

**JAPAN – MEASURES AFFECTING  
THE IMPORTATION OF APPLES  
(WT/DS245)**

**EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTY SUBMISSION**

**15 October 2002**

## **I Introduction**

1. Australia's third party submission addressed the following issues relevant to this dispute:
  - Burden of Proof
  - Standard for developing a *prima facie* presumption and rebuttal in sanitary and phytosanitary measures
  - Conflicting scientific evidence
  - The product at issue
2. The *Agreement on Sanitary and Phytosanitary Measures* (SPS Agreement) is a science-based Agreement. Adopted reports of several relevant WTO disputes have clarified that the burden of proof rests on the complainant party and that assertions must be supported by evidence. In the case of the SPS Agreement, such evidence must take the form of relevant and reliable scientific evidence based on scientific principles.
3. It is also clear that scientific evidence need not be monolithic in character and that conflicting scientific evidence is not unusual. Nor can minority scientific opinion, based on valid scientific data, be discounted as evidence.
4. Further, it is necessary to clearly identify the product at issue and to ensure that that claims, counterclaims, arguments and evidence relate to the identical product.

## **II Burden of Proof**

5. Australia recalls the examination of the burden of proof in proceedings under the SPS Agreement which was undertaken by the Appellate Body in *EC Measures Concerning Meat and Meat Products (EC Hormones)*.<sup>1</sup> The Appellate Body acknowledged the importance of correctly allocating the burden of proof in SPS disputes, which raise 'multiple and complex issues of fact'.<sup>2</sup> Applying its ruling in *United States – Shirts and Blouses*<sup>3</sup>, the Appellate Body stated that the complaining party bears the initial burden of proof to establish a *prima facie* case of inconsistency with an identified provision of the SPS Agreement. The Appellate Body reiterated that:

‘a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case’.<sup>4</sup>

## **III Standard for Developing a *Prima Facie* Presumption**

7. All assertions must be documented and relate to relevant legal tests including the

---

<sup>1</sup> WT/DS26/AB/R, paras 97-109.

<sup>2</sup> WT/DS26/AB/R, para. 97.

<sup>3</sup> WT/DS33/AB/R

<sup>4</sup> WT/DS26/AB/R, para. 104.

*likelihood* of entry establishment or spread. Scientific evidence to support a *prima facie* presumption should be valid scientific evidence, based on scientific principles, including scientific studies.

8. In the present case, the Panel must first examine whether the United States, as the complaining party, has presented ‘evidence and legal arguments sufficient to demonstrate’<sup>5</sup> that Japan’s measures are inconsistent with the identified provisions of the SPS Agreement. If the Panel is satisfied that the United States has established such a case, the onus would shift to Japan to bring forward evidence and legal arguments to rebut the United States’ case.

#### IV Conflicting Scientific Evidence and Opinion

9. Even when limited to mature and symptomless apples, the available science shows clearly there is no monolithic opinion on the risk of transmission of fire blight through fruit (matrix below highlights the divergent opinions).

	<b><u>Positive (presence)</u></b>	<b><u>Negative (absence)</u></b>
<b><u>Infestation</u></b> (surface colonization)	<u>Hale et al. (1987)</u> <u>Sholberg et al. (1988)</u> <u>van der Zwet et al. (1990)</u>	<u>Dueck (1974)</u> <u>Hale et al. (1987)</u> <u>Clark et al. (1993)</u> <u>Hale et al. (1996)</u>
<b><u>Infection</u></b> (Internal colonization)	<u>Goodman (1954)</u> <sup>Error! Bookmark not defined.</sup> <u>van der Zwet et al. (1990)</u> <sup>67</sup>	<u>Dueck (1974)</u> <u>Roberts et al. (1989)</u> <u>Roberts (2002)</u> <sup>8</sup> <u>van der Zwet et al. (1990)</u>

10. Accordingly, the Panel should reaffirm the principle that where there is conflicting science, governments can, in good faith, rely on science that provides the level of appropriate protection the importing member deems necessary.

11. Recognising the realities of conflicting scientific evidence, the Appellate Body in *EC - Hormones* considered that a risk assessment need not come to a “monolithic conclusion” that coincides with the scientific conclusion or view implicit in the

<sup>5</sup> WT/DS26/AB/R, para. 109.

<sup>6</sup> Roberts et al (1989) have clearly indicated that the fruit they harvested in August and September for their experiments were mature and there is also good indication that fruit used by van der Zwet et al (1990) for at least some of their experiments were mature.

<sup>7</sup> Further, Anderson (1952) and McLarty (1924), (1925), (1926) report the ability of the bacterium to over winter in fruit when artificially inoculated.

<sup>8</sup> Australia notes the environmental conditions during the experiment reported in this work were not conducive for the disease.

SPS measure.<sup>9</sup> Nor must a risk assessment embody only the majority scientific view.

12. Further, the Appellate Body emphasised the need for a practical or “real world” approach to risk. A risk assessment is not confined to an examination of only those factors susceptible to quantitative analysis by empirical or experimental laboratory methods.<sup>10</sup>

## **V The Product at Issue**

13. In *Australia – Salmon* the Appellate Body found that the SPS measure at issue in the dispute can only be the measure which is actually applied *to the product at issue*<sup>11</sup> (emphasis added). The US in its request for a panel has identified the product at issue as “apples”. Australia notes that evidence submitted only in relation to mature symptomless apples would not be applicable to the first two tests of Article 5.1 in establishing whether Japan’s risk assessment met the criteria for a proper risk assessment.

---

<sup>9</sup> WT/DS26/AB/R, para. 194.

<sup>10</sup> WT/DS26/AB/R, para. 187.

<sup>11</sup> WT/DS18/AB/R at para 103