitution of the Panel Established at the Request of the United States, WT/DS245/3, 17 July 2002, para. 2.

[4] The United States had also raised claims under Articles 2.3, 5.3, 5.5, and 6.1-6.2 of the *SPS Agreement* in its request for the establishment of a panel. The Panel observed, however, that the United States did not pursue these claims in any of its submissions. Accordingly, the Panel concluded that the United States had not made a *prima facie* case for any of these claims and therefore declined to make corresponding findings. (Panel Report, para. 8.334)

[5] *Ibid*., para. 9.1(a)-(c).

[6] *Ibid*., paras. 8.292, 8.303, 8.328, and 8.332.

[7] Panel Report, para. 9.3.

5. On 28 August 2003, Japan notified the DSB of its intention to appeal certain issues of law developed in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[8] On 8 September 2003, Japan filed an appellant's submission.[9] The United States filed an appellee's submission on 22 September 2003.[10] In addition to Japan's appeal, the United States cross-appealed the Panel Report by filing an other appellant's submission on 12 September 2003.[11] With respect to this cross-appeal, Japan filed an appellee's submission on 22 September 2003.[12] On that same day, Australia, Brazil, the European Communities, and New Zealand filed third participants' submissions[13], and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu notified its intention to attend and make statements at the oral hearing.[14]

6. The oral hearing in this appeal was held on 13 October 2003. The participants and third participants presented oral statements (with the exception of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu) and responded to questions put to them by the Members of the Division hearing the appeal.

7. Our analysis in this Report proceeds as follows:

- we begin with a brief factual background and an examination of the scope of the dispute, including the nature and history of the plant disease at issue, the products addressed by the Panel in its analysis, and the measure challenged by the United States[15];
- we then set out the arguments of the participants and third participants on appeal;
- we next identify the issues raised before us on appeal and, in order to do so, consider the United States' claim that one of the issues argued by Japan in its appellant's submission is not properly before us because it was not identified in Japan's Notice of Appeal;
- we begin our assessment of the case by examining the United States' claim on appeal that the Panel did not have the authority to issue findings with respect to apples other than "mature, symptomless" apples. Because this claim raises the question of whether the Panel was even permitted to pronounce on the subject

[8] Notification of an Appeal by Japan, WT/DS245/5, 28 August 2003, attached as Annex 1 to this Report. Japan's Notice of Appeal challenges only certain findings made by the Panel in the course of its analysis under the *SPS Agreement*; there are no issues on appeal related to the *Agreement on Agriculture* or to the GATT 1994.
[9] Pursuant to Rule 21(1) of the *Working Procedures*.
[10] Pursuant to Rule 22(1) of the *Working Procedures*.
[11] Pursuant to Rule 23(1) of the *Working Procedures*.
[12] Pursuant to Rule 23(3) of the *Working Procedures*.
[13] Pursuant to Rule 24(1) of the *Working Procedures*.
[14] Pursuant to Rule 24(2) of the *Working Procedures*.
[15] Additional factual aspects of this dispute are set out in greater detail in paragraphs 2.1-2.32 of the Panel Report.

of apples other than "mature, symptomless" apples", we address this claim as a logical antecedent to Japan's claims on the merits of the Panel's findings;

- next, we consider Japan's claims challenging the Panel's findings that Japan's phytosanitary measure at issue is inconsistent with Japan's obligations under Articles 2.2, 5.7, and 5.1 of the *SPS Agreement*; and
- finally, we evaluate Japan's claims under Article 11 of the DSU that the Panel failed to make an "objective assessment of the facts of the case" in the course of its analysis of the United States' claims under the *SPS Agreement.*

II. BACKGROUND

A. The Disease at Issue

8. The following summarizes "factual aspects" set out by the Panel in paragraphs 2.1–2.6 of the Panel Report. The disease [16] targeted by Japan's phytosanitary measure in this dispute is called "fire blight", often referred to by the scientific name for its bacterium, *Erwinia amylovora* or *E. amylovora*. Fruits infected [17] by fire blight exude bacterial ooze, or inoculum [18], which is transmitted primarily through wind and/or rain and by insects or birds to open flowers on the same or new host plants. *E. amylovora* bacteria multiply externally on the stigmas of these open flowers and enter the plant by various openings. [19] In addition to apple fruit, hosts of fire blight include pears, quince, and loquats, as well as several garden plants. [20] Scientific evidence establishes, as the Panel found, that the risk of introduction and spread of fire blight varies considerably according to the host plant. [21]

9. The uncontested history of fire blight reveals significant trans-oceanic dissemination in the 200-plus years since its discovery. [22] *E. amylovora*, first reported in New York State in the United States in 1793, is believed to be native

---

[16] The Panel defined "disease" as "[a] disorder of structure or function in a plant of such a degree as to produce or threaten to produce detectable illness or disorder … usually with specific signs or symptoms." (Panel Report, para. 2.9)

[17] "Infection" was defined by the Panel as "[w]hen an organism (e.g., *E. amylovora*) has entered into a host plant (or fruit) establishing a permanent or temporary pathogenic relationship with the host." (*Ibid.*, para. 2.12) In contrast, the Panel noted that the term "infestation" would "[r]efer[] to the presence of the bacteria on the surface of a plant *without any implication that infection has occurred*." (*Ibid.*, para. 2.13 (emphasis added))

[18] The Panel defined "inoculum" as "[m]aterial consisting of or containing bacteria to be introduced into or transferred to a host or medium". The Panel explained that "[i]noculation is the introduction of inoculum into a host or into a culture medium. Inoculum can also refer to potentially infective material available in soil, air or water and which by chance results in the natural inoculation of a host." (*Ibid.*, para. 2.14)

[19] Panel Report, para. 2.2.

[20] *Ibid.*, para. 2.5.

[21] *Ibid.*, para. 8.271.

[22] *Ibid.*, para. 2.6.

to North America. [23] By the early 1900s, fire blight had been reported in Canada from Ontario to British Columbia, in northern Mexico, and in the United States from the East Coast to California and the Pacific Northwest. Fire blight was reported in New Zealand in 1919, in Great Britain in 1957, and in Egypt in 1964. The disease has spread across much of Europe, to varying degrees depending on the country, and also through the Mediterranean region. In 1997, Australia reported the presence of fire blight, but eradication efforts were successful and no further outbreaks have been reported. With respect to the incidence of fire blight in Japan, the parties disputed before the Panel whether fire blight had ever entered Japan; but the United States assumed, for purposes of this dispute, that Japan was, as it claimed, free of fire blight and fire blight bacteria. [24]

B. The Product at Issue

10. The United States argued before the Panel that the subject of the United States' challenge to Japan's phytosanitary measure at issue is the sole apple product that the United States exports, that is, "mature, symptomless" apples. The United States claimed that such apples constitute a separate, identifiable category of apples and that its categorization is "scientifically supported". [25] Japan did not accept the United States' categorization, arguing that "mature" and "symptomless" are subjective terms and that the distinction has no scientific basis. [26] Furthermore, Japan argued, its phytosanitary measure addressed the risk arising, not only from mature, symptomless apples that develop and spread fire blight, but also from the accidental introduction of infected or infested apples within a shipment of what are thought to be mature, symptomless apples destined for Japan. [27]

11. In the light of this disagreement about the product scope of the dispute, the Panel identified the product that was subject to the measure at issue. The Panel observed that, if it were to consider the "product" to be limited to mature, symptomless apple fruit, as claimed by the United States, "many aspects of the measure at issue might, *ipso facto*, lose their *raison d'être* and may become incompatible with the *SPS Agreement*." [28] If, on the contrary, the Panel were to conclude that the product at issue was "any apple" fruit exported to Japan from the United States, then it would need to address the justification of all the requirements imposed by Japan as a whole. [29] The Panel also noted that it would be "illogical" to accept the United States' characterization because it would

[23] *Ibid.*, paras. 2.1 and 2.6.
[24] *Ibid.*, paras. 4.25-4.26.
[25] *Ibid.*, para. 8.26.
[26] *Ibid.*, paras. 4.99 and 8.26.
[27] *Ibid.*, para. 8.28(b).
[28] Panel Report, para. 8.30. As an example of aspects of the measure that might in this manner lose their *raison d'être*, the Panel refers to the requirements covering pre-harvesting actions to be undertaken with respect to apples. (*Ibid.*)
[29] *Ibid.*

prevent the Panel from examining certain aspects of the measure that could be relevant, even if not expressly addressing mature, symptomless apples. [30]

12. In addition, the Panel stated that the request for the establishment of a panel submitted by the United States referred only to "US apples", which is less specific than mature, symptomless apples. The Panel said that the fact that the United States intended to address "only" mature, symptomless apples in its submission did not affect the Panel's mandate. [31] Finally, the Panel observed that scientific methods existed for distinguishing mature apples, and that an apple's susceptibility to fire blight was related to its maturity.

13. Considering the parties' arguments, as well as the experts' views [32], the Panel determined that the scope of the dispute should not, at a preliminary stage, be limited to mature, symptomless apples. The Panel considered it particularly inappropriate to limit the scope of the dispute before further consideration of the merits of the case in the light of the two assumptions it found to underlie the United States' characterization of the product at issue: (i) that mature, symptomless apple fruit is not a "pathway" [33] for fire blight and (ii) that shipments from the United States to Japan contain only mature, symptomless apples. [34]

C. The Measure at Issue

14. The United States argued before the Panel that, through the operation of various legal instruments [35], Japan maintains nine prohibitions or requirements imposed with respect to apple fruit imported from the United States. [36] With

---

[30] *Ibid.*, para. 8.31. Aspects of the measure that the Panel thought might be relevant, notwithstanding the fact that they did not focus on mature, symptomless apple fruit, included requirements related to apples that *cannot* be exported (that is, prohibitions). (*Ibid.*)

[31] *Ibid.*, para. 8.32.

[32] The Panel engaged experts in consultation with the parties, as provided for in Article 11.2 of the *SPS Agreement* . (*Ibid.*, paras. 6.1-6.4)

[33] We understand the Panel to have used the term "pathway" to describe the steps through which a disease must travel for successful transmission from one plant to a new host plant. We employ the term in this Report in the same manner.

[34] Panel Report, para. 8.33.

[35] The Panel identified the following means by which Japan imposed the prohibitions or requirements relevant to this dispute: (i) the Plant Protection Law (Law No. 151; enacted 4 May 1950), as amended; (ii) the Plant Protection Regulations (Ministry of Agriculture, Forestry, and Fisheries Ordinance No. 73, enacted 30 June 1950), as amended; (iii) Ministry of Agriculture, Forestry and Fisheries Notification No. 354 (dated 10 March 1997); and (iv) related detailed rules and regulations, including Ministry of Agriculture, Forestry, and Fisheries Circular 8103. (Panel Report, para. 8.7)

[36] Panel Report, para. 8.5, citing Request for the Establishment of a Panel by the United States, WT/DS245/2, 8 May 2002; United States' first written submission to the Panel, para. 19; United States' answers to the Additional Questions posed by the Panel, 28 January 2003, para. 2. The nine requirements identified by the United States are as follows:

(a) The prohibition of imported apples from US states other than apples produced in designated areas in the states of Oregon or Washington;
(b) the prohibition of imported apples from orchards in which any fire blight is detected on plants or in which host plants of fire blight (other than apple trees) are found, whether or not infected;