Exhibit 23

Panel Report
Japan - Measures Affecting Agricultural Products
(WT/DS76/R) / DSR 1999:I, 315

Parties
Complainant: U.S.
Respondent: Japan
Third Parties: Brazil, EC, Hungary

Timeline of Dispute
Panel Request: October 3, 1997
Panel Established: November 18, 1997
Panel Composed: December 18, 1997
Interim Report Issued: August 6, 1998
Final Report Issued to Parties: October 6, 1998
Final Report Circulated: October 27, 1998
Notice of Appeal: November 24, 1998
AB Report Circulated: February 22, 1999
Adoption: March 19, 1999

Panelists
Mr. Kari Bergholm (Chairperson),
Mr. Germain Denis, Mr. Eirikur Einarsson

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Key Findings

- A Panel's terms of reference are based on the panel request -- there is no requirement that the challenged measure be specifically identified during consultations in order for the claim to be included within the terms of reference.
- Japan's varietal testing requirement violates SPS Agreement Article 2.2 because it is maintained without "sufficient scientific evidence." Furthermore, the requirement is not justified under Article 5.7. **[Upheld by Appellate Body.]**
- Japan's varietal testing requirement violates SPS Agreement Article 5.6 because an alternative measure that is less trade-restrictive, and which will achieve Japan's desired level of protection, is available. **[Reversed by Appellate Body.]**
- Japan's failure to publish the varietal testing requirement violates SPS Agreement Article 7 and Annex B. **[Upheld by Appellate Body.]**

BACKGROUND

In 1950, Japan enacted the Plant Protection Law, under which the import of certain plants was prohibited through various Ministerial Ordinances. By Ministerial Ordinance of June 30, 1950 (Plant Protection Law Enforcement Regulations) eight products originating from, *inter alia*, the United States were listed as prohibited plants: apricots, cherries, plums, pears, quince, peaches (including nectarines), apples and walnuts. The importation of these plants was prohibited on the grounds that they are potential hosts of codling moth, a pest not found in Japan.

For each product, exemptions from the import ban were granted on a variety-by-variety basis. In other words, to obtain an exemption, a permit must be sought for a *specific variety* of a product listed above. Obtaining a permit for *one* variety of a product, however, does not entitle a company to import *other* varieties of that product. Rather, import permits must be obtained for *each variety* of the product, and a permit entitles a company to sell only that variety of the product in Japan. Since 1978, approval has been granted for certain varieties of the U.S. products, and therefore the import ban has been lifted for those varieties.

In order to obtain an exemption from the import prohibition for a particular variety of a product, the exporting country must propose an alternative measure that would achieve a level of protection equivalent to that achieved by the existing import prohibition. The exporting country bears the burden of proving that the proposed alternative will achieve the appropriate level of protection. In practice, the alternative measure proposed is always disinfestation. With respect to plants that are hosts of codling moth, disinfestation consists of fumigation with methyl bromide ("MB") or a combination of MB fumigation and cold storage.

The Ministry of Agriculture, Forestry and Fisheries of Japan ("MAFF") developed two sets of guidelines for obtaining an exemption from the ban: (1) the "Experimental Guideline for Lifting Import Ban – Fumigation" outlines the procedures applicable to the initial lifting of the ban; and (2) the "Experimental Guide for Cultivar Comparison Test on Insect Mortality – Fumigation" establishes guidelines for approval of additional varieties. These guidelines were introduced in 1987 and have, according to Japan, not "generally been published."

(Paras. 2.1-33, 8.2-3)

The United States claimed that the measure (referred to by the Panel as the "varietal testing requirement") is inconsistent with SPS Agreement Articles 2.2, 5.1, 5.2, 5.6, 7 and 8 (for reasons of judicial economy, the Panel did not examine the U.S. claims under SPS Agreement Articles 5.1, 5.2, 8 and Annex C).

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Consultation with Scientific Experts

Pursuant to SPS Agreement Article 11.2 and DSU Article 13, the Panel decided to consult with individual scientific experts on issues related to this dispute. (Paras. 6.1-4)

Terms of Reference / Specificity of Panel Request

Inclusion of Claim Not Raised During Consultations

Japan argued that the U.S. claim relating to SPS Agreement Article 7 should be excluded from the Panel's terms of reference because it was mentioned for the first time in the panel request and no consultations were held on it. In a preliminary ruling, the Panel rejected this argument, stating that its terms of reference are based on the panel request, which specifically refers to Article 7. Therefore, this claim is within its terms of reference. (Para. 8.4)

Specificity of Panel Request

In its panel request, the United States identified the measures it challenged with the qualifying phrase "including but not limited to." Japan requested a finding that the phrase "including but not limited to" as used in the U.S. panel request does not constitute part of the Panel's terms of reference. As the United States did not make any claim based on this phrase, *i.e.*, it raised claims only under measures that were actually identified in its panel request, the Panel stated, in a preliminary ruling, that there is no claim before it on which to rule. (Para. 8.4)

Scope of the Measures/Products in Dispute

In response to a request for a preliminary ruling by Japan, the Panel defined the scope of the measures in dispute. First, it said that only the varietal testing requirement imposed by Japan for lifting the import prohibition on U.S. products on which Japan claims that codling moth may occur is in dispute. These products are: apricots, cherries, plums, pears, quinces, peaches (including nectarines), apples and walnuts. However, the Panel noted that the parties only submitted evidence with respect to apples, cherries, nectarines and walnuts. Therefore, it would examine the measures at issue on the basis of that evidence for the products to which the evidence applies, and then refer to the experts advising the Panel to evaluate the relevance of that evidence for the other products covered by the measures. Second, it said that the varietal testing requirement need only be examined to the extent it applies to the demonstration of efficacy of MB treatment or of MB treatment combined with cold storage as a treatment against *codling moth*, as opposed to other pests. (Paras. 8.4-7)

SUBSTANTIVE ISSUES

SPS Agreement Article 2.2/5.7

The United States claimed that the measure at issue is maintained without "sufficient scientific evidence" and is not "based on scientific principles," contrary to SPS Agreement Article 2.2. That provision states:

> Members shall ensure that any ... phytosanitary measure is applied only to the extent necessary to protect ... plant life or health, *is based on scientific principles* and *is not maintained without sufficient scientific evidence*, except as provided for in paragraph 7 of Article 5.

The Panel noted that this provision must be read in light of the context provided by SPS Agreement Articles 5.1, 5.2 and 5.7, and in particular should be read together with Article 5.1. (Paras. 8.14-15)

The Panel first considered whether the varietal testing requirement is maintained without "sufficient scientific evidence," contrary to Article 2.2. Recalling the Appellate Body's statement in EC -

Hormones that this provision must be read together with Article 5.1, the Panel noted the Appellate Body's finding in that case that in order for a measure to be "based on" a risk assessment under Article 5.1, there must be a "rational relationship" between the measure and the risk assessment. Applying this finding here, the Panel considered that, in order for "sufficient scientific evidence" to exist under Article 2.2, there must be an "objective or rational relationship" between the measure and the scientific evidence presented (in this case, six studies referred to by Japan). (Paras. 8.28-29)

Applying this legal standard to the facts of this case, the Panel examined whether the varietal testing requirement is maintained without sufficient scientific evidence. It noted that according to the scientific experts consulted, there is not sufficient scientific evidence to support the varietal testing requirement. (Para. 8.35) **Then, based on all the evidence provided, and the opinions of the experts, the Panel concluded that a "rational or objective relationship" between the varietal testing requirement and the scientific evidence has not been demonstrated.** (Paras. 8.42-43)

The Panel recalled its preliminary ruling that evidence had only been presented for four of the products at issue, apples, cherries, nectarines and walnuts. By contrast, no evidence was available for apricots, pears, plums and quince. **Although the experts stated that their conclusions on this issue applied to the other four product as well, the Panel considered that there was insufficient evidence to apply its finding to the other four products. Therefore, the Panel's finding was limited to the varietal testing requirement as it applied to apples, cherries, nectarines and walnuts.** (Paras. 8.44-45) (On appeal, the Appellate Body upheld the Panel's decision to limit its finding under Article 2.2 to these four products, but it made an additional finding that the varietal requirement violates Article 5.1 with regard to the other products. *See DSC for Japan - Agricultural Products (AB).*)

Having made this finding, the Panel then considered Japan's argument that the Article 2.2 requirement applies "except as provided for in paragraph 7 of Article 5" and that the measure at issue is justified under SPS Agreement Article 5.7. Article 5.7 states:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt ... phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from ... phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the ... phytosanitary measure accordingly within a reasonable period of time.

According to the Panel, the first sentence of Article 5.7 allows Members to provisionally adopt phytosanitary measures if two elements are met: (1) the measure is imposed in respect of a situation where "relevant scientific information is insufficient"; and (2) the measure is adopted "on the basis of available pertinent information." However, the Panel noted that even if a measure meets both of these elements, the second sentence of Article 5.7 imposes additional obligations, namely the obligation to "seek to obtain the additional information necessary for a more objective assessment of risk"; and to "review the ... phytosanitary measure accordingly within a reasonable period of time." (Para. 8.54)

The Panel concluded that Japan had not fulfilled the latter two obligations. In particular, Japan had not sought information examining the appropriateness of the requirement, despite the relative ease with which such a study could be carried out; and it had not reviewed the measure within a reasonable period of time, especially considering that the procedure for testing these products had been in place for 20 years. **Therefore, the Panel found that Japan did not comply with the requirements in the second sentence of Article 5.7.** (Paras. 8.56-58)

Having found that the varietal testing requirement is not justified by Article 5.7, the Panel concluded that Japan's measure is inconsistent with Article 2.2, as it applies to apples, cherries, nectarines and walnuts, because it is maintained without "sufficient scientific evidence." (On appeal, the Appellate Body upheld this finding. *See DSC for Japan - Agricultural Products (AB).*)

The Panel saw no need to make an additional determination as to whether the measure is "based on scientific principles" under Article 2.2. Furthermore, the Panel said it was also unnecessary to determine whether the measure is inconsistent with Articles 5.1 and 5.2. (Paras. 8.61-62) (On appeal, the Appellate Body reversed the Panel's finding that there was no need to determine whether the measure, as it applies to the four products for which no finding under Article 2.2 could be made, is inconsistent with Article 5.1. *See DSC for Japan - Agricultural Products (AB).*)

SPS Agreement Article 5.6

The United States claimed that the varietal testing requirement is inconsistent with Article 5.6 because it is significantly more trade-restrictive than required to achieve Japan's appropriate level of sanitary protection.

The Panel noted that Article 5.6 provides:

> ... when establishing or maintaining ... phytosanitary measures to achieve the appropriate level of ... phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of ... phytosanitary protection, taking into account technical and economic feasibility.

Footnote 3 to Article 5.6 states the following:

> For purposes of paragraph 6 of Article 5, *a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of ... phytosanitary protection and is significantly less restrictive to trade.*

Thus, under this footnote, a measure will be found to be "more trade-restrictive than required," and therefore will violate Article 5.6, if there is an alternative measure which meets the following three elements:

> (1) the alternative measure is "reasonably available taking into account technical and economic feasibility";
>
> (2) the alternative measure "achieves [the Member's] appropriate level of ... phytosanitary protection"; and
>
> (3) the alternative measure is "significantly less restrictive to trade" than the measure at issue.

The Panel noted that the context of Article 2.2 is relevant for interpreting Article 5.6. Article 2.2 provides:

> Members shall ensure that any ... phytosanitary measure is applied only to the extent necessary to protect ... plant life or health.

(Paras. 8.70-72)

The Panel then examined whether certain alternative measures suggested by the United States and by the experts consulted meet the three elements under Article 5.6. If they did, then Japan would be acting inconsistently with that provision. In particular, the Panel looked at the options of (1) testing on a product-by-product basis, under which *all varieties of a product* would be approved for sale in Japan after *any variety of that product* has been approved, and (2) testing of possible differences in "sorption" characteristics of the different varieties of the products at issue. (Paras. 8.73-77)

The Panel considered whether each of these alternative measures meets all of the elements of Article 5.6. With regard to testing on a product-by-product basis, the Panel stated that this alternative is "reasonably available" under the first element of Article 5.6, as it is easier for both Japan and the exporting country to implement testing on a product-by-product basis than on variety-by-variety basis. (Para. 8.78) The third element of Article 5.6, that the alternative measure be significantly less trade-restrictive, was also satisfied, because testing by product would provide "market access" for additional varieties of products without additional testing. (Para. 8.79)

The Panel then examined whether testing by product meets the second element of Article 5.6, that the alternative measure achieves Japan's appropriate level of protection. Based on the opinion of the experts, the Panel considered that it could not say with sufficient certainty that testing by product would achieve the same level of protection as varietal testing. Therefore, it found that testing by product as an alternative measure does not satisfy the elements of Article 5.6. (Paras. 8.80-84)

Next, the Panel considered whether measures based on the testing of possible differences in "sorption" characteristics satisfied the elements of Article 5.6. In this regard, the Panel looked at two alternatives. First, it considered the option of monitoring certain product information during commercial treatment of the product. It found that this option was technically and economically feasible, and was significantly less restrictive to trade, thereby meeting the first and third elements of Article 5.6. However, it found that this option does not provide Japan's appropriate level of protection, so the second element of Article 5.6 was not met. (Paras. 8.85-90)

Second, the Panel considered the option of determining whether the sorption level of the approved variety differs from that of any additional varieties. The Panel found that this option is reasonably available taking into account technical and economic feasibility, and is significantly less restrictive to trade, thereby meeting the first and third elements of Article 5.6. Furthermore, the Panel concluded that this option achieves Japan's appropriate level of protection, thereby meeting the second element. (Paras. 8.91-101)

On this basis, the Panel concluded that the varietal testing requirement is more trade-restrictive than required and violates Article 5.6, because an alternative measure exists that meets all of the elements of Article 5.6. The Panel noted that its finding applies only to apples cherries, nectarines and walnuts, the products for which evidence was presented. (Paras. 8.102-104) (On appeal, the Appellate Body reversed the Panel's finding of inconsistency with Article 5.6, finding that the United States had never argued that determination of sorption levels was a measure that satisfied the requirements of Article 5.6. Rather, that theory had come solely from the experts. Therefore, the United States had not met its burden of proving a violation of Article 5.6. *See DSC for Japan - Agricultural Products (AB).*)

SPS Agreement Article 7 and Annex B - Transparency

The United States claimed that the varietal testing requirement has not been published, in violation of SPS Agreement Article 7. In addressing this claim, the Panel noted that Article 7 provides in relevant part: "Members ... shall provide information on their ... phytosanitary measures in accordance with the provisions of Annex B." Paragraph 1 of Annex B, in turn, states that: "Members shall ensure that all ... phytosanitary regulations which have been adopted are *published* promptly in such a manner as to enable interested Members to become acquainted with them." A footnote to this paragraph specifies that the "phytosanitary regulations" referred to are: "phytosanitary measures such as laws, decrees or ordinances which are applicable generally." The Panel concluded that for a measure to be subject to the publication requirement in Annex B, three conditions must be met: (1) the measure "[has] been adopted;" and (2) the measure is a "phytosanitary regulation," which is (3) "applicable generally." (Paras. 8.108-110)

Applying this standard here, the Panel observed that the parties agreed that the varietal testing requirement has been adopted and is applicable generally. The only remaining issue, therefore, is whether it is a "phytosanitary regulation." The Panel found that it is. In reaching this conclusion, the Panel noted that it made its finding "even though the varietal testing requirement is not mandatory" in the sense that "exporting countries can demonstrate quarantine efficiency by other means." In this regard, the Panel pointed out that the definition of phytosanitary regulation does not require such measures to be "mandatory or legally enforceable." (Paras. 8.108-111)

Therefore, the Panel concluded that the varietal testing requirement is subject to the publication requirement in SPS Agreement Annex B, paragraph 1. Because Japan has not published the varietal testing requirement, the Panel concluded that Japan is acting inconsistently with its obligations under SPS Agreement Annex B, paragraph 1, and with SPS Agreement Article 7. Furthermore, since Japan has not published the requirement with respect to any of the products at issue, the finding applies to all of these products. (Paras. 8.114-116) (On appeal, the Appellate Body upheld the Panel's conclusion on this issue, relying on slightly different reasoning. *See DSC for Japan - Agricultural Products (AB).*)

COMMENTARY

For further reading, see:

Joost Pauwelyn, "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: *EC - Hormones, Australia - Salmon and Japan - Varietals,*" 2 JIEL 4, pp. 641-664 (1999).

Terms of Reference - Claim Not Subject to Consultations

The Panel rejected the Japanese argument that a claim in the U.S. panel request should be disallowed because it had not been the subject of consultations. The issue of the relationship between consultations and the panel request was discussed by the Appellate Body in *Brazil - Aircraft*, where it stated that:

> We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the

> establishment of a panel. As stated by the Panel, "[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel." We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX. (emphasis added by the Appellate Body, footnote omitted)

Thus, it appears that as long as the particular claim in the panel request relates to the same matter in dispute that was the subject of consultations, it falls within the Panel's terms of reference. *See DSC for Brazil - Aircraft (AB).*

Scope of the Term "Measure"

See DSC for Japan - Agricultural Products (AB).

Last Update: March 22, 2005

Appellate Body Report
Japan - Measures Affecting Agricultural Products
(WT/DS76/AB/R) / DSR 1999:I, 277

Participants
Appellant/Appellee: Japan
Appellant/Appellee: U.S.
Third Participants: Brazil, EC

Appellate Body Division
Beeby (Presiding Member),
Lacarte-Muró, Matsushita

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Key Findings

- Upheld Panel's finding that the varietal testing requirement violates SPS Agreement Article 2.2 because it is maintained without sufficient scientific evidence, and that the requirement is not justified by SPS Agreement Article 5.7.
- Reversed Panel's finding that, based on a determination of sorption characteristics as an alternative measure, Japan's varietal testing requirement violates SPS Agreement Article 5.6.
- Upheld Panel's finding that the United States failed to prove that "testing by product" is a less-restrictive alternative measure that provides Japan's appropriate level of protection, and therefore upheld the Panel's finding that Japan does not violate Article 5.6 based on this alternative measure.
- Panel's decision not to consider certain of the products at issue under SPS Agreement Article 5.1 was "false judicial economy." The Appellate Body then completed the Panel's legal analysis of this issue, and found that the varietal testing requirement is inconsistent with SPS Agreement Article 5.1 as applied to those products.

BACKGROUND

In 1950, Japan enacted the Plant Protection Law, under which the import of certain plants was prohibited through various Ministerial Ordinances. By Ministerial Ordinance of June 30, 1950 (Plant Protection Law Enforcement Regulations) eight products originating from, *inter alia*, the United States were listed as prohibited plants: apricots, cherries, plums, pears, quince, peaches (including nectarines), apples and walnuts. The importation of these plants was prohibited on the grounds that they are potential hosts of codling moth, a pest not found in Japan.

For each product, exemptions from the import ban were granted on a variety-by-variety basis. In other words, to obtain an exemption, a permit must be sought for a *specific variety* of a product listed above. Obtaining a permit for *one* variety of a product, however, does not entitle a company to import *other* varieties of that product. Rather, import permits must be obtained for *each variety* of the product, and a permit entitles a company to sell only that variety of the product in Japan. Since 1978, approval has been granted for certain varieties of the U.S. products, and therefore the import ban has been lifted for those varieties.

In order to obtain an exemption from the import prohibition for a particular variety of a product, the exporting country must propose an alternative measure that would achieve a level of protection equivalent to that achieved by the existing import prohibition. The exporting country bears the burden of proving that the proposed alternative will achieve the appropriate level of protection. In practice, the alternative measure proposed is always disinfestation. With respect to plants that are hosts of codling moth, disinfestation consists of fumigation with methyl bromide ("MB") or a combination of MB fumigation and cold storage.

The Ministry of Agriculture, Forestry and Fisheries of Japan ("MAFF") developed two sets of guidelines for obtaining an exemption from the ban: (1) the "Experimental Guideline for Lifting Import Ban – Fumigation" outlines the procedures applicable to the initial lifting of the ban; and (2) the "Experimental Guide for Cultivar Comparison Test on Insect Mortality – Fumigation" establishes guidelines for approval of additional varieties. These guidelines were introduced in 1987 and have, according to Japan, not "generally been published."

(Panel Report, paras. 2.1-33, 8.2-3)

The United States claimed that the measure (referred to by the Panel as the "varietal testing requirement") is inconsistent with SPS Agreement Articles 2.2, 5.1, 5.2, 5.6, 7 and 8. The Panel found the measure to be inconsistent with SPS Agreement Articles 2.2, 5.6 and 7 (although its findings were limited to certain of the products at issue). For reasons of judicial economy, the Panel did not examine the U.S. claims under SPS Agreement Articles 5.1, 5.2, 8 and Annex C.

On appeal, Japan argued that the Panel erred in finding of violations of Articles 2.2, 5.6 and 7. In addition, Japan submitted that the Panel erred in its allocation of the burden of proof under Article 5.6, and violated DSU Article 11 in its findings under Article 2.2. The United States filed a cross-appeal, in which it addressed certain aspects of the Panel's findings on Articles 5.6 and 5.7. In addition, the United States argued that the Panel's findings on Articles 2.2 and 5.6 should be extended to the four products for which the Panel did not make findings; and it argued that, should the Appellate Body overturn the Panel's findings on Article 2.2, it should then find that the varietal testing requirement is inconsistent with Article 5.1, and with Article 8 and Annex C, paragraph 1 (because the Appellate Body upheld the Panel's findings under Article 2.2, this latter issue did not arise).

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Certain systemic issues arose in the context of specific substantive issues. See below.

SUBSTANTIVE ISSUES

SPS Agreement Article 2.2

The Panel had found that the varietal testing requirement is maintained without sufficient scientific evidence and is therefore inconsistent with SPS Agreement Article 2.2. Japan appealed this finding. (Para. 72)

In addressing this issue, the Appellate Body quoted Article 2.2, which provides:

> Members shall ensure that any sanitary and phytosanitary measure ... *is not maintained without sufficient scientific evidence*, except as provided for in paragraph 7 of Article 5.

(Para. 72) The Appellate Body referred to SPS Agreement Articles 5.1, 3.3 and 5.7 as relevant context for the phrase "maintained without sufficient scientific evidence." **Taking into account all of the considerations based on the text and context of Article 2.2, the Appellate Body said that it agreed with the Panel that the obligation in Article 2.2 not to maintain an SPS measure without "sufficient scientific evidence" requires that "there be a rational or objective relationship between the SPS measure and the scientific evidence."** Furthermore, it explained that whether there is a rational relationship "is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence." (Paras. 75-84)

Having upheld the legal standard formulated by the Panel, the Appellate Body also upheld the Panel's finding that the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts is maintained without sufficient scientific evidence in violation of SPS Agreement Article 2.2. (Para. 85)

DSU Article 11 - Panel's Findings under SPS Agreement Article 2.2

Japan claimed that the Panel acted inconsistently with DSU Article 11 in makings its finding that the varietal testing requirement is inconsistent with Article 2.2, because of a lack of proper examination of evidence, arbitrary citation of the experts' views, and a contradictory evaluation of the evidence. The Appellate Body noted that DSU Article 11 provides in part: "... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case ... ." Referring to its report in *EC - Hormones*, the Appellate Body said that only "egregious errors" constitute a failure to make an objective assessment of the facts under DSU Article 11. Here, the Appellate Body found that Japan had not demonstrated that the Panel made errors "of the gravity required" to find such a violation. **Therefore, the Appellate Body found that the Panel did not "abuse its discretion" contrary to the requirements of DSU Article 11.** (Paras. 140-142)

SPS Agreement Article 5.7

After finding that the varietal testing requirement is inconsistent with SPS Agreement Article 2.2, the Panel had considered whether it is nonetheless justified by Article 5.7. The Panel found that it was not. Japan appealed this finding. (Paras. 86-88)

Article 5.7 provides:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

The Appellate Body noted that Article 5.7 sets out four requirements which must be met in order to adopt and maintain a provisional SPS measure. Under the first sentence of Article 5.7, a Member may "provisionally" adopt an SPS measure if this measure is:

> (1) imposed in respect of a situation where "relevant scientific information is insufficient"; and
>
> (2) adopted "on the basis of available pertinent information."

Under the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:

> (1) "seek[s] to obtain the additional information necessary for a more objective assessment of risk"; and
>
> (2) "review[s] the ... measure accordingly within a reasonable period of time."

(Paras. 86-89)

The Panel had found that Japan had not fulfilled the requirements contained in the second sentence of Article 5.7, but it did not examine whether Japan's varietal testing requirement met the requirements of the first sentence of Article 5.7. Japan made two arguments on appeal: (1) That the Panel erred in its application of Article 5.7 (specifically, Japan argued that the wording in Article 2.2 stating "except as provided for in paragraph 7 of Article 5" refers only to the first sentence of Article 5.7, and therefore the first sentence is the only requirement which must be fulfilled); and (2) that the Panel erred in its finding that the requirements of the second sentence of Article 5.7 were not fulfilled. (Paras. 86-90)

The Appellate Body rejected both arguments. With regard to the argument that only the first sentence of Article 5.7 must be fulfilled, the Appellate Body said that this approach was not supported by the text of Article 2.2, which refers to Article 5.7 as a whole. As a result, *all* of the requirements of Article 5.7 must be fulfilled. (Paras. 90-91) As for the second argument, that the Panel erred in finding that the requirements of the second sentence were not met, the Appellate Body rejected Japan's appeal. In

particular, it agreed with the Panel that Japan did not seek to obtain the additional information necessary for ("germane" to) a more objective risk assessment, as the information actually collected by Japan did not "examine the appropriateness" of the measure and did not address the issue of whether "varietal characteristics cause a divergency in quarantine efficacy." Moreover, it agreed that Japan did not review its varietal testing requirement within a reasonable period of time. (Paras. 92-93)

Therefore, the Appellate Body upheld the Panel's finding that the varietal testing requirement is not justified under Article 5.7. (Para. 94)

SPS Agreement Article 5.6 - Burden of Proof/Prima Facie Case (Determination of Sorption)

The Panel had found that Japan acted inconsistently with SPS Agreement Article 5.6 because there was an alternative measure available that provided the same level of protection as the measure at issue, but which was significantly less trade-restrictive than the varietal testing requirement. The measure that was the basis for the Panel's finding was the "determination of sorption levels." In its findings, the Panel recognized that the United States had never specifically addressed the issue of whether this particular alternative measure meets the requirements of Article 5.6. Instead, the United States had focused on a different alternative measure, testing on a product-by-product basis, and it was the Panel itself, based on testimony given by the experts, that suggested that determination of sorption levels might satisfy Article 5.6. Japan argued that the Panel's finding that determination of sorption levels is a measure satisfying the requirements of Article 5.6 was therefore in error. Specifically, Japan argued that under the rules on burden of proof, "panels cannot find facts neither argued nor proven by the parties." (Paras. 118-120)

In reviewing the Panel's finding, the Appellate Body stated that under the rules of burden of proof, it was for the United States to establish a *prima facie* case that there is an alternative measure that meets the requirements of Article 5.6. However, since the United States did not even *claim* that the determination of sorption levels constitutes such an alternative measure, the Appellate Body considered that the United States could not have established a *prima facie* case. Here, the United States had not even argued that the determination of sorption levels was a measure which meets the requirements of Article 5.6. Although it is true that panels have the right to seek information and consult experts, the Appellate Body noted, this information cannot be the "basis" for a finding of inconsistency with Article 5.6 where the complaining party did not establish a *prima facie* case of inconsistency, as was the case here. **Therefore, the Appellate Body reversed the Panel's finding that Japan acts inconsistently with Article 5.6.** (Paras. 121-131)

SPS Agreement Article 5.6 (Testing by Product)

The Panel had found that the alternative measure proposed by the United States, testing on a product-by-product basis, did not meet the requirements of Article 5.6, in that the varietal testing requirement was not "more trade-restrictive than required" in relation to the measure proposed by the United States. The United States appealed this finding.

Article 5.6 provides:

> ... when establishing or maintaining ... phytosanitary measures to achieve the appropriate level of ... phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of ... phytosanitary protection, taking into account technical and economic feasibility.

A footnote to Article 5.6 states the following:

> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of ... phytosanitary protection and is significantly less restrictive to trade.

According to the Appellate Body, referring to its finding in *Australia - Salmon*, under this footnote, a measure will be found to be "more trade-restrictive than required," and therefore in violation of Article 5.6, if there is an alternative measure which meets the following three elements:

> (1) the alternative measure is reasonably available taking into account technical and economic feasibility;
>
> (2) the alternative measure achieves the Members' appropriate level of phytosanitary protection; and
>
> (3) the alternative measure is significantly less restrictive to trade" than the measure at issue.

(Para. 95)

The Panel had found that testing by product meets the first and third elements, but does not achieve Japan's appropriate level of protection under the second element, and therefore, based on testing by product as an alternative measure under Article 5.6, Japan did not act inconsistently with Article 5.6. (Para. 97)

The Appellate Body rejected the U.S. appeal, stating that it appeared that the United States was challenging the Panel's consideration and weighing of evidence. The Appellate Body said that, as such a claim relates to the Panel's assessment of facts, it is outside the scope of appellate review under DSU Article 17.6. (Para. 98) **Therefore, the Appellate Body upheld the Panel's finding that the United States had not proved that testing by product as an alternative measure demonstrates that Japan has acted inconsistently with Article 5.6.** (Para. 100)

SPS Agreement Article 7 and Annex B, paragraph 1

The Panel had found that Japan acted inconsistently with SPS Agreement Article 7 and Annex B, paragraph 1 by failing to publish the varietal testing requirement. Japan appealed this finding, claiming that the varietal testing requirement is not a "legally enforceable instrument," and therefore it is not within the scope of application of Annex B, paragraph 1. (Para. 104)

SPS Agreement Article 7 is titled "Transparency," and reads:

> Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

SPS Agreement Annex B, paragraph 1 states: "Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them." In a footnote to this paragraph, sanitary and phytosanitary

"regulations" are defined as: "Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally." (Para. 102)

The Appellate Body considered whether the varietal testing requirement is a "measure" covered by the publication requirement. In doing so, the Appellate Body said that the scope of application of the publication requirement is not limited to "laws, decrees or ordinances," because the phrase "such as" indicates that these examples are non-exhaustive. It stated that the scope also includes "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to." Thus, the publication requirement applies to any "instrument" which is "similar in character" to "laws, decrees or ordinances." (Para. 105)

Applying that standard here, the Appellate Body found that "in the light of the actual impact of the varietal testing requirement on exporting countries, ... this instrument is of a character similar to laws, decrees and ordinances ... ." **Therefore, the Appellate Body agreed with the Panel that the varietal testing requirement is a phytosanitary regulation within the meaning of paragraph 1 of Annex B, and upheld the Panel's finding that Japan has acted inconsistently with this provision and with Article 7 by failing to publish it.** (Paras. 107-108)

SPS Agreement Article 5.1 / Judicial Economy

Because it found that the varietal testing requirement is inconsistent with SPS Agreement Article 2.2, the Panel saw "no need" to make a finding on the consistency of the requirement with SPS Agreement Article 5.1. In its appellant's submission, the United States made two requests related to the Panel's conclusion: (1) In the event that the Appellate Body does not extend the Panel's finding under Article 2.2 to apricots, pears, plums and quince (the products excluded from the Panel's findings under Article 2.2), the Appellate Body should "complete the Article 5.1 analysis" and find that the varietal testing requirement violates Article 5.1; and (2) if the Appellate Body reverses the Panel's finding that the requirement as it applies to apples, cherries, nectarines and walnuts is inconsistent with Article 2.2, the Appellate Body should "complete the Article 5.1 analysis" and find that the varietal testing requirement as a whole violates Article 5.1. (Paras. 109-110)

In reviewing the Panel's finding, the Appellate Body referred to an "error of logic" made by the Panel. The Panel had found that the varietal testing requirement violates Article 2.2 only with respect to the products for which evidence was presented (apples, cherries, nectarines and walnuts), not with respect to the other products (apricots, pears, plums and quince). However, the Panel also said that there was no need to examine the measure under Articles 5.1 and 5.2 because it had already been found to be inconsistent with Article 2.2. In fact, the Appellate Body noted, the violation of Article 2.2 only applied to apples, cherries, nectarines and walnuts, and not to the other products. Thus, there had been no finding of inconsistency with regard to these other products. As a result, with regard to the varietal testing requirement as it applies to these other products, the Appellate Body considered that there was a need to examine whether this measure was inconsistent with Article 5.1. The Appellate Body concluded that by not making a finding under Article 5.1 with regard to the varietal testing requirement as it applies to the other four products, "the Panel improperly applied the principle of judicial economy." (Para. 111)

The Appellate Body then said, referring to its statements in *Australia - Salmon* on completing a panel's legal analysis, that a finding under Article 5.1 with respect to apricots, pears, plums and quince is necessary "in order to ensure effective resolution" of the dispute. Therefore, the Appellate Body attempted "to complete the legal analysis and examine whether the varietal testing requirement as it applies to apricots, pears, plums and quince is consistent with Article 5.1." (Para. 112)

As noted in its report in *Australia - Salmon*, the Appellate Body stated that with regard to the type of risk assessment required in this case, a risk assessment within the meaning of Article 5.1 must:

> (1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
>
> (2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and
>
> (3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*

(Para. 112, emphasis added by Appellate Body) Japan had argued before the Panel that its varietal testing requirement was based on the *1996 Pest Risk Assessment of Codling Moth* (the "*1996 Risk Assessment*"), and therefore, according to Japan, the requirements of Article 5.1 are satisfied. The Appellate Body noted, however, that the *1996 Risk Assessment* does not discuss or even refer to the varietal testing requirement or to any other phytosanitary measure that might be taken to reduce risk. This document, therefore, does not "evaluate the likelihood of the entry, establishment or spread" of codling moth "according to the SPS measures which might be applied" within the meaning of Article 5.1. As a result, the Appellate Body said, it is not a "risk assessment." (Para. 113)

On this basis, the Appellate Body concluded that the varietal testing requirement as it applies to apricots, pears, plums and quince is inconsistent with SPS Agreement Article 5.1, as there is no proper risk assessment on which it is based. (Para. 114)

SPS Agreement Articles 2.2, 5.6 - Apricots, Pears, Plums and Quince

The Panel had found that there was insufficient evidence upon which to extend its findings under SPS Agreement Articles 2.2 and 5.6 to apricots, pears, plums and quince. The United States appealed these findings. (Paras. 132-133)

In addressing this issue, the Appellate Body first noted that the U.S. panel request defines the measure in dispute as the varietal testing requirement as it applies to "US products on which Japan claims that codling moth may occur." These products are apples, cherries, peaches (including nectarines), walnuts, apricots, pears, plums and quince. As the parties had only submitted evidence relating to apples, cherries, nectarines and walnuts, however, the Panel had said that it would examine the measure at issue in relation to those particular products, and refer to the experts concerning the relevance of this evidence for the other products. At its meeting with the experts, the Panel asked them whether their statements concerning apples, cherries, nectarines and walnuts were also valid for apricots, pears, plums and quince. One of the experts answered "yes," and the other two agreed. After noting that the experts did not further elaborate on their answers, and that neither of the parties provided any additional comments or information, the Panel concluded that there was not sufficient evidence before it to extend its finding of inconsistency with Article 2.2 to apricots, pears, plums and quince. (Paras. 134-135)

The Appellate Body upheld the Panel's conclusion. In doing so, the Appellate Body noted that the burden was on the United States to make a *prima facie* case that the varietal testing requirement was inconsistent with Article 2.2. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel had considered, after taking into account both the evidence submitted

by the United States and the opinions received from the experts, that the United States did *not* adduce sufficient evidence to meet this burden. **Therefore, the Appellate Body concluded that the Panel's decision not to extend its findings of inconsistency under Article 2.2 to apricots, pears, plums and quince was not an error of law.**

Then, because the Appellate Body had reversed the Panel's finding of inconsistency with Article 5.6 with respect to the four products examined, the Appellate Body said that there was no need for it to consider the claim made by the United States that the Panel's findings of inconsistency under this provision should be extended to apricots, pears, plums and quince. (Paras. 136, 138-139)

Finally, in response to the U.S. concern regarding its ability to gather evidence pertaining to these four other products, the Appellate Body noted that the United States could have requested, pursuant to SPS Agreement Article 5.8, that Japan provide "an explanation of reasons" for its varietal testing requirement as it relates to these products.

COMMENTARY

For further reading, see:

Joost Pauwelyn, "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: *EC - Hormones, Australia - Salmon and Japan - Varietals*," *2* JIEL 4, pp. 641-664 (1999).

Burden of Proof/Prima Facie Case

The Panel had found that Japan acted inconsistently with SPS Agreement Article 5.6 because there is another measure available that provides the same level of protection but is significantly less trade-restrictive. The alternative measure that was the basis for the Panel's finding was the "determination of sorption levels." In its findings, the Panel had recognized that the United States never specifically addressed the issue of whether this particular measure meets the requirements of Article 5.6. Instead, the United States had focused on another alternative measure, "testing by product," and it was the Panel itself, solely on the basis of expert testimony, that suggested that the determination of sorption levels might satisfy Article 5.6.

In reviewing the Panel's findings under Article 5.6, the Appellate Body stated that under the rules of burden of proof, it was for the United States to establish a *prima facie* case that there is an alternative measure that meets the requirements of Article 5.6. Since the United States did not even *claim* that the determination of sorption levels is such an alternative measure, the Appellate Body considered that the United States could not have made the requisite *prima facie* case. Therefore, the Panel's finding was in error.

Thus, the Appellate Body made clear that a panel's finding must have at least some basis in the claims and arguments of a party. That is, a panel cannot make findings based exclusively on its own evidence or legal reasoning.

This does not mean, however, that panels are restricted to relying on the arguments of the parties as the *sole* rationale for their findings. In *EC - Hormones*, the European Communities argued that the Panel erred by basing the main part of its reasoning related to SPS Agreement Article 5.5 on a claim that the complainants had not made. The Appellate Body rejected the EC argument. In doing so, the Appellate Body stated that, as the complainants had made a claim that the EC measure is inconsistent with Article 5.5,

the objection of the European Communities overlooks the distinction between legal *claims* made by the complainant and *arguments* used by that complainant to sustain its legal claims. The Appellate Body ruled that "nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- *or to develop its own legal reasoning* -- to support its own findings and conclusions on the matter under its consideration."

So, in *Japan - Agricultural Products* the Appellate Body said that a panel cannot reach a finding of violation in the absence of a *prima facie* case being made by the complaining party. By contrast, in *EC - Hormones*, the Appellate Body said that panels are free to develop their own legal reasoning. How can these two decisions be reconciled? The different fact patterns in these two cases demonstrate the line the Appellate Body was drawing. In *EC - Hormones*, the panel relied on *several* evidentiary factors in support of its finding of violation, *only one of which* it had developed on its own. Implicitly, the Appellate Body appears to have been saying that the *EC - Hormones* panel's finding was premised on the assumption that the complaining parties made their *prima facie* case based on their own arguments, and therefore there was no error in the panel's reliance on its own reasoning to supplement the evidence presented by the complaining parties. By contrast, in *Japan - Agricultural Products*, the Panel's finding of violation was based *exclusively* on evidence developed on its own, and the complaining party had not made its *prima facie* case based on its own arguments and evidence. Thus, the statements in *EC - Hormones* about the difference between claims and arguments should be read in light of the findings in *Japan - Agricultural Products* that a panel cannot make a finding of violation in the absence of the complaining party making its *prima facie* case. The Appellate Body further clarified this point in *India - ORs*, where it made clear that while the complaining party must make its *prima facie* case, panels may take into account outside information or arguments from the other party in deciding whether this case has been made. *See DSC for India - ORs (AB).*

Scope of the Term "Measure"

In examining the U.S. claim under SPS Agreement Article 7 and Annex B, the Appellate Body interpreted the scope of the term "measure" as used in Annex B. Annex B applies to all "measures," and provides three examples of measures: "laws, decrees or ordinances." The Appellate Body found that the term also includes "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to." Thus, the SPS Agreement publication requirement applies to any "instrument" which is "similar in character" to "laws, decrees or ordinances." Applying that standard here, the Appellate Body found that "in the light of the actual impact of the varietal testing requirement on exporting countries, ... this instrument is of a character similar to laws, decrees and ordinances ...."

The scope of the term "measure" has also been interpreted under GATT Article XXIII:1(b). In *Japan - Film*, the panel examined whether certain items included by the United States in the list of "measures" identified in its panel request were properly characterized as measures under this provision. At issue were certain laws, regulations, general policy statements by government agencies and officials of various ranks, and governmental actions generally authorizing certain private activities. The *Japan - Film* panel recalled the criteria applied by the GATT panel in *Japan - Semi-conductors* for determining whether or not a formally non-binding measure should be considered to be a governmental restriction under Article XI:1, *i.e.*, that administrative guidance must create incentives or disincentives to act and compliance with the guidance must depend largely on governmental action. In addition, the *Film* panel referred to the GATT panel in *Japan - Agriculture* (which dealt with a measure unrelated to the one at issue here), under which the panel would simply look at whether "administrative guidance" emanated from the government and was effective in the Japanese context. The *Film* panel concluded that a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors, and said that it was "open to a broad definition of the term measure for

purposes of Article XXIII:1(b), which considers whether or not a non-binding government action has an effect similar to a binding one."

Last Update: March 22, 2005

xhibit 24

Panel Report
Japan - Measures Affecting the Importation of Apples
(WT/DS245/R) / DSR 2003:IX, 4481

Parties
Complainant: U.S.
Respondent: Japan
Third Parties: Australia, Brazil, Chinese Taipei, EC, New Zealand

Timeline of Dispute
Panel Request: May 7, 2002
Panel Established: June 3, 2002
Panel Composed: July 16, 2002
Interim Report Issued: March 20, 2003
Final Report Issued to Parties: June 25, 2003
Final Report Circulated: July 15, 2003
Notice of Appeal: August 28, 2003
AB Report Circulated: November 26, 2003
Adoption: December 10, 2003

Panelists
Mr. Michael Cartland (Chairperson), Ms. Kathy-Ann Brown, Mr. Christian Häberli

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Key Findings

- Found that two of the "requirements" in the measure at issue are "instances of elements ... which are most obviously 'maintained without sufficient scientific evidence'": (1) the prohibition on imports where fire blight is detected within a 500 meter buffer zone surrounding an orchard; and (2) the requirement that export orchards be inspected three times per year. These requirements, the Panel found, do not "bear a rational relationship" to the scientific evidence available. Therefore, the Panel concluded that the measure is "clearly disproportionate" to the identified risk and that the measure "as a whole" is maintained "without sufficient scientific evidence" within the meaning of SPS Agreement Article 2.2. **[Article 2.2 findings upheld by Appellate Body; DSU Article 11 challenge related to findings on Article 2.2 rejected by Appellate Body.]**
- Concluded that the present "situation" is one where there is "sufficient relevant scientific evidence available, and that the first condition for invoking [SPS Agreement] Article 5.7 is consequently not met." Therefore, the Panel found that Japan failed to establish that the measure at issue is a provisional measure justified under Article 5.7. **[Upheld by Appellate Body.]**
- Having concluded that the measure is not a provisional measure maintained in accordance with Article 5.7, the Panel found that Japan violated Article 2.2. **[Upheld by Appellate Body.]**
- Concluded that Japan's 1999 Pest Risk Analysis "does not meet the requirements of a risk assessment" under SPS Agreement Article 5.1, as defined in Annex A, paragraph 4. As a result, measure is not "based on" a "risk assessment," and Japan has violated Article 5.1. **[Upheld by Appellate Body.]**

BACKGROUND

This dispute involves Japanese policies related to the protection of apple fruit grown in Japan from the fire blight bacterium (*Erwinia amylovora*). Fire blight affects a number of host plants, including apple trees. Fruits infected by fire blight exude bacterial ooze, or inoculum, which is transmitted primarily through wind and/or rain and by insects or birds to open flowers on the same or new host plants. Immature apples can be infected through natural openings in the skin or by diseased branches. Symptoms of infection of host plants with fire blight depend on the parts infected.

The bacterium can exist in a non-pathogenic relationship with its host. When the bacterium occurs *inside* a plant or apple fruit in a non-pathogenic relationship, the term *endophytic* is used; when the bacterium occurs on the *outer surface* of a plant or fruit in a non-pathogenic relationship, the term *epiphytic* is used.

Fire blight is native to North America, but has since spread across northern and western Europe and the Mediterranean region. Latin America and substantial parts of Africa and Asia apparently remain fire blight-free.

At issue here are the following Japanese measures that restrict imports of apples from the United States on the basis of concerns about fire blight:

- Plant Protection Law No. 151, enacted on May 4, 1950 (specifically Article 7);
- Plant Protection Law Enforcement Regulations, enacted on June 30, 1950 (specifically Article 9 and Annexed table 2);
- Ministry of Agriculture, Forestry and Fisheries ("MAFF") Notification No. 354, dated March 10, 1997; and
- MAFF "Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America," dated April 1, 1997 ("Detailed Rules").

Under the Plant Protection Law and the Enforcement Regulations, importation of host plants of 15 quarantine pests, including fire blight bacteria, is prohibited. However, these laws permit Japan to decide, on a case-by-case basis, to lift the import prohibition with respect to designated plants and products according to certain criteria that have been established by past practice. These criteria are as follows:

- Lifting of the prohibition is subject to a proposal of an alternative measure by a foreign government;
- The level of protection required for the proposed alternative measure is that equivalent to import prohibition;
- The exporting government bears the burden of proving that the proposed alternative measure achieves the required level of protection.

Based on these general criteria, as well as certain specific conditions that were developed, apples from the United States may be imported into Japan. In this regard, MAFF Notification No. 354 and the Detailed Rules set out the following conditions under which U.S. apples may be imported:

(1) Apple fruit must be produced in "designated fire blight-free orchards," with the designation made by the U.S. Department of Agriculture (in practice, only orchards in the states of Oregon and Washington have been designated as such);

(2) The export orchard "must be free of plants infected with fire blight and free of host plants of fire blight (other than apples), whether or not infected";

(3) The fire blight-free orchard must be surrounded by a 500-meter fire blight-free "buffer zone";

(4) The orchard and buffer zone must be inspected at least three times annually, with additional inspections following any strong storm;

(5) Harvested apples must be treated with surface disinfection by soaking in sodium hypochlorite solution for one minute or longer;

(6) Containers for harvesting must be disinfected by a chlorine treatment;

(7) The interior of the packing facility must be disinfected by a chlorine treatment;

(8) Fruit destined for Japan must be kept separated post-harvest from other fruit;

(9) U.S. plant protection officials must certify or declare that fruit are free of quarantine pests, "are not infested/infected with ... fire blight," and were treated with chlorine; and

(10) Japanese officials must confirm that the U.S. officials have made the necessary certification and that the chlorine treatment and orchard designations were properly made, and must also inspect both the disinfestation and packing facilities.

(Panel Report, paras. 2.1-19, 8.5-7, 8.25; AB Report, paras. 8-9, 14-16)

The United States claimed that these requirements, individually and taken together, are inconsistent with SPS Agreement Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 5.7, 6.1, 6.2, 7 and Annex B (paragraphs 5 and 7), as well as GATT Article XI and Agriculture Agreement Article 4.2. (The Panel did not examine the claims under SPS Agreement Articles 5.2 and 5.6, or the claims under the GATT and the Agriculture Agreement, for reasons of judicial economy. In addition, the Panel did not make any findings under SPS Agreement Articles 2.3, 5.3, 5.5, 6.1 and 6.2 because these claims were not addressed in the U.S. submissions).

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

SPS Agreement Article 11.2 / DSU Article 13.1 - Consultation with Scientific Experts

Pursuant to SPS Agreement Article 11.2 and DSU Article 13.1, the Panel decided to consult with individual scientific experts on issues related to this dispute. (Paras. 6.1-4, fn. 215)

Terms of Reference - The Measure at Issue

At the outset, the Panel examined two issues related to the scope of the measures at issue. First, the Panel said that it would clarify the "relevance" of "treating the Japanese requirements and restrictions ... as one single measure or as a combination of several individual measures." After considering the various references to the term "measure" in the DSU and the SPS Agreement, as well as past disputes where SPS measures were examined, the Panel concluded that it would examine the requirements and

restrictions at issue as "one single measure." In doing so, the Panel noted that the United States did not suggest that such an approach would be "inappropriate"; that Japan referred to its "systems approach" of treating the restrictions as a whole and therefore objected to reviewing the measures individually; and that "these requirements cumulatively constitute the measures *actually applied* by Japan." Thus, the Panel concluded that it "should consider together" these requirements. (Paras. 8.10-20)

Second, the Panel considered the specific "elements" of the measure at issue. In this regard, the Panel noted the parties' disagreement as to the "actual number of requirements ... ." In response, the Panel set forth its view of the "elements" that compose the measure at issue, noting that the certification and inspection requirements at issue here fall within the definition of phytosanitary measures contained in Annex A, paragraph 1. (*See* the elements of the measure as listed in the Background section above). (Paras. 8.21-25)

Terms of Reference - The Products at Issue

The United States argued that the product that is subject to the measure at issue is "mature, symptomless apples." In response, the Panel noted that the U.S. panel request refers only to "US apples," which it said is "less specific" than "mature, symptomless apples." It also noted that the United States argued for this product definition based on its assumptions that mature, symptomless apples are not a pathway for fire blight and that shipments from the United States to Japan only contain mature, symptomless apples. Both of these assumptions, the Panel said, could only be verified through a review of the merits of the case. The Panel stated that it would not "prejudge [its] conclusions by unduly restricting the scope of [its] findings to 'mature, symptomless apple fruit.'" Therefore, it concluded that the measure at issue applies to "apple fruit produced in the United States for exportation to Japan." (Paras. 8.26-34) (On appeal, the Appellate Body rejected a U.S. claim that the Panel acted outside the scope of its "authority" when it made findings related to products other than "mature, symptomless" apples. *See DSC for Japan - Apples (AB).*)

Terms of Reference - Provisions Not Addressed in the First U.S. Submission

Japan requested that the Panel "remove" certain claims from the "scope of [the] proceedings." In particular, Japan argued that certain claims should be excluded because they were not found in the consultations request, and that other claims should be excluded because they "were not developed in the first US written submission." (Paras. 8.38, 8.57, 8.59) On the first point, the Panel considered it unnecessary to make a finding, because the United States developed no arguments or evidence on one of the claims, and the Panel ultimately exercised judicial economy on the other. (Paras. 8.60-61) As to the second point, the Panel referred to the Appellate Body report in *EC - Bananas* and noted that "it is well established that a complainant is not prevented ... from developing in its second submission arguments relating to a claim that is within the terms of reference of the panel, even if it did not do so in its first written submission." Here, the United States made arguments in relation to GATT Article XI and Agriculture Agreement Article 4.2 "only during [the] two substantive hearings with the parties." The Panel decided that the "most appropriate way" to deal with this issue was to give Japan "sufficient opportunity to reply." (Paras. 8.63-66)

Admissibility of Evidence

Japan requested that the Panel "remove" two documents submitted by the United States as evidence in its first submission. According to Japan, these documents were submitted "in such a way that Japan was prevented from discussing them during consultations," and "the probative value ... is questionable, given the conditions in which they were obtained." (Paras. 8.37, 8.52) In response, the Panel noted that "as a matter of principle, the parties are entitled to submit evidence in support of their

arguments." Here, the Panel was "not convinced that ... it should exclude" the documents in question. In this regard, it noted that the DSU Article 11 requirement to make an objective assessment of the facts "imposes on us an obligation not to exclude *a priori* any evidence submitted in due time by any party." The Panel noted that it had provided Japan "with the opportunity to comment on the substance of these documents." (Paras. 8.55-56)

In addition, as part of its consideration of the "burden of proof," the Panel looked at the question of whether it should "consider evidence that became available only after the establishment of the Panel." On this issue, the Panel decided "not to reject evidence submitted by a party on which the other party had had an opportunity to comment, whether it took advantage of such an opportunity or not." (Para. 8.49)

Finally, Japan also argued that the Panel should not include scientific evidence which has become available after the date of entry into force of the SPS Agreement in 1995. In response, the Panel stated: "We do not see in the text of Article 5.7, or of Article 2.2 for that matter, any reason to limit our assessment of the 'relevant scientific evidence' to evidence available before 1995." (Para. 7.10)

Burden of Proof - SPS Agreement Articles 2.2 and 5.7 and SPS Agreement Generally

Japan argued that the United States, "as the exporting country affected by the disease, would 'naturally' have more information on the *E. amylovora* bacteria." The Panel rejected this view, stating: "We do not see the greater expertise of the exporting country as a factor that should automatically justify a different allocation of the burden of proof or the imposition of a heavier burden of proof on one party." Furthermore, the Panel noted that Japan "could have sought to perform or commission research on *E. amylovora* in third countries." (Paras. 7.1-5, 8.44-46)

In addition, Japan argued that in order for the United States to prove its claim under Article 2.2, it "has to positively prove the 'insufficiency' of scientific evidence." In response, the United States said that there is "simply no scientific evidence supporting the measure at issue." The Panel concluded that in these circumstances, "we consider that the United States should raise a presumption that there are no *relevant* scientific studies or reports in order to demonstrate that the measure at issue is not supported by sufficient scientific evidence." Then, if Japan "submits elements to rebut that presumption," the Panel would have to weigh the evidence before it. (Paras. 8.106, 8.108)

Finally, in considering the issue of Article 5.7, the Panel recalled that "the burden is on Japan, as the party invoking Article 5.7 to make a *prima facie* case in support of its position." (Para. 8.212)

SUBSTANTIVE ISSUES

SPS Agreement Article 2.2 - Maintained Without Sufficient Scientific Evidence

The United States claimed that the measure at issue is maintained without "sufficient scientific evidence," contrary to SPS Agreement Article 2.2. (Paras. 8.67-71) That provision states:

> Members shall ensure that any ... phytosanitary measure is applied only to the extent necessary to protect ... plant life or health, is based on scientific principles and *is not maintained without sufficient scientific evidence*, except as provided for in paragraph 7 of Article 5.

At the outset, the Panel addressed two general questions related to this claim: (1) what needs to be demonstrated "in substance"? (2) How can the parties demonstrate "the existence or absence of scientific evidence"? (Paras. 8.81-83)

As to the "substance" of what must be demonstrated, the Panel said that it would assess the following five elements as part of its examination:

- "As a preliminary matter, whether the notion of mature, symptomless apple fruit is scientifically supported and whether it is appropriate to restrict our examination of the measure at issue to its application to mature, symptomless apples";
- "whether mature apple fruit can be infected";
- "whether endophytic bacteria may be found in mature apple fruit";
- "whether mature apple fruit may harbour epiphytic bacteria";
- "whether infested or infected apple fruit harbouring endophytic or epiphytic bacteria can complete the fire blight transmission pathway, i.e. whether the bacteria can survive commercial handling, storage and transportation and whether, once it has entered Japan, it can transmit the bacteria to host plants at a receptive stage (apple as a pathway)." (Para. 8.89)

The Panel considered each of these points in turn below.

With regard to "how" to demonstrate "the existence or absence of sufficient scientific evidence," the Panel considered the meaning of two specific terms: "scientific evidence" and "sufficient." Regarding the term "scientific evidence," the Panel said that the use of the word "scientific" means that the evidence should be "gathered through scientific methods" and should exclude "information not acquired through a scientific method." As to the word "evidence," the Panel noted that if the negotiators intended that "any material" could be used, they could have used the word "information." Thus, the term "scientific evidence" "excludes ... not only insufficiently substantiated information, but also such things as a non-demonstrated hypothesis." In addition, referring to the statement of one of the experts consulted, the Panel said that "an approach that favors relying on scientifically produced evidence rather than on purely circumstantial evidence" is appropriate. On this basis, the Panel concluded that it would consider all relevant evidence that "can be considered 'scientific,'" and would not exclude *a priori* pertinent "indirect" evidence, provided that it is scientific. (Paras. 8.91-99) Finally, with regard to the word "sufficient," the Panel referred to the Appellate Body's interpretation of this term in paragraph 73 of *Japan - Agricultural Products*, where it was stated that the ordinary meaning of "sufficient" is "of a quantity, extent, or scope adequate to a certain purpose or object." Thus, the Appellate Body said, "sufficiency" is a "relational concept," requiring "the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence." On this basis, the Panel said, "[a]n *adequate relationship* is thus required between the restriction on imports of apples applied by Japan and the relevant scientific evidence." This "adequate relationship," it said, requires "a rational or objective relationship" between the two. (Paras. 8.101-103)

Before proceeding with an examination of the Article 2.2 legal standard, the Panel next addressed the specific issues referred to above in the context of the "substance" of what must be demonstrated here. First, it examined the "preliminary question" of "the relevance and consequences of the notion of 'mature, symptomless' apple fruit" for its assessment. In this regard, the Panel recalled that the United States argued that the product it exports to Japan is exclusively "mature, symptomless" apple fruit. (Para. 8.109) On the basis of the comments of the experts consulted, the Panel considered that differentiating between "mature and immature" apples is relevant in terms of the risk of fruit contamination, and also that the concept of "symptomless" apples is "scientifically pertinent." (Paras. 8.113-118) In addition, the Panel stated that "mature, symptomless" apples "may present a low risk of acting as an effective pathway,"

whereas "other apples" "may carry a higher risk in terms of contamination." Recalling the Appellate Body's finding in *EC - Hormones* that it is legitimate to consider the risks "arising from the failure to observe the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, in combination with multiple problems relating to the detection and control of such failure," the Panel considered that it was "legitimate" to consider the issue, raised by Japan, of "human/technical errors in the sorting of apples or illegal actions which would lead to importation of infested/infected apples." The Panel concluded, "it is not only useful, but also relevant to differentiate, in our assessment of the evidence regarding transmission of the disease, between the risks related to physiologically mature and apparently healthy apple fruit on the one hand, and the risks related to other apples (immature, mature but damaged) on the other hand, even if the latter may only accidentally enter the territory of Japan." (Paras. 8.119-122) (On appeal, the Appellate Body upheld the Panel's findings in this regard. *See DSC for Japan - Apples (AB).*)

Second, the Panel examined the issue of "infestation" and "infection" of mature, symptomless apple fruit. (Infested fruit are contaminated but not diseased; infected fruit are diseased). With regard to "infestation," the Panel noted the view of the experts that there is no evidence that mature, symptomless apple fruit will "harbour" endophytic bacteria. The one study that did support the view that such "harbouring" could occur had findings which "are not clear and are disputed." Therefore, the Panel concluded, "on the basis of the information made available" there is not sufficient scientific evidence that mature, symptomless apples would "harbour" endophytic populations of bacteria. (Paras. 8.123-128) Similarly, with regard to epiphytic bacteria, after noting that the experts "did not exclude" that bacteria could be found on the surface of apples in heavily infected orchards, the Panel concluded that there is not sufficient scientific evidence to conclude that mature, symptomless apples are "likely to harbour" epiphytic populations of bacteria capable of transmitting fire blight. (Paras. 8.129-136) On the issue of "infection," the Panel stated that the "information" before it tends to demonstrate that it is "unlikely" that a mature apple will be infected by fire blight if it does not show any symptoms. (Pars. 8.137-139)

Third, the Panel discussed the "risk of entry, establishment or spread of fire blight within Japan by imported US apple fruit," an issue it referred to as "apple fruit as a pathway." In this regard, the Panel noted the U.S. argument that there is no evidence that mature apples could be a "pathway" for the spread of the bacteria. Recalling its earlier conclusions that "infection" of mature apples has not been established, that populations of endophytic bacteria have not been found in mature apples, and that epiphytic bacteria populations are "very rare," the Panel said that it would therefore only address the "two last steps of the pathway," as follows: (1) "the survival of the bacteria through commercial handling, storage and transportation"; and (2) "the existence of a vector [*i.e.*, an organism able to transport and transmit a pathogen] permitting the contamination of a host plant in Japan hy the imported apple." (Paras. 8.140-142)

In addressing these last two steps, the Panel first considered these issues as they apply to mature, symptomless apple fruit. Based on the evidence, the Panel concluded, "there is scientific evidence suggesting that epiphytic bacteria could be found on such apples." However, it said, the number of apples contaminated with epiphytic bacteria in severely blighted orchards has been found to represent a "very small percentage" and it is not clear whether this form of bacteria could actually transmit the disease to a host. After hearing the views of the experts consulted, the Panel found that the risk that the transmission pathway would be completed is "negligible." (Nevertheless, the experts suggested that apples from "severely blighted" orchards "not be exported.") (Paras. 8.144-153) The Panel next examined "apples other than 'mature, symptomless apple fruit.'" For these apples, the Panel concluded, "infected apples are capable of harbouring populations of bacteria which could survive through the various stages of commercial handling, storage and transportation." (Paras. 8.154-157) Furthermore, the Panel recalled that in *EC - Hormones*, the Appellate Body deemed consideration of the risk of error of handling or of illegal action legitimate in the SPS context and that in this case "the experts have admitted the possibility

of an error of handling." Thus, the Panel concluded that "errors of handling or illegal actions" allowing these apples to be exported to Japan are risks that may be considered, even though these risks were considered by the experts to be "small" or "debatable." (Paras. 8.158-161)

Turning to the last step, the Panel examined whether infested or infected apple fruit entering Japan "could actually transmit fire blight to a host plant, i.e. complete the pathway." On this point, the Panel stated that epiphytic bacteria "could apparently survive commercial handling, storage and transport ... but their number would be reduced by commercial storage ... ." The Panel concluded, "the likelihood that a naturally infested apple will contain a population capable of transmitting fire blight when it reaches Japan is apparently limited, even though survival is not excluded." It also said that this risk "seems to be more important in the case of infected apples." With regard to the "existence of a vector to transmit the bacteria to a host plant," however, the Panel noted that the experts considered the completion of the pathway to be "unlikely." On this basis, the Panel concluded, "it has not been established with sufficient scientific evidence that the last stage of the pathway (i.e. the transmission of fire blight to a host plant) would likely be completed." (Paras. 8.162-168)

As a result of these findings, the Panel came to an "intermediate conclusion" that "the scientific evidence suggests a negligible risk of possible transmission of fire blight through apple fruit." In this regard, it said that the following points can be "highlighted": (1) "If infection or infestation of immature apple fruit is not contested, infection of mature, symptomless apples has not been established"; (2) "the possible presence of endophytic bacteria in mature, symptomless apples is not generally established"; (3) "the presence of epiphytic bacteria in mature, symptomless apples is considered to be extremely rare"; (4) "assuming that either of the situations of infection or infestation listed above would arise, the entry, establishment or spread of the disease as a result of the presence of these bacteria in or on apple fruit would require the completion of an additional sequence of events which is deemed unlikely, and which has not even been experimentally established to date." The Panel then recalled the opinion of the experts that "due to the development of new scientific research tools, in particular DNA-based methods, they were more confident than ever before that there was only a negligible chance of fire blight being transmitted through apple fruit." The Panel concluded: "On the basis of the information made available to the Panel, ... there is not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment or spread of fire hlight within Japan." (Nonetheless, the Panel noted, "even if the scientific evidence before us demonstrates that apple fruit is highly unlikely to be a pathway for the entry, establishment and spread of fire blight within Japan, it does suggest that some slight risk of contamination cannot be totally excluded.") (Paras. 8.169-176)

Finally, the Panel considered the conformity of the measure at issue with Article 2.2. Specifically, it examined whether there was a "rational relationship" between the available scientific evidence and the measure. In this regard, it said that a measure should be considered to be maintained "without sufficient scientific evidence" if "one or more of its elements" are not justified by the relevant scientific evidence addressing the risk at issue. Recalling its earlier conclusion that there is not sufficient scientific evidence that apples are "likely" to serve as a pathway, the Panel stated, "the measure on the face of it is disproportionate" to the risk. More specifically, the Panel found that two of the requirements in the measure are "instances of elements ... which are most obviously 'maintained without sufficient scientific evidence,'" either as such or when applied in cumulation with others: (1) the prohibition on imports where fire blight is detected within a 500 meter buffer zone surrounding the orchard; and (2) the requirement that export orchards be inspected three times per year. These requirements, the Panel found, do not "bear a rational relationship" to the scientific evidence available. In particular, it found that a buffer zone requirement is a measure generally taken for "eradication purposes," not prevention of the disease from imports. Moreover, the Panel said that even if it were effective, it would be "redundant," given the existence of other requirements intended to ensure that the fruit is free of fire blight when exported. As for the inspection requirement, all of the experts agreed that while inspection is required to

determine the disease-free status of the orchard, three inspections is more than necessary. (Paras. 8.177-197)

On this basis, the Panel concluded that the measure at issue is "clearly disproportionate" to the identified risk, with certain of the requirements, either individually or when applied cumulatively with the other requirements, "not supported by sufficient scientific evidence." Therefore, the Panel "provisionally" concluded that the measure "as a whole" is maintained "without sufficient scientific evidence" within the meaning of Article 2.2. (Paras. 8.198-199) However, the Panel stated that it would not make "final findings" under Article 2.2 until it completed its analysis of the applicability of Article 5.7. (Paras. 8.200-201) (On appeal, the Appellate Body upheld the Panel's findings, and also rejected a claim that the Panel violated DSU Article 11 with respect to these findings. *See DSC for Japan - Apples (AB).*)

SPS Agreement Article 5.7 - Provisional Measures "Where Relevant Scientific Evidence is Insufficient"

Japan argued that "should the Panel find the scientific evidence insufficient to support Japan's measure under Article 2.2, the measure could be considered to be a provisional measure in the context of Article 5.7 since the date of entry into force of the SPS Agreement." (Para. 8.203) Article 5.7 provides:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measures accordingly within a reasonable period of time.

The Panel noted that the burden of proof for this point is on Japan. (Para. 8.212)

In addressing this issue, the Panel referred to "four requirements" in the text of Article 5.7 that must be satisfied. Here, the Panel focused on the requirement in the first sentence that the measure be imposed in respect of a situation where "relevant scientific evidence is insufficient." In this regard, it stated that for the situation addressed by the measure in this case, a "wealth of information" is available. Furthermore, the Panel had "come across an important amount of relevant evidence." It concluded: "It is indisputable that a large amount of relevant scientific evidence is available." By contrast, it said, Article 5.7 "was obviously designed to be invoked in situations where little, or no, reliable evidence was available"; and the situation in this case is "clearly not the type of situation Article 5.7 was intended to address." (Paras. 8.213-219)

The Panel then noted Japan's argument that, "on certain aspects of the dissemination of the bacteria, the evidence is not sufficient." The Panel rejected this argument, noting, "[e]ven if we were to accept Japan's arguments that 'relevant scientific evidence' in Article 5.7 may refer to a specific aspect of a phytosanitary problem, we recall that the experts have indicated that even on the specific scientific questions raised by Japan, there is a large volume of relevant scientific evidence." (Paras. 8.217-220)

On this basis, the Panel concluded that the present "situation" is one where there is "sufficient relevant scientific evidence available, and that the first condition for invoking Article 5.7 is consequently not met." **Therefore, it said, Japan failed to establish that the phytosanitary measure at issue is a**

provisional measure justified under Article 5.7. (Paras. 8.221-222) (On appeal, the Appellate Body upheld the Panel's findings. *See DSC for Japan - Apples (AB).*)

SPS Agreement Article 2.2 - Final Conclusion

Having concluded that the measure is not a provisional measure maintained in accordance with Article 5.7, the Panel found that the United States made a *prima facie* case that, by maintaining the measure at issue "without sufficient scientific evidence," Japan violated Article 2.2, and it also found that Japan failed to rebut that presumption. (Paras. 8.223-224)

The Panel then noted that its conclusion "relates to the application of the measure at issue *as a whole*." Thus, it said, its conclusion does not "prejudge the question whether certain elements of the measure at issue could, individually or in combination with others, be compatible with Article 2.2." In this regard, it recalled that "the experts considered, *inter alia*, that it would be appropriate not to export apples from (severely) blighted orchards and that they would not be comfortable with a complete and immediate removal of the phytosanitary measures imposed by Japan, given the phytosanitary situation of that Member." (Paras. 8.225-226) (On appeal, the Appellate Body upheld the Panel's findings, and also rejected a claim that the Panel violated DSU Article 11 with respect to these findings. *See DSC for Japan - Apples (AB).*)

SPS Agreement Article 5.1 - Based on a Risk Assessment

The United States argued that the measure at issue is inconsistent with SPS Agreement Articles 5.1 and 5.2 because it is not based on a risk assessment (in light of its findings on Article 5.1, the Panel did not consider it necessary to examine the claims under Article 5.2). Article 5.1 states:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

In addition, Annex A, paragraph 4 defines "risk assessment" as follows:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences.

(Paras. 8.228-230) The Panel noted that Article 5.1 sets out two requirements: (1) that there be a "risk assessment"; and (2) that SPS measures be based on such an assessment. (Paras. 8.233-234)

Pursuant to these provisions, the Panel stated that a risk assessment in relation to the measure at issue would involve "an evaluation of":

> (a) "the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences" (Annex A, paragraph 4);

(b) whether this risk assessment is "as appropriate to the circumstances";

(c) whether the risk assessment takes "into account risk assessment techniques developed by the relevant international organizations."

The Panel noted that the last two factors "pervade the entire assessment," and it would therefore consider them first. (Para. 8.237)

With regard to whether the risk assessment is "as appropriate to the circumstances," the Panel noted that the measure here is a phytosanitary measure, where the risks are related to "plant life and health." Therefore, it is these risks that must be the "focus" of the risk assessment. It also noted that a relevant "circumstance" in this case is that Japan is considered to be "fire blight-free" and that its "specific climatic conditions" make it a "potentially favourable environment for the spread of fire blight, should the disease enter the country." (Paras. 8.238-240)

As to the "international risk assessment techniques developed by relevant international organizations," the Panel noted the standard in Article 5.1 that such techniques be "taken into account," which it differentiated from standards such as "based on" or "in conformity with." Therefore, such techniques "should be considered relevant, but ... a failure to respect each and every aspect of them would not necessarily, *per se*, signal that the risk assessment on which the measure is based is not in conformity with the requirements of Article 5.1." Here, the parties agreed that the relevant international organization is the Interim Commission on Phytosanitary Measures of the International Plant Protection Convention ("IPPC"). However, the parties referred to two separate IPPC instruments for Pest Risk Analysis ("PRA"). After noting that both instruments "build on the same framework," the Panel said it would "focus on the key issue of" whether Japan's assessment "sufficiently identifies and assesses, as suggested under both instruments, the possible pathways for the introduction and spread of fire blight through apple fruit and the likelihood/probability for their being realized." (Paras. 8.241-244)

The Panel then evaluated whether the Annex A definition of risk assessment had been met. Citing the panel report (at para. 8.72) and Appellate Body report (at para. 120) in *Australia - Salmon*, it noted that this requirement "encompasses two distinct elements, which together constitute the relevant risk assessment in relation to phytosanitary measures": (1) an evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied; and (2) an evaluation of the "potential biological and economic consequences associated with such entry or spread." (Para. 8.245) In this regard, the Panel noted that, as part of its evaluation, Japan had conducted two pest risk analyses of relevance to fire blight: one in 1996, concerning various pests, including fire blight, and another in 1999 concerning fire blight on apples imported from the United States (the "Report on Pest Risk Analysis concerning Fire Blight Pathogen (*Erwinia amylovora*): Fresh apples produced in the United States of America," or the "1999 PRA"). While noting the parties' agreement that the 1999 PRA is the "main relevant document," the Panel said that it could not exclude that "other elements, including subsequent information, could also be of relevance." (8.246-248)

Next, citing paragraph 121 of the Appellate Body report in *Australia - Salmon*, the Panel noted that the Annex A, paragraph 4, first sentence definition of "risk assessment" establishes that a risk assessment must:

- *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;

- *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and

- evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*

The Panel considered each element in turn. (Paras. 8.250-251)

As to the first condition, the United States did not dispute that Japan's risk assessment meets this criterion, as it identifies fire blight as the disease in question. (Para. 8.252)

On the second condition, the United States argued that Japan's risk assessment fails to evaluate the likelihood of entry, establishment or spread of fire blight. In particular, it claimed, the risk assessment lacks the required "specificity" in relation to the products at issue and the source of the risk. Also, the "likelihood" was not "evaluated" sufficiently. Examining Japan's 1999 PRA, the Panel agreed with both U.S. arguments. On the first point, the Panel noted that the "main portion" of the PRA refers to a "variety of hosts, including -- but not exclusively -- apple fruit." Thus, the 1999 PRA is not "sufficiently specific" to the "matter at issue" to constitute a "proper risk assessment under Article 5.1 ... ." As to the second point, the Panel concluded that the 1999 PRA does not "assess the probability" of entry, establishment and spread. In particular, it does not "address the likelihood of an apple becoming contaminated by the harvesting operation, nor the likelihood that a damaged fruit will be included in the export shipment, nor the likelihood that such a fruit, were it to be shipped, would become rotten." In addition, other inadequacies in the 1999 PRA were identified by the experts consulted. On this basis, the Panel concluded that the 1999 PRA does not evaluate the likelihood of entry, establishment or spread of fire blight through the importation of apple fruit, as foreseen in Article 5.1 and Annex A, paragraph 4. (Paras. 8.254-280)

Finally, the United States argued that Japan's risk assessment does not meet the third condition because, "although it clearly identifies some SPS measures that might apply to US apples," it does not, "in any substantial way, evaluate their relative effectiveness in reducing the overall disease risk" as required under Article 5.1. (Para. 8.281) On this issue, the Panel first observed that "Japan does not appear to have considered any alternative measures other than these existing measures." In this regard, the Panel said that the term "might be applied" used in the risk assessment definition suggests that consideration should be given "not just to those specific measures which are currently in application, but at least to a potential range of relevant measures." Here, Japan has not "attempted to identify any other risk-mitigating measures than those actually applied as a result of its discussions with the United States." In the 1999 PRA, each of the measures applied is "considered and described" and a "brief conclusion is drawn." According to the Panel, this analysis "seems to suffer from flaws in part linked to the insufficiency of the evaluation of the likelihood itself, and provides only a cursory assessment of some of the proposed measures." Furthermore, it said, the evaluation "according to the measure which might be applied" is "considerably less substantial in terms of consideration of the relevant scientific evidence than that found to be insufficient in the *Australia - Salmon* case." Finally, the Panel noted that "no attempt" was made to assess the "relative effectiveness" of the "various individual requirements" and that the assessment "appears to be based on the assumption from the outset that all the measures would apply cumulatively" (in this regard, the Panel noted the opinion of two of the experts consulted that the 1999 PRA "appeared to prejudge the outcome of the risk assessment.") (Paras. 8.282-289)

On this basis, the Panel concluded that Japan's 1999 PRA "does not meet the requirements of a risk assessment" within the meaning of Article 5.1, "as defined in" Annex A, paragraph 4. As a result, the measure is not "based on" a "risk assessment." Therefore, the Panel found that the United States has made a *prima facie* case that Japan has violated Article 5.1, which, it said, Japan

has not rebutted. (Paras. 8.290-292) (On appeal, the Appellate Body upheld the Panel's findings. *See* DSC for Japan - Apples (AB).)

SPS Agreement Article 5.6 (Judicial Economy)

The United States argued that Japan acted inconsistently with SPS Agreement Article 5.6 in that the measure at issue is "more trade-restrictive than required to achieve Japan's appropriate level of protection." (Para. 8.293) In this regard, the Panel noted the statement by the Appellate Body in *Australia - Salmon* that: "a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'" Here, the Panel recalled that it was reviewing the measure at issue *as a whole*, not certain elements of it. Because it had already found a violation under Article 2.2, the Panel noted, "this measure cannot be maintained as such by Japan." As a result, it said, "[a] finding under Article 5.6 would not add anything in terms of legal implications." In particular, "[s]uch a finding would simply establish that Japan's phytosanitary measure *as a whole* is more trade-restrictive than required to achieve Japan's appropriate level of phytosanitary protection." It concluded: "In a context where it has already been established that the phytosanitary measure at issue cannot be maintained, another finding to the same effect that the measure cannot be maintained would be of no practical advantage and thus would be of no assistance to the DSB." Therefore, the Panel decided to exercise judicial economy with regard to the claim under Article 5.6 and refrained from making any finding. (Paras. 8.303-304)

SPS Agreement Article 7 and Annex B - Notification of Changes to SPS Measures

The United States claimed that Japan violated SPS Agreement Article 7 and Annex B, paragraphs 5 and 7, "in that it has not notified changes introduced to its fire blight measures since the entry into force of the SPS Agreement in 1995." Specifically, the United States considered that Japan should have notified the changes effected through MAFF Notification No. 354, dated March 10, 1997, "because it changes Japan's fire blight restrictions and imposes a regulation not based on international standards." The United States also referred to the MAFF Detailed Rules for U.S. Apples. According to the United States, these measures "appear to have been amended or introduced since 1995 without being notified to WTO Members." (Paras. 8.305-306)

In addressing these issues, the Panel noted that SPS Agreement Article 7 requires that Members "notify changes" in their SPS measures and provide information on such measures "in accordance with" Annex B. In turn, Annex B contains a number of provisions relating to transparency, including paragraph 5, which foresees the notification of SPS measures where a relevant international standard does not exist or the measure is not "substantially" the same as an international standard, and where the regulation "may have a significant effect on trade of other Members." Paragraph 7 of Annex B, which the United States also argued had been violated, provides that notifications shall be in French, Spanish or English. (Paras. 8.309-310)

The Panel then stated that it would determine whether the changes identified by the United States constitute changes requiring notification under Article 7 due to the possibility that they have a "significant effect on trade" under Annex B, paragraph 5. In this regard, it said that the most important factor is whether the change "affects the conditions of market access for the product concerned, that is, would the exported product ... still be permitted to enter Japan if they complied with the prescription in the previous regulations" (*i.e.*, these instruments as they existed prior to the change). If not, the Panel would consider whether the change could "potentially" have a significant effect on trade (*e.g.*, it would consider whether

the change "has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time-consuming administrative formalities.") (Paras. 8.313-314)

Observing that the party making a claim must provide sufficient evidence in support, the Panel noted that the United States "did not specify in what respect these new regulations departed from the previous ones." Therefore, the Panel concluded that the United States did not establish a *prima facie* case with respect to Article 7 and Annex B. (Paras. 8.316-318)

Regardless, the Panel considered that a violation of Article 7 and Annex B had not been established. Comparing the MAFF Notification to the previous instrument maintained by Japan, the Panel concluded that, while the later version "may reflect" a change whose content is "not substantially the same as the content of an international standard," it did not consider that this change "may have a significant effect on trade of other Members." Therefore, Japan was not required to notify the change. (Paras. 8.319-324) As for the MAFF Detailed Rules, the Panel said that, based on the English translation of this document, it was "difficult to determine" whether a "substantial change" had been introduced. Therefore, the Panel was "unable to reach any conclusion" as to whether Japan was required to notify this change. (Paras. 8.325-326)

On this basis, the Panel found that the United States failed to make a *prima facie* case of violation of Article 7 and Annex B. (Para. 8.327)

COMMENTARY

For further reading on this dispute, see:

Gavin Goh, "Tipping the Apple Cart: The Limits of Science and Law in the SPS Agreement after *Japan—Apples*," 40 Journal of World Trade 4, pp. 655-686 (2006).

Subsequent Developments

After the DSB adopted the panel and Appellate Body reports in this dispute, Japan revised the measures at issue. The revised measures were the subject of a further challenge under DSU Article 21.5. *See DSC for Japan - Apples, Article 21.5 (Panel).*

General Comments on Implementation

Although the Panel ultimately concluded that the measure "as a whole" is maintained "without sufficient scientific evidence," in violation of Article 2.2, its specific findings may indicate a more limited scope. In particular, in determining whether the measure "bears a rational relationship" to the scientific evidence available, the Panel referred to two specific elements of the measure: (1) the prohibition on imports where fire blight is detected within a 500 meter buffer zone surrounding the orchard; and (2) the requirement that export orchards be inspected three times per year. Other elements, such as the requirement that the export orchard itself "must be free of plants infected with fire blight and free of host plants of fire blight (other than apples), whether or not infected," were not mentioned in this regard. The Panel noted that its conclusion does not "prejudge the question whether certain elements of the measure at issue could, individually or in combination with others, be compatible with Article 2.2." In this regard, it recalled, "the experts considered, *inter alia*, that it would be appropriate not to export apples from (severely) blighted orchards and that they would not be comfortable with a complete and immediate removal of the phytosanitary measures imposed by Japan, given the phytosanitary situation of that

Member." Thus, under these findings on Article 2.2, Japan might have some leeway to maintain certain aspects of the measure.

On the other hand, pursuant to Article 5.1, the Panel found that the measure was not "based on a risk assessment" because no proper risk assessment existed. Under this finding, it would seem that the measure as a whole must be removed, unless a new risk assessment that meets the requirements of the SPS Agreement is conducted.

Requirement of Continuous Review of SPS Measures in Relation to "New Evidence"

As part of the interim review process, Japan argued that the conformity of a Pest Risk Analysis ("PRA") should be assessed "in light of information available at the time when the PRA was conducted, and no later evidence should be considered." The Panel rejected this argument, "particularly if, as in the present case, that PRA is already almost four years old at the time it is reviewed." The Panel then noted: "Some assessment of the subsequent evolution of the scientific evidence is not only acceptable, it is also necessary, if only to monitor the development of any new evidence which might require a revision of the risk assessment." "If the scientific evidence evolves," it said, "this may he an indication that the risk assessment should be reviewed or a new assessment undertaken." (Paras. 7.11-12)

The Panel's finding that the SPS Agreement requires an ongoing review of measures based on evolving scientific evidence is somewhat analogous to a finding of the panel in *EC - Sardines*, as upheld by the Appellate Body. In that case, under TBT Agreement Article 2.4, the panel stated: "Article 2.4 of the TBT Agreement imposes an ongoing obligation on Members to reassess their existing technical regulations in light of the adoption of new international standards or the revision of existing international standards." (*See* para. 7.78) At the same time, though, a requirement to review SPS measures when "new *evidence*" is developed is potentially much broader than the corresponding requirement pertaining to "*international standards*" developed in *Sardines* under the TBT Agreement. When international standards are involved, changes are likely to be based on a long deliberative process and will, therefore, be fairly infrequent. In addition, such changes are easily monitored by governments. By contrast, the development of "new evidence" can occur whenever individual scientists or scientific bodies engage in studies on a particular issue, making it more difficult for governments to monitor.

On appeal, Japan argued that the Panel's statements were in error, and that "a risk assessment should be evaluated solely against the evidence available at the time of the risk assessment, such that a Member that fulfils the requirement of a risk assessment when adopting a measure is not held to have acted inconsistently with Article 5.1 upon the discovery of subsequently published scientific evidence." (*See* para. 210) However, the Appellate Body found it unnecessary to "express views" on this question, because, it said, Japan "failed to establish that the Panel utilized subsequent scientific evidence in evaluating the risk assessment at issue." (*See* para. 215) *See DSC for Japan - Apples (AB).*

Last Update: January 5, 2007

Appellate Body Report
Japan - Measures Affecting the Importation of Apples
(WT/DS245/AB/R) / DSR 2003:IX, 4391

Participants
Appellant/Appellee: Japan
Appellant/Appellee: U.S.
Third Participants: Australia, Brazil, Chinese Taipei, EC, New Zealand

Appellate Body Division
Lockhart (Presiding Member), Baptista, Sacerdoti

Timeline of Dispute
Panel Request: May 7, 2002
Panel Established: June 3, 2002
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Interim Report Issued: March 20, 2003
Final Report Issued to Parties: June 25, 2003
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Notice of Appeal: August 28, 2003
AB Report Circulated: November 26, 2003
Adoption: December 10, 2003

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Key Findings

- Upheld Panel's finding that the measure at issue is maintained "without sufficient scientific evidence," contrary to SPS Agreement Article 2.2. In addition, found that the Panel "did not act inconsistently with Article 11 of the DSU" with respect to the findings on Article 2.2.
- Upheld Panel's finding that the measure "was not imposed in respect of a situation 'where relevant scientific evidence is insufficient,'" and, therefore, that it is not a provisional measure justified under SPS Agreement Article 5.7.
- Upheld Panel's finding that Japan's 1999 Pest Risk Analysis ("PRA") does not satisfy the definition of "risk assessment" under SPS Agreement Annex A, paragraph 4 because (1) the 1999 PRA does not evaluate the likelihood of entry, establishment or spread of fire blight specifically through *apple fruit* and (2) it does not evaluate "the likelihood of entry 'according to the SPS measures that might be applied'"; on this basis, upheld the Panel's finding that the 1999 PRA is not a "risk assessment" within the meaning of the SPS Agreement, and, therefore, that the measure is not "based on" a risk assessment, as required by Article 5.1.

BACKGROUND

This dispute involves Japanese policies related to the protection of apple fruit grown in Japan from the fire blight bacterium (*Erwinia amylovora*). Fire blight affects a number of host plants, including apple trees. Fruits infected by fire blight exude bacterial ooze, or inoculum, which is transmitted primarily through wind and/or rain and by insects or birds to open flowers on the same or new host plants. Immature apples can be infected through natural openings in the skin or by diseased branches. Symptoms of infection of host plants with fire blight depend on the parts infected.

The bacterium can exist in a non-pathogenic relationship with its host. When the bacterium occurs *inside* a plant or apple fruit in a non-pathogenic relationship, the term *endophytic* is used; when the bacterium occurs on the *outer surface* of a plant or fruit in a non-pathogenic relationship, the term *epiphytic* is used.

Fire blight is native to North America, but has since spread across northern and western Europe and the Mediterranean region. Latin America and substantial parts of Africa and Asia apparently remain fire blight-free.

At issue here are the following Japanese measures that restrict imports of apples from the United States on the basis of concerns about fire blight:

- Plant Protection Law No. 151, enacted on May 4, 1950 (specifically Article 7);
- Plant Protection Law Enforcement Regulations, enacted on June 30, 1950 (specifically Article 9 and Annexed table 2);
- Ministry of Agriculture, Forestry and Fisheries ("MAFF") Notification No. 354, dated March 10, 1997; and
- MAFF "Detailed Rules for Plant Quarantine Enforcement Regulation Concerning Fresh Fruit of Apple Produced in the United States of America," dated April 1, 1997 ("Detailed Rules").

Under the Plant Protection Law and the Enforcement Regulations, importation of host plants of 15 quarantine pests, including fire blight bacteria, is prohibited. However, these laws permit Japan to decide, on a case-by-case basis, to lift the import prohibition with respect to designated plants and products according to certain criteria that have been established by past practice. These criteria are as follows:

- Lifting of the prohibition is subject to a proposal of an alternative measure by a foreign government;
- The level of protection required for the proposed alternative measure is that equivalent to import prohibition;
- The exporting government bears the burden of proving that the proposed alternative measure achieves the required level of protection.

Based on these general criteria, as well as certain specific conditions that were developed, apples from the United States may be imported into Japan. In this regard, MAFF Notification No. 354 and the Detailed Rules set out the following conditions under which U.S. apples may be imported:

(1) Apple fruit must be produced in "designated fire blight-free orchards," with the designation made by the U.S. Department of Agriculture (in practice, only orchards in the states of Oregon and Washington have been designated as such);

(2) The export orchard "must be free of plants infected with fire blight and free of host plants of fire blight (other than apples), whether or not infected";

(3) The fire blight-free orchard must be surrounded by a 500-meter fire blight-free "buffer zone";

(4) The orchard and buffer zone must be inspected at least three times annually, with additional inspections following any strong storm;

(5) Harvested apples must be treated with surface disinfection by soaking in sodium hypochlorite solution for one minute or longer;

(6) Containers for harvesting must be disinfected by a chlorine treatment;

(7) The interior of the packing facility must be disinfected by a chlorine treatment;

(8) Fruit destined for Japan must be kept separated post-harvest from other fruit;

(9) U.S. plant protection officials must certify or declare that fruit are free of quarantine pests, "are not infested/infected with ... fire blight," and were treated with chlorine; and

(10) Japanese officials must confirm that the U.S. officials have made the necessary certification and that the chlorine treatment and orchard designations were properly made, and must also inspect both the disinfestation and packing facilities.

(Panel Report, paras. 2.1-19, 8.5-7, 8.25; AB Report, paras. 8-9, 14-16)

The United States claimed that these requirements, individually and taken together, are inconsistent with SPS Agreement Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 5.7, 6.1, 6.2, 7 and Annex B (paragraphs 5 and 7), as well as GATT Article XI and Agriculture Agreement Article 4.2. (The Panel did not examine the claims under SPS Agreement Articles 5.2 and 5.6, or the claims under the GATT and the Agriculture Agreement, for reasons of judicial economy. In addition, the Panel did not make any findings under SPS Agreement Articles 2.3, 5.3, 5.5, 6.1 and 6.2 because these claims were not addressed in the U.S. submissions).

The Panel found a violation of SPS Agreement Article 2.2, and concluded that this violation was not justified under Article 5.7; it also found a violation of Article 5.1. However, it rejected the U.S. claims under Article 7/Annex B. On appeal, Japan argued that the Panel's findings under Articles 2.2, 5.7 and 5.1 were in error, and also that the Panel violated DSU Article 11 with regard to certain of its findings. In addition, the United States filed an other appellant's submission alleging that the Panel made findings that were outside the scope of its "authority" in relation to the specific product under dispute.

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Working Procedures for Appellate Review Rule 20(2)(d) - Sufficiency of Notice of Appeal

The United States argued that Japan's claim on appeal under DSU Article 11 in respect of the Panel's findings under SPS Agreement Article 5.1 should be dismissed because, according to the United

States, Japan did not properly raise this claim in its notice of appeal, in violation of Rule 20(2)(d) of the Appellate Body's Working Procedures. (Para. 120)

The Appellate Body agreed with the U.S. claim. It began its analysis by examining the text of Rule 20(2), which provides, in part: "A Notice of Appeal shall include the following information: ... (d) a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel." Citing paragraph 62 of its report in *U.S. - CVDs on EC Products*, the Appellate Body explained, "an evaluation of the sufficiency of a Notice of Appeal must examine whether the appellee received notice therein of the issues to be argued on appeal." (Para. 121)

The Appellate Body then examined Japan's notice of appeal to "evaluate whether the United States was on notice that Japan would make claims on appeal under Article 11 of the DSU." The Appellate Body observed that Japan's challenge under Article 11 to the Panel's analysis of SPS Agreement *Article 2.2* "is set out clearly and unambiguously." By contrast, with regard to the Panel's analysis of SPS Agreement *Article 5.1*, there is "conspicuous absence of any reference" to DSU Article 11 or to the "objective assessment" standard. (Paras. 124-125) Moreover, the Appellate Body rejected Japan's argument that its claim under Article 5.1 "naturally involved some factual issues," such that it could be "assume[d] that the United States was notified" as to the related DSU Article 11 challenge. In this regard, quoting paragraph 182 of its report in *Chile - Price Band*, the Appellate Body emphasized that an Article 11 claim constitutes a "separate 'allegation of error,'" and it therefore "reject[ed] Japan's assertion that an Article 11 challenge is only a 'legal argument' underlying the issues raised on appeal." (Para. 127)

On this basis, the Appellate Body found that the United States could not have been on notice that Japan intended to raise an Article 11 challenge in respect of the Panel's evaluation of SPS Agreement Article 5.1; therefore, the Appellate Body said, this claim is "not properly before us in this appeal," and it would not rule on this issue. (Para. 128)

Terms of Reference - Scope of Panel's "Authority" to Hear Claim Related to Certain Products

The United States filed an other appellant's submission in which it claimed that, because the United States had limited its claims before the Panel to *mature, symptomless* apples, the Panel therefore did not have the "authority" to make findings and draw conclusions in respect of *immature* apples. Specifically, during the course of the proceedings, the United States asserted that only mature, symptomless apple fruit could be exported to Japan because U.S. laws prohibit the export of any other apple fruit. Nonetheless, in the course of evaluating the risk that apple fruit exported by the United States would serve as a pathway for the entry, establishment and spread of fire blight in Japan, the Panel did not limit its examination to the risk related to mature, symptomless apples, but rather it also concluded that it was entitled to address Japan's assertion that a risk of introduction of fire blight "could result from a malfunction in the sorting of apples or [from] illegal action in the country of exportation." The United States asserted that the Panel did not have "authority" to make this examination since there was no evidence on the record regarding the failure or likelihood of failure of U.S. procedures which prohibit the exportation of apples other than mature, symptomless apple fruit. (Paras. 130-132)

In evaluating the Panel's "authority" to make findings in respect of *all* apple fruit, the Appellate Body first turned to the Panel's terms of reference, which were defined on the basis of the U.S. panel request in this dispute. The Appellate Body observed that the U.S. panel request refers to "measures restricting the importation of US apples in connection with fire blight ... ," and it then lists the restrictions with which the United States was concerned. Given that the scope of the restrictions mentioned by the United States was not limited to mature, symptomless fruit and that the U.S. request refers to "US apples"

in general, the Appellate Body concluded that "the terms of reference did not limit the Panel to making findings and drawing conclusions with respect to mature, symptomless apples." (Para. 133)

The Appellate Body was also not persuaded by the U.S. argument that the Panel should not have made these findings because the United States never made a claim regarding immature apples. In this regard, the Appellate Body noted that, in response to the U.S. claim under SPS Agreement Article 2.2, it was Japan that had put forward arguments and allegations of fact regarding apples other than mature, symptomless apple fruit. In this regard, the Appellate Body said: "A panel has the authority to make findings and draw conclusions on arguments and allegations of fact that are made by the respondent and relevant to a claim pursued by the complainant. The Panel's findings and conclusions with respect to apples other than mature, symptomless apples were in response to the arguments and allegations of fact that were 'legitimately' raised by Japan." As a result, it concluded, the Panel "acted within the limits of its authority" when it made findings and drew conclusions on those other apples. (Paras. 134-135) While the Appellate Body agreed with the United States that a complainant may restrict the scope of its claim subsequent to the issuance of the terms of reference, it cautioned that such a strategy "must not curtail the right of other parties to pursue strategies of their own; nor can the strategic choices of the parties impose a straightjacket on a panel." It continued, as long as a response is "relevant to the issues in dispute," a respondent "is not confined to addressing the specific facts and arguments put forward by the complainant." (Para.136)

Finally, the Appellate Body disagreed with the U.S. contention that there was an absence of evidence on the failure or likelihood of failure of U.S. procedures to ensure compliance with U.S. export control requirements. In particular, the Appellate Body noted that Japan had made its argument not against the specific U.S. regulations, but in respect of "export control systems *in general*." In turn, the Panel, too, had examined export control systems generally and had relied in particular on the opinion of one of the experts that plant quarantine inspections "are rarely 100 percent efficient." (Paras. 137-140)

On this basis, the Appellate Body concluded that the Panel had the "authority" to make findings and draw conclusions "with respect to all apple fruit from the United States, including immature apples." (Para. 142)

SUBSTANTIVE ISSUES

SPS Agreement Article 2.2 - "Maintained Without Sufficient Scientific Evidence"

Before the Panel, the United States claimed that the measure at issue is "maintained without sufficient scientific evidence," contrary to SPS Agreement Article 2.2. That provision states:

> Members shall ensure that any ... phytosanitary measure is applied only to the extent necessary to protect ... plant life or health, is based on scientific principles and *is not maintained without sufficient scientific evidence*, except as provided for in paragraph 7 of Article 5.

On the basis of its factual findings, the Panel concluded that the scientific evidence "suggests a negligible risk of possible transmission of fire blight through apple fruit," and that "scientific evidence does not support the view that apples are likely to serve as a pathway for the entry, establishment or spread of fire blight within Japan." The Panel then stated that a measure is maintained "without sufficient scientific evidence" under Article 2.2 "if there is no 'rational or objective relationship' between the measure and the relevant scientific evidence." Given the "negligible risk" identified "on the basis of the scientific evidence and the nature of the elements composing the measure," the Panel concluded that Japan's measure is "'clearly disproportionate' to that risk." The Panel further stated, "such disproportion implies

that a rational or objective relationship does not exist between the measure and the relevant scientific evidence." Therefore, the Panel found that Japan's measure is maintained "without sufficient scientific evidence." In reaching this conclusion, the Panel did not limit its analysis to "mature, symptomless apple fruit." Rather, it also considered the risk associated with "other apples (that is, immature apples, or mature but damaged apples) that might enter Japanese territory as a result of human or technical errors, or of illegal actions." (Paras. 144-147)

On appeal, the Appellate Body addressed two arguments made by Japan, the first relating to "apples other than mature, symptomless apples" and the second relating to "mature, symptomless apples."

Apples Other Than Mature, Symptomless Apples

With regard to apples "other than mature, symptomless apples," Japan made a number of arguments on appeal. First, Japan argued that it was for the United States to establish a *prima facie* case that there was no risk that "infected apples" could serve as a vector for the introduction of fire blight within Japan. According to Japan, the United States did not do so, because it presented arguments and evidence relating *only to mature, symptomless apples*, acknowledging explicitly during the Interim Review that "there is no factual claim or evidence submitted by the United States" relating to the risk associated with infected apple fruit. Absent a *prima facie* case, Japan argued, the Panel should have ruled in favor of Japan and found that infected apples could act as a pathway for fire blight. In addition, Japan contended that, by finding that "Japan did not submit sufficient scientific evidence in support of its allegation that the last step of the pathway had been completed or was likely to be completed," the Panel shifted the burden of proof to Japan. This constituted an error of law, Japan argued, as it was made prematurely, before the demonstration of a *prima facie* case by the United States. Third, Japan argued that the Panel was not allowed to use its investigative authority to make findings of fact on the risk relating to infected apples because the United States did not establish a *prima facie* case with respect to this issue. (Para. 149) Fourth, Japan argued that in order to establish a *prima facie* case under Article 2.2, "the complaining party must establish that there is not sufficient scientific evidence for *any* of the perceived risks underlying the measure." (Para. 159)

With regard to the first two appeal points, the Appellate Body first recalled the traditional rules for the burden of proof. In this regard, it noted that the burden is on the complaining party to "establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement." At the same time, "the responding party must prove the case it seeks to make in response." Here, the United States made allegations regarding Japan's measure. Japan then countered with certain arguments in response, relating to the possibility that infected apples could be exported to Japan as a result of failures in the control systems of exporting countries and thereby introduce fire blight to Japan. According to the Appellate Body, "Japan was thus responsible for providing proof of the allegations of fact it advanced in relation to apples other than mature, symptomless apples being exported to Japan as a result of errors of handling or illegal actions." Thus, the Appellate Body disagreed "with Japan's contention that the Panel erred because it 'shifted the burden of proof to Japan in respect of a factual point that the complainant explicitly declined to prove' or that 'the shift of the burden of proof to Japan was made prematurely *before* the demonstration of a *prima facie* case by the United States.'" (Paras. 152-156)

The Appellate Body then elaborated on the issues related to burden of proof. In this regard, it noted: "It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof." These two principles, it said, "are distinct." Here, the burden of demonstrating a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence was on the United States. Japan sought to counter the U.S. claim by making arguments in respect of apples other than mature, symptomless apples

being exported to Japan as a result of errors of handling or illegal actions. Thus, the Appellate Body said, it was for Japan to substantiate those allegations. (Para. 157)

Next, with regard to Japan's third appeal point -- that the Panel did not have the authority to make certain findings of fact -- the Appellate Body said that it "disagree[d] with Japan." In this regard, the Appellate Body first said that it was not persuaded that the Panel's findings at issue "relate specifically to, or address apples other than mature, symptomless apples." In addition, the findings "were relevant to the claim pursued by the United States under Article 2.2 of the *SPS Agreement*, and were responsive to relevant allegations of fact advanced by Japan in the context of its rebuttal of the United States' claim." Thus, the Appellate Body concluded, "[t]he Panel acted within the limits of its investigative authority because it did nothing more than assess relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts." (Para. 158)

Finally, on the fourth appeal point, Japan submitted that, "in order to establish a *prima facie* case of insufficient scientific evidence under Article 2.2 of the SPS Agreement, the complaining party must establish that there is not sufficient scientific evidence for *any* of the perceived risks underlying the measure." According to Japan, "the Panel should not have concluded that this *prima facie* case had been established unless the United States had first addressed *all* the possible hypotheses—including those for which the likelihood of occurrence is low or rests upon theoretical reasonings—and had shown for each of them that the risk of transmission of fire blight is negligible." (Para. 159)

The Appellate Body rejected this argument, noting, "the Panel appears to have concluded that in order to demonstrate a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, it sufficed for the United States to address only the question of whether mature, symptomless apples could serve as a pathway for fire blight." According to the Appellate Body, the Panel's conclusion was "appropriate," on the following basis: (1) the U.S. claim was that Japan's measure is maintained without sufficient scientific evidence to the extent that it applies to mature, symptomless apples exported from the United States to Japan, and "[a] complainant should not be required to prove a claim it does not seek to make"; (2) the Panel found that mature, symptomless apple fruit is the commodity "normally exported" by the United States to Japan and that the risk that apple fruit other than mature, symptomless apples may actually be imported into Japan was "small" or "debatable" -- given the characterization of these risks, the Appellate Body said that it "was legitimate for the Panel to consider that the United States could demonstrate a *prima facie* case of inconsistency with Article 2.2 of the *SPS Agreement* through argument based solely on mature, symptomless apples"; and (3) the record contains no evidence to suggest that apples other than mature, symptomless ones have ever been exported to Japan from the United States as a result of errors of handling or illegal actions. (Paras. 159-160)

On this basis, the Appellate Body found "no error in the Panel's approach that the United States could establish a *prima facie* case of inconsistency with Article 2.2 of the *SPS Agreement* in relation to apples exported from the United States to Japan, even though the United States confined its arguments to mature, symptomless apples." (Para. 160)

Mature, Symptomless Apples

With regard to mature, symptomless apples, Japan argued that the Panel should have interpreted Article 2.2 in such a way that a "certain degree of discretion" be accorded to the importing Member as to the manner it chooses, weighs, and evaluates scientific evidence. Japan argued that the Panel denied such discretion, as it "evaluated the scientific evidence in accordance with the experts' view, despite the contrary view of an importing Member." Japan contended that its own approach to the risk relating to mature, symptomless apples "is reasonable as well as scientific because it is derived from 'perspectives of prudence and precaution.'" This approach, it asserted, "reflects 'the historical facts of trans-oceanic

expansion of the bacteria' and the rapid growth of international trade" and is "premised on 'the fact that the pathways of ... transmission of the bacteria are still unknown in spite of several efforts to trace them." Consequently, Japan argued, the Panel "should have accorded deference to Japan's approach and should have assessed whether the United States had established a *prima facie* case in the light of it." Japan thus argued that "the Panel erred in the application of Article 2.2 of the *SPS Agreement*, as it should have assessed whether the United States had established a *prima facie* case regarding the sufficiency of scientific evidence, not from the perspective of the experts' views, but, rather, in the light of Japan's approach to scientific evidence." (Paras. 150, 161)

The Appellate Body rejected Japan's arguments. In doing so, the Appellate Body noted that the term "sufficient" in Article 2.2 "implies a 'rational or objective relationship,'" to be determined with reference to the "scientific evidence." Here, the Panel had "examined the evidence adduced by the parties and considered the opinions of the experts," and then had concluded "that it is not likely that apple fruit would serve as a pathway for the entry, establishment or spread of fire blight in Japan." The Panel had also concluded that the measure was "clearly disproportionate to the risk identified on the basis of the scientific evidence available." (Paras. 162-163) The Appellate Body then emphasized that "whether a given approach or methodology is appropriate in order to assess whether a measure is maintained 'without sufficient scientific evidence' ... depends on the 'particular circumstances of the case,' and must be 'determined on a case-by-case basis.'" Here, it said, "[t]he methodology adopted by the Panel was appropriate to the particular circumstances of the case before it and, therefore, we see no error in the Panel's reliance on it." (Para. 164)

Regarding Japan's argument that the Panel should have made its assessment under Article 2.2 "in the light of Japan's approach to risk and scientific evidence," the Appellate Body recalled its statement in *EC - Hormones* that DSU Article 11 sets out the applicable standard, requiring panels to make an "objective assessment of the facts." Furthermore, it had noted in *Hormones* that, "as regards fact-finding by panels and the appreciation of scientific evidence, total deference to the findings of the national authorities would not ensure an objective assessment as required by Article 11 of the DSU." Thus, the Appellate Body concluded, "Japan's submission that the Panel was obliged to favour Japan's approach to risk and scientific evidence over the views of the experts conflicts with the Appellate Body's articulation of the standard of 'objective assessment of the facts.'" (Para. 165) Finally, the Appellate Body noted, "[i]n order to assess whether the United States had established a *prima facie* case, the Panel was entitled to take into account the views of the experts." (Para. 166)

Thus, the Appellate Body rejected "the contention that, under Article 2.2, a panel is obliged to give precedence to the importing Member's approach to scientific evidence and risk when analyzing and assessing scientific evidence." Stating that it disagreed with Japan that the Panel erred in assessing whether the United States had established a *prima facie* case when it did so from a perspective different from Japan's, the Appellate Body concluded, "we are not persuaded that we should revisit the Panel's conclusion that the United States established a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence." (Para. 167)

Conclusion

On this basis, the Appellate Body upheld the Panel's finding that the measure at issue is maintained "without sufficient scientific evidence," contrary to SPS Agreement Article 2.2. (Para. 168)

SPS Agreement Article 5.7 - Provisional Measures "Where Relevant Scientific Evidence is Insufficient"

Before the Panel, Japan had argued, "should the Panel find the scientific evidence insufficient to support Japan's measure under Article 2.2, the measure could be considered to be a provisional measure in the context of Article 5.7 since the date of entry into force of the SPS Agreement." Article 5.7 provides in relevant part:

> *In cases where relevant scientific evidence is insufficient*, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. (emphasis added)

The Panel rejected Japan's argument, concluding that this is not a situation where "relevant scientific evidence is insufficient." In this regard, the Panel identified the "phytosanitary question at issue" as the risk of transmission of fire blight through apple fruit, and it observed that "scientific studies as well as practical experience have accumulated for the past 200 years" on this question and that, in the course of its analysis under Article 2.2, it had come across an "important amount of relevant evidence." Moreover, the Panel noted that "a large quantity of high quality scientific evidence on the risk of transmission of fire blight through apple fruit had been produced over the years," and the experts had expressed "strong and increasing confidence" in this evidence. The Panel also stated that, even if the term "relevant scientific evidence" referred to a "*specific aspect*" of a phytosanitary problem, as Japan claimed, its conclusion would be the same. (Paras. 169-173)

On appeal, Japan made several arguments that the Panel's finding was in error. These arguments are addressed separately below.

The Insufficiency of Relevant Scientific Evidence

Japan's first point of appeal was that the "assessment as to whether relevant scientific evidence is insufficient should not be restricted to evidence 'in general' on the phytosanitary question at issue, but should also cover a 'particular situation' in relation to a 'particular measure' or a 'particular risk.'" Thus, Japan argued that the phrase "[w]here relevant scientific evidence is insufficient," in Article 5.7, "should be interpreted to relate to a particular situation in respect of a particular *measure* to which Article 2.2 applies (or a particular risk), but not to a particular *subject matter* in general, which Article 2.2 does not address." According to Japan, the Panel "erred by interpreting the applicability of [Article 5.7] too narrowly" and too "rigid[ly]." (Para. 178)

The Appellate Body rejected Japan's argument. In doing so, it first noted that "Japan's reliance on the opposition between evidence 'in general' and evidence relating to specific aspects of a particular subject matter is misplaced." In this regard, it noted "a link or relationship between the first requirement under Article 5.7 and the obligation to perform a risk assessment under Article 5.1," in that "relevant scientific evidence" will be "insufficient" within the meaning of Article 5.7 "if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*." Thus, the question, it said, is "not whether there is sufficient evidence of a general nature or whether there is sufficient evidence related to a specific aspect of a phytosanitary problem, or a specific risk." Rather, "[t]he question is whether the relevant evidence, be it 'general' or 'specific,' in the Panel's parlance, is

sufficient to permit the evaluation of the likelihood of entry, establishment or spread of, in this case, fire blight in Japan." (Para. 179)

Here, the Appellate Body said, the Panel had found that, with regard to the risk of transmission of fire blight through apples exported from the United States, "not only a large quantity but a high quality of scientific evidence has been produced over the years that describes the risk of transmission of fire blight through apple fruit as negligible," and "this is evidence in which the experts have expressed strong and increasing confidence." (Para. 180) In addition, the Panel had made findings of fact that there is a large volume of scientific evidence regarding questions related to endophytic bacteria in mature apple fruit and the completion of contamination pathways. (Para. 181) According to the Appellate Body, "[t]hese findings of fact by the Panel suggest that the body of available scientific evidence permitted, in quantitative and qualitative terms, the performance of an assessment of risks, as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*, with respect to the risk of transmission of fire blight through apple fruit exported from the United States to Japan." In particular, "the body of available scientific evidence would allow '[t]he evaluation of the likelihood of entry, establishment or spread' of fire blight in Japan through apples exported from the United States." Accordingly, the Appellate Body concluded, "with respect to the risk of transmission of fire blight through apple fruit exported from the United States to Japan ('normally,' mature, symptomless apples), the 'relevant scientific evidence' is not 'insufficient' within the meaning of Article 5.7." (Para. 182)

Japan's Argument on "Scientific Uncertainty"

Japan challenged the Panel's statement that Article 5.7 is intended to address only "situations where little, or no, reliable evidence was available on the subject matter at issue," on the basis that this interpretation does not provide for situations where there is "unresolved uncertainty." In this regard, Japan drew a distinction between "new uncertainty" and "unresolved uncertainty": "new uncertainty" arises when a new risk is identified, whereas "unresolved uncertainty" is uncertainty that the scientific evidence is not able to resolve, despite accumulated scientific evidence. Japan argued that both types of uncertainty fall within Article 5.7. Applying its arguments to this case, Japan asserted that the risk of transmission of fire blight through apple fruit "relates essentially to a situation of 'unresolved uncertainty.'" Thus, Japan contended, "despite considerable scientific evidence regarding fire blight, there is still uncertainty about certain aspects of transmission of fire blight." Japan further argued that the reasoning of the Panel is "tantamount to restricting the applicability of Article 5.7 to situations of 'new uncertainty' and to excluding situations of 'unresolved uncertainty.'" (Para. 183)

The Appellate Body rejected Japan's arguments. In doing so, it first stated, "[t]he application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence." It continued, "[t]he text of Article 5.7 is clear: it refers to 'cases where relevant scientific evidence is insufficient,' not to 'scientific uncertainty,'" noting, "[t]he two concepts are not interchangeable." (Para. 184)

In addition, the Appellate Body rejected Japan's argument that the Panel's interpretation of Article 5.7 "is too narrow for the reason that it excludes cases where the quantity of evidence on a phytosanitary question is 'more than little,' but the available scientific evidence has not resolved the question." In this regard, the Appellate Body stated, "[w]e do not read the Panel's interpretation as excluding cases where the available evidence is more than minimal in quantity, but has not led to reliable or conclusive results." Furthermore, the Appellate Body noted, the Panel "explicitly recognized that such cases fall within the scope of Article 5.7 when it observed ... that under its approach, Article 5.7 would be applicable to a situation where a lot of scientific research has been carried out on a particular issue without yielding reliable evidence." (Para. 185)

The Panel's Reliance on a "History of 200 Years of Studies and Practical Experience"

Finally, Japan argued that the Panel's conclusion regarding Article 5.7 "is based on its assessment that, as regards fire blight, 'scientific studies as well as practical experience have accumulated for the past 200 years.'" In this regard, Japan submitted that the Panel was not "authorized to rule" on the basis of a "'history' of 200 year[s] of studies and practical experience" because "the United States did not raise any objection to application of Article 5.7 on the basis of [a] 'history' of 200 year[s] of studies and practical experience." The Appellate Body rejected this argument, noting that the Panel's statement in this regard "was relevant to the debate under Article 5.7 and was based on the evidence before the Panel." Accordingly, the Appellate Body concluded, "it was appropriate for the Panel to make such a statement irrespective of whether the United States had explicitly advanced an argument based on 'history.'" (Paras. 186-187)

Conclusion

On this basis, the Appellate Body upheld the Panel's finding that the measure at issue "was not imposed in respect of a situation 'where relevant scientific evidence is insufficient,'" and, therefore, it also upheld the Panel's finding that the measure is not a provisional measure justified under SPS Agreement Article 5.7. (Para. 188)

SPS Agreement Article 5.1 - Based on a "Risk Assessment"

Before the Panel, the United States claimed that the Pest Risk Analysis relied on by Japan -- referred to as the "1999 PRA" -- did not meet the requirements of SPS Agreement Article 5.1. Article 5.1 requires that SPS measures be based on a "risk assessment," as follows:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed hy the relevant international organizations.

Annex A, paragraph 4 then defines "risk assessment" as follows:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences.

Also relevant was the Appellate Body's explanation of "risk assessment" in paragraph 121 of *Australia - Salmon*, where it stated that a risk assessment must:

- *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
- *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and
- evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*

The Panel had found that the latter two conditions of the Appellate Body's test in *Salmon* were not met, and therefore the 1999 PRA did not constitute a "risk assessment" pursuant to Article 5.1. In particular, with respect to the second condition, the Panel found that the risk assessment was not "sufficiently specific" because "the conclusion of the [1999] PRA [did] not purport to relate exclusively to the introduction of the disease through apple fruit," but rather more generally through "any susceptible host/vector," as the 1999 PRA "studied several possible hosts of fire blight." Therefore, the Panel concluded that the 1999 PRA did not properly evaluate the likelihood of entry, establishment or spread of fire blight "through apple fruit." As to the third condition, because the 1999 PRA did not consider "other risk-mitigating measures," the Panel found that the PRA did not constitute a "risk assessment" under Article 5.1. The Panel also stated that the required consideration of alternative measures "included an obligation to evaluate whether the independent elements needed to be applied cumulatively and to provide an explanation therefor." (Paras. 189-197)

On appeal, Japan challenged three specific aspects of the Panel's findings, as set forth below.

Evaluating the Likelihood of Entry, Establishment or Spread of Fire Blight

The Panel, relying on the Appellate Body's finding in *EC - Hormones*, had concluded that the 1999 PRA was not "sufficiently specific" to constitute a "risk assessment" in accordance with the SPS Agreement because the PRA "failed to evaluate the entry, establishment or spread of fire blight *through apple fruit as a separate and distinct vector*." (emphasis added) Rather, it said, the 1999 PRA "makes determinations as to the entry, establishment and spread of fire blight through a collection of various hosts (including apple fruit)." Thus, the Panel had stated, "Japan evaluated the risks associated with all possible hosts taken together, not sufficiently considering the risks specifically associated with the commodity at issue: US apple fruit exported to Japan." On appeal, Japan challenged the Panel's finding. Specifically, Japan claimed that the Panel's reasoning relates to a "matter of methodology" that is within the discretion of the importing Member. (Paras. 195-201)

The Appellate Body rejected Japan's argument. In this regard, it stated, "[u]nder the *SPS Agreement*, the obligation to conduct an assessment of 'risk' is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a phytosanitary measure." It continued, "as a general matter, 'risk' cannot usually be understood only in terms of the disease or adverse effects that may result." Rather, it said, "an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause." (Para. 202)

Turning to the facts of this case, the Appellate Body noted the Panel's finding that the conclusion of the 1999 PRA with respect to fire blight was "based on an overall assessment of possible modes of contamination, where apple fruit is only one of the possible hosts/vectors considered." The Appellate Body then concluded, "the Panel properly determined that the 1999 PRA 'evaluat[ion of] the risks associated with all possible hosts taken together' was not sufficiently specific to qualify as a 'risk assessment' under the *SPS Agreement* for the evaluation of the likelihood of entry, establishment or spread of fire blight in Japan *through apple fruit*." (Para. 203, emphasis added) However, the Appellate Body also noted that "Members are free to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attribute a likelihood of entry, establishment or spread of the disease to each agent specifically." (Para. 204) It stated further that "the relevant international standards ... expressly contemplate examining risk in relation to particular pathways" and that "[t]hose standards call for that specific examination even when the risk analysis is initiated on the basis of the particular pest or disease at issue." (Para. 205)

On this basis, the Appellate Body upheld the Panel's finding that the 1999 Pest Risk Analysis does not satisfy the definition of "risk assessment" in SPS Agreement Annex A, paragraph 4 because it fails to evaluate the likelihood of entry, establishment or spread of fire blight specifically through apple fruit. (Para. 206)

According to the SPS Measures Which Might Be Applied

Second, Japan challenged the Panel's finding that Japan "has not ... properly evaluated the likelihood of entry 'according to the SPS measures that might be applied.'" Specifically, Japan argued that Article 5.1, contrary to the Panel's interpretation, does not require a consideration of "alternative measures other than [the] existing measures," and that this "relates to the matter of methodology," which is at the discretion of the importing Member. (Paras. 195, 207)

According to the Appellate Body, the SPS Agreement definition of "risk assessment" requires that the evaluation of the entry, establishment or spread of a disease be conducted "according to the sanitary or phytosanitary measures which might be applied." The Appellate Body noted its agreement with the Panel that this phrase "refers to the measures *which might* be applied, not merely to the measures which *are being* applied." This phrase, it said, implies "that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing Member." (Para. 208)

Turning to the facts of this case, the Appellate Body noted the Panel's finding that the 1999 PRA dealt exclusively with the "'plant quarantine measures against *E. amylovora* concerning US fresh apple fruit,' which have been taken by Japan based on the proposal by the US government since 1994." The Panel also found that, in the 1999 PRA, no attempts were made "to assess the 'relative effectiveness' of the various individual requirements applied, [that] the assessment appears to be based on the assumption from the outset that all these measures would apply cumulatively," and that no analysis was made "of their relative effectiveness and whether and why all of them in combination are required in order to reduce or eliminate the possibility of entry, establishment or spread of the disease." The Appellate Body concluded, "these findings of fact of the Panel leave no room for doubt that the 1999 PRA was designed and conducted in such a manner that *no* phytosanitary policy other than the regulatory scheme *already in place* was considered." (Para. 209)

On this basis, the Appellate Body upheld the Panel's finding that "Japan has not ... properly evaluated the likelihood of entry 'according to the SPS measures that might be applied.'" (Para. 209)

Consideration of Scientific Evidence Arising Subsequent to the Risk Assessment at Issue

Finally, Japan claimed that its risk assessment should be assessed in the light of evidence available at the time of the assessment, not evidence that has become available subsequently. In this regard, Japan argued that the "PRA *was* consistent with Article 5.1 of the SPS Agreement at the time of the analysis, because conformity of a risk assessment with Article 5.1 should be assessed against the information available at the time of the risk assessment." (Paras. 195, 210)

Reviewing the factual record of the case, the Appellate Body stated that it was "not persuaded that, when analyzing the conformity of the 1999 PRA with Japan's obligations under Article 5.1, the Panel relied on scientific evidence that was not available to Japan at the time it conducted its risk assessment." Therefore, it concluded, "[a]s Japan failed to establish that the Panel utilized subsequent scientific evidence in evaluating the risk assessment at issue, it is not necessary for us to express views on the question whether the conformity of a risk assessment with Article 5.1 should be evaluated solely against

the scientific evidence available at the time of the risk assessment, to the exclusion of subsequent information." (Paras. 214-215)

Conclusion

On the basis of the above findings, the Appellate Body upheld the Panel's conclusion that Japan's 1999 PRA does not satisfy the definition of "risk assessment" set out in paragraph 4 of Annex A to the *SPS Agreement* because it (i) fails to "evaluate the likelihood of entry, establishment or spread of" the plant disease at issue, and (ii) fails to conduct such an evaluation "according to the SPS measures which might be applied." Thus, because the 1999 PRA is not a "risk assessment" within the meaning of the SPS Agreement, the Appellate Body upheld the Panel's finding that the measure at issue is not "based on" a risk assessment, as required by Article 5.1. (Para. 216)

DSU Article 11 - "Objective Assessment" of Claims Under SPS Agreement Article 2.2

With respect to SPS Agreement Article 2.2, Japan challenged the Panel's analysis of the likelihood that the pathway of transmission for fire blight from apple fruit to other plants would be completed, in particular the last stage of the pathway (*i.e.*, the transmission of fire blight to a host plant). According to Japan, the Panel "made certain errors when evaluating the relevant scientific evidence, each of which constitutes a failure on the part of the Panel to 'make an objective assessment of the facts of the case' under DSU Article 11." (Para. 218)

In examining Japan's appeal, the Appellate Body recalled its past rulings on DSU Article 11, noting, *inter alia*, that, under this provision, panels enjoy a "margin of discretion" as triers of fact. It continued, "[w]here parties challenging a panel's fact-finding under Article 11 have failed to establish that a panel exceeded the bounds of its discretion as the trier of facts, the Appellate Body has not 'interfere[d]' with the findings of the panel." (Paras. 219-222) The Appellate Body then examined each of four errors cited by Japan, as follows.

The Panel's Characterization of Experimental Evidence

Japan's first challenge involved an alleged "material" factual error in the Panel's characterization of the experimental evidence underlying the conclusion that fire blight was not likely to be transmitted to other plants. (Paras. 218, 223) However, "[i]n the light of the other factual material relied upon by the Panel, including its express consideration and discounting of scientific evidence submitted by Japan," the Appellate Body said that the Panel did not exceed its "margin of discretion" in evaluating the relevant evidence before it. Accordingly, the Appellate Body concluded that Japan failed to establish that the Panel violated Article 11. (Para. 224)

Evidence "Centered Around" Mature, Symptomless Apple Fruit

Second, Japan argued that the Panel acted inconsistently with DSU Article 11 in making findings that covered the completion of the pathway for transmission of fire blight by "infected" apple fruit, because the evidence before the Panel "centered around" the pathway with respect to mature, symptomless fruit. That is, Japan argued that there is "a lack of connection between the evidence considered by the Panel and its findings on the completion of the last stage of the pathway for transmission of fire blight." (Paras. 218, 225)

The Appellate Body rejected this argument. In this regard, the Appellate Body noted that "the Panel found that the additional sequence of steps required for completion of the pathway from apple fruit to other host plants would be unlikely to occur." This finding covered both the pathway for mature,

symptomless apples and for apples other than mature, symptomless apple fruit. Thus, the Appellate Body concluded, the Panel did not err in making its finding. (Para. 226) On the other hand, the Appellate Body also observed that the Panel's reasoning was "perhaps not sufficiently explicit," and, the Appellate Body stated, "it might have been helpful had the Panel been more precise about the scope of its factual analysis." (Paras. 226-227)

Ultimately, the Appellate Body said that it "disagree[d] with Japan that the Panel acted inconsistently with its obligations under Article 11 of the DSU in making a finding that covered the completion of the pathway for transmission of fire blight by 'infected' apple fruit, even though the evidence before the Panel 'centered around' the pathway with respect to mature, symptomless apple fruit." (Para. 229) The Appellate Body further stated that it saw "no lack of connection between the overall evidence that the Panel considered and the findings it made with respect to the last stage of the pathway for transmission of fire blight." Therefore, it found that the Panel did not act inconsistently with DSU Article 11. (Para. 231)

Experts' Statements of Caution

Next, Japan challenged the Panel's alleged failure to take into account adequately the "precautionary principle." Japan based this challenge on the fact that the Panel did not take into account "the need of caution emphasized by the experts" with respect to the measure aimed at preventing the entry of fire blight into Japan. (Paras. 218, 232) Furthermore, Japan contended that the "precautionary principle" was "embodied in the opinions of the experts cautioning against elimination of phytosanitary measures protecting Japan from fire blight; and that, accordingly, such caution 'should have been given greater weight in the conclusion of the Panel on completion of the pathway.'" (Para. 234)

The Appellate Body rejected this argument. In doing so, it first said that "the concerns articulated by these experts ... address the consequences associated with eliminating *all* or *most* controls over imports, combined with the importation of poor-grade apples," and therefore "[t]hese concerns do *not* speak about whether the pathway for transmission of fire blight could be completed." (Para. 236) Furthermore, it said, "the Panel did explicitly 'tak[e] into account' the experts' cautionary statements, but understood properly that those statements focused on an issue different from the likelihood of completion of the last stage of the pathway for transmission of fire blight from apple fruit." Accordingly, the Appellate Body found, "the Panel did not err in refusing to 'recognize[] the risk of completion of the pathway from infected apple fruit' on the basis of the experts' statements of caution." (Para. 237)

The Appellate Body also noted that Japan "essentially disagrees with the Panel's appreciation of the evidence," but said that Japan offered "no arguments challenging the objectivity of the Panel's assessment." Therefore, the Appellate Body concluded, Japan failed to establish that the Panel "exceeded the bounds of its discretion as the trier of facts." (Para. 238)

Completion of the Pathway and "Theoretical Risk"

Finally, Japan alleged an inconsistency in the Panel's fact-finding "that renders its analysis of the pathway for transmission of fire blight through apple fruit inconsistent with its obligation to make an 'objective assessment of the facts of the case.'" Specifically, Japan contended that the Panel's rejection of the U.S. argument that the experts' prudence constituted a "'theoretical risk' implies that the risk from infected apple fruit is *real*, and that the entire pathway could be completed." (Paras. 218, 239) The Appellate Body rejected this argument, noting: "The conclusion of the Panel that the measure is maintained without sufficient scientific evidence rests on the finding of fact of 'a negligible risk of possible transmission of fire blight through apple fruit'; it has no relation to the Panel's rejection of the United States' argument that the experts' prudence constituted a 'theoretical risk.'" (Para. 240)

Accordingly, the Appellate Body disagreed with Japan's argument, and concluded that the Panel did not act inconsistently with DSU Article 11. (Para. 241)

Conclusion

On this basis, the Appellate Body found that the Panel "did not act inconsistently with Article 11 of the DSU, with respect to its analysis of the United States' claim under Article 2.2 of the SPS Agreement." (Para. 242)

COMMENTARY

For further reading on this dispute, see:

Gavin Goh, "Tipping the Apple Cart: The Limits of Science and Law in the SPS Agreement after *Japan—Apples*," 40 Journal of World Trade 4, pp. 655-686 (2006).

Subsequent Developments

After the DSB adopted the panel and Appellate Body reports in this dispute, Japan revised the measures at issue. The revised measures were the subject of a further challenge under DSU Article 21.5. *See DSC for Japan - Apples, Article 21.5 (Panel).*

SPS Agreement Article 5.7 - Provisional Measures "Where Relevant Scientific Evidence is Insufficient"

SPS Agreement Article 5.7 allows Members to take provisional SPS measures "where relevant scientific evidence is insufficient." In this appeal, one of Japan's arguments was that this provision is satisfied not only where the is a *lack* of scientific evidence, but also where there is "scientific uncertainty." (*See* paras. 33-34) Japan's point seems to have been that the term "insufficiency" applies where there is a substantial amount of scientific evidence, but the evidence does not resolve the issue (*e.g.*, the evidence may be contradictory, with some studies indicating one result, and other studies indicating another).

The Appellate Body rejected Japan's appeal on this point. However, its statements on the issue make it a bit unclear as to its view of the specific question Japan had in mind. In its findings, the Appellate Body first stated that it "disagree[d]" with Japan, noting that "[t]he application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence." It continued, "[t]he text of Article 5.7 is clear: it refers to 'cases where relevant scientific evidence is insufficient,' not to 'scientific uncertainty,'" noting, "[t]he two concepts are not interchangeable." (*See* para. 184) This part of the Appellate Body's findings seems to be a clear rejection of Japan's arguments.

However, the Appellate Body's later statements could be seen as either mis-stating the issue to some extent or actually favoring Japan's view. Specifically, the Appellate Body rejected Japan's argument that the Panel's interpretation of Article 5.7 "is too narrow for the reason that it excludes cases where the quantity of evidence on a phytosanitary question is 'more than little,' but the available scientific evidence has not resolved the question." In this context, the Appellate Body also stated, "[w]e do not read the Panel's interpretation as excluding cases where the available evidence is more than minimal in quantity, but has not led to reliable or conclusive results." Thus, the Appellate Body appears to say here that a situation where scientific evidence has led to inconclusive results could fall within the "insufficient

scientific evidence" standard, which is what Japan had argued. Furthermore, the Appellate Body noted, the Panel "explicitly recognized that such cases fall within the scope of Article 5.7 when it observed ... that under its approach, Article 5.7 would be applicable to a situation where a lot of scientific research has been carried out on a particular issue without yielding reliable evidence." (*See* para. 185) The problem with the Appellate Body's last statement, however, is the reference to the absence of "reliable evidence." Japan's arguments did not emphasize the absence of "*reliable* evidence." Rather, they were based on the idea that existing, reliable evidence might not *resolve* the question. That is, there may be evidence that is "reliable," but which does not resolve the issue (*e.g.*, if there are several contradictory studies).

Last Update: January 5, 2007

Exhibit 25

Panel Report
United States - Anti-Dumping Act of 1916
(WT/DS136/R , WT/DS162/R) / DSR 2000:X, 4593, DSR 2000:X, 4831

Parties (DS136)
Complainant: EC
Respondent: U.S.
Third Parties: India, Japan, Mexico

Parties (DS162)
Complainant: Japan
Respondent: U.S.
Third Parties: EC, India

Timeline of Dispute
Panel Request (EC): November 11, 1998
Panel Request (Japan): June 3, 1999
Panel Established (EC): February 1, 1999
Panel Established (Japan): July 26, 1999
Panel Composed (EC): April 1, 1999
Panel Composed (Japan): August 11, 1999
Interim Report Issued (EC): December 20, 1999
Interim Report Issued (Japan): February 28, 1999
Final Report Issued to Parties (EC): February 14, 2000
Final Report Issued to Parties (Japan): March 31, 2000
Final Report Circulated (EC): March 31, 2000
Final Report Circuloted (Japan): May 29, 2000
Notice of Appeal (EC case): May 29, 2000
Notice of Appeal (Japan case): May 29, 2000
AB Report Circulated: August 28, 2000
Adoption: September 26, 2000

Panelists
Mr. Johan Human (Chairperson),
Mr. Dimitrij Grčar, Professor Eugeniusz Piontek

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Key Findings

- Anti-dumping legislation can be challenged "as such," outside the context of a specific application of the legislation. **[Upheld by Appellate Body.]**
- Only measures in the form of anti-dumping *duties* may be applied to counteract dumping. Because the 1916 Act applies measures other than anti-dumping duties to counteract dumping, it is inconsistent with GATT Article VI:2. **[Upheld by Appellate Body.]**
- The 1916 Act violates GATT Article VI:1 because it does not contain a requirement to demonstrate injury. **[Panel's ultimate conclusion of violation upheld by Appellate Body.]**
- The 1916 Act violates AD Agreement Articles 4 and 5 because it does not contain certain procedural requirements. **[Panel's ultimate conclusion of violation upheld by Appellate Body.]**

Note on the Panel Reports in This Case:

The measure at issue here was the subject of two WTO complaints, one brought by the European Communities and the other by Japan. The subject matter in both cases is the same, although the issues raised by each complainant and the responses given by the United States are sometimes different (in particular, the U.S. position evolved based on the proceedings in the EC dispute, which came first). While the panels in the two cases were composed of the same persons, separate deliberations were carried out with respect to the two panels, largely in response to objections by the United States and the European Communities to concurrent deliberations. Nonetheless, in its report for the complaint brought by Japan, where the issues were identical to those considered in the EC dispute, the Panel applied the same reasoning that it applied in the earlier dispute. This *Dispute Settlement Commentary* covers both reports together, noting, where relevant, instances in which an issue applies only to the complaint brought by the European Communities or only to that brought by Japan.

BACKGROUND

This dispute concerns Title VIII of the Revenue Act of 1916 ("1916 Act") (15 U.S.C. § 72). This law provides as follows:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

(Para. 2.1) Under this law, in order for an importer's behavior to be punishable, the importer must have: 1) sold a foreign-produced product within the United States at a price which is "substantially less" than the price sold in the home market or other comparison market; 2) undertaken this price discrimination "commonly and systematically"; and 3) undertaken this price discrimination with a particular intent, including the intent "of destroying or injuring an industry in the United States." Key features of this law in the context of this dispute are: 1) the private right of action; 2) the remedy of treble damages for a private complainant; and 3) the possibility of criminal penalties in an action brought by the U.S. Government. (Paras. 2.2 -5)

In the U.S. legal system, the judicial branch is the "final authority" as to the interpretation of federal laws such as the 1916 Act. However, because the 1916 Act has been invoked infrequently, there are only a limited number of judicial interpretations of the law. The U.S. Supreme Court has never reviewed the 1916 Act. In addition, all judicial examinations of the 1916 Act to date have involved civil complaints rather than criminal ones, and no complainant has ever collected treble damages. Nonetheless, in a recent case under the 1916 Act, a case which effectively triggered this challenge to the law under WTO dispute settlement procedures, the defendants elected to settle the dispute rather than proceed to trial. The U.S. Department of Justice, which is the agency responsible for prosecuting criminal violations of the 1916 Act, has never successfully prosecuted a criminal case under the law, such that no criminal sanctions have ever been imposed. (Paras. 2.14-16)

The European Communities challenged the 1916 Act under GATT Articles III:4, VI:1 and VI:2, AD Agreement Articles 1, 2.1, 2.2, 3, 4 and 5.5, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"). Japan challenged the 1916 Act under the following WTO provisions, either separately or in combination with each other: GATT Articles III:4, VI:1, VI:2 and XI, AD Agreement Articles 1, 2, 3, 4, 5, 9, 11 and 18.4 and WTO Agreement Article XVI:4. Both the European Communities and Japan challenged the measure "as such," as opposed to a specific instance of application of the 1916 Act.

SUMMARY OF PANEL'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

DSU Article 6.2 - Panel Request

In the dispute brought by the European Communities, the United States requested the Panel to issue a preliminary ruling on two "claims" allegedly made by the European Communities in its first written submission. Specifically, the United States challenged the EC "claims" regarding AD Agreement Articles 1 and 18.1 because no claims under these provisions were included in the EC panel request. (EC Report, para. 6.22)

Citing the Appellate Body report in *EC - Bananas*, the Panel dismissed the U.S. argument. This dismissal was based on the EC response that the alleged "claims" are merely "*arguments*," and that the European Communities was not alleging violations of AD Agreement Articles 1 and 18.1. The Panel affirmed its preliminary ruling to reject this U.S. request when the United States again raised the issue during the first panel meeting. The Panel also emphasized that these additional provisions serve as "context," under Article 31 of the Vienna Convention on the Law of Treaties ("VCLT), to provisions under which actual claims have been made. (EC Report, paras. 6.24-28) **Therefore, the Panel refused to exclude from its consideration references by the European Communities to AD Agreement Articles 1 and 18.1, although it did not consider them as separate claims.**

Enhanced Third Party Rights

In the dispute brought by Japan, the European Communities requested enhanced third party rights. Japan accepted this request, but the United States opposed it. (Japan Report, para. 6.29)

The Panel rejected the EC request. It noted that, in *EC - Hormones*, the Appellate Body confirmed the discretion of panels under DSU Article 12.1 to grant enhanced third party rights. However, the Panel found that the particular circumstances that supported the granting of such rights in *Hormones*, namely the "highly technical and factually intensive nature" of the case and the need for the panel to consult experts, did not exist in this case. (Japan Report, paras. 6.29-35)

After the EC requested enhanced third party rights in the case brought by Japan, Japan made a similar request for enhanced third party rights in the parallel dispute brought by the European Communities. (EC Report, para. 6.29) The Panel denied this request for similar reasons to those noted above, observing in addition that none of the parties had requested harmonized panel schedules or concurrent deliberations between the panels. (EC Report, paras. 6.33-36)

Thus, the Panel refused to grant either the European Communities or Japan enhanced third party rights in each other's cases. (The Appellate Body upheld the Panel's decision. *See DSC for U.S. - 1916 Act (AB).*)

Examination of Domestic Law by Panels

Before addressing the substantive issues in this case, the Panel first considered how the WTO Agreement directs it to examine a Member's domestic law. Pointing to DSU Article 3.2, the Panel concluded that it should develop its approach "on the basis of that of international courts in similar circumstances." (EC Report, para. 6.40, Japan Report, para. 6.36) The Panel noted an added dimension to this case, in that the law under consideration is 80 years old, thereby raising issues related to historical context and subsequent judicial interpretation. (EC Report, para. 6.41) Based on the Appellate Body's statement in *India - Patents (US)*, where a similar examination of domestic law was undertaken, the Panel concluded:

> Thus, our understanding of the term "examination" as used by the Appellate Body is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement.

(EC Report, para. 6.51, Japan Report, para. 6.50) As support, the Panel cited to a decision of the International Court of Justice, and concluded that it is within its power to consider the various U.S. judicial opinions interpreting the 1916 Act and to weigh the value of these opinions based on a consideration of the overall U.S. judicial system. The Panel also rejected any probative value related to the classification of the 1916 Act (*e.g.*, as an "anti-dumping" law or as an "anti-trust" law) by U.S. agencies, courts, or other entities. (EC Report, paras. 6.53-59, Japan Report, paras. 6.52-58)

As for the historical context and an examination of U.S. legislative history, the Panel again turned to the International Court of Justice, referring to the criteria for examining legislative history set forth in the *Nuclear Tests* case. In this regard, the Panel discounted many of the statements made by U.S. officials

concerning the 1916 Act because they were not made at a high enough level (*i.e.*, most were below the level of the U.S. Trade Representative), or they were directed at the U.S. legislature and not the international community. (EC Report, paras. 6.60-63, Japan Report, paras. 6.59-62) The Panel also noted that the age of these statements made them difficult to verify and suggested that they could be used only "to the extent that they confirm other established evidence." (EC Report, para. 6.65, Japan Report, para. 6.62)

Approach under GATT Articles III and VI

As a preliminary matter, the Panel addressed the issue of whether the 1916 Act should be considered under GATT Article VI or GATT Article III, or both. The Panel first noted that it "has the 'competence of its competence', i.e., that it may determine whether a given claim can be addressed, irrespective of the positions expressed by the parties on the issue." (EC Report, para. 6.72, Japan Report, para. 6.71) The Panel said that ultimately the issue of which provision governs must be addressed along with the substantive issues of the case to determine where the 1916 Act fits within the WTO Agreement. However, referring to the Appellate Body report in *EC - Bananas* and a judgment of the Permanent Court of International Justice in the *Serbian Loans* case, the Panel concluded that the provision that more specifically addresses the facts should be considered first, and that, in this case, Article VI is more specific to international price discrimination, the matter at issue here. (EC Report, paras. 6.76-78, Japan Report, paras. 6.75-76) On this basis, the Panel decided to begin its analysis with GATT Article VI, and proceed to Article III only if necessary to make sufficiently precise recommendations and rulings to the DSB.

Scope of the AD Agreement and Its Relationship to GATT Article VI

Rather than challenging a specific application of the 1916 Act, Japan and the European Communities challenged the 1916 Act "as such" (or "on its face"). In other words, they challenged the legislation itself, rather than a specific application of the legislation. The United States disputed the Panel's jurisdiction to review this legislation "as such," for two reasons: 1) under AD Agreement Article 17.4, as interpreted by the Appellate Body in *Guatemala - Cement I*, Members may only challenge the three types of anti-dumping measures set forth in the AD Agreement (*i.e.*, a definitive anti-dumping duty, acceptance of a price undertaking, or a provisional measure), none of which had occurred here; and 2) based on the Appellate Body report in *Brazil - Coconut* (which had endorsed that panel's findings), the Panel has no jurisdiction to decide a claim under GATT Article VI independently of the AD Agreement. (EC Report, para. 5.15, Japan Report, para. 6.82) (The United States made this challenge early in the proceedings in the dispute brought by Japan, but did not do so in the dispute brought by the European Communities until the interim review stage. As a result, in the EC case, the Panel rejected the U.S. claim because it was not made in a timely manner. Nonetheless, because it considered that these GATT/AD Agreement issues might be subject to appeal, the Panel decided to address the claim in its discussion of the interim review stage. (EC Report, paras. 5.18-19))

The Panel rejected both U.S. arguments. With regard to the first argument, the Panel considered that the limitations contained in AD Agreement Article 17.4 apply only in certain situations, namely when a Member challenges *actions* taken by another Member in the context of an anti-dumping *investigation*. Thus, they do not preclude a Member from challenging the WTO-consistency of an anti-dumping *law*, even when that law has not been applied. The Panel found support for this interpretation in the other provisions of AD Agreement Article 17, as well as AD Agreement Article 18.4 which "[requires] the conformity of Members' anti-dumping laws as of the date of entry into force of the WTO Agreement for those Members." In other words, the Panel considered that a Member's anti-dumping legislation must be compatible with the WTO Agreement "whether that legislation is applied or not." In this regard, the Panel noted that the Appellate Body's holding in *Guatemala - Cement I* is limited to situations in which

Members take specific actions in anti-dumping investigations, but that it is not intended to exclude the "review of anti-dumping laws as such." (Japan Report, paras. 6.84-90) **Therefore, the Panel concluded that "Article 17 of the Anti-Dumping Agreement does not prevent us from reviewing the conformity of laws as such under the Anti-Dumping Agreement, irrespective of whether the measures referred to in Article 17.4 have been adopted or not."** (Japan Report, para. 6.91, *see also* EC Report, paras. 5.20-27) (On appeal, the Appellate Body upheld the Panel's finding. *See DSC for U.S. - 1916 Act (AB).*)

As for the independent application of GATT Article VI, the Panel distinguished this case from the situation in *Brazil - Coconut*. The Panel noted that, in *Coconut*, Brazil was challenging the application of GATT Article VI when the SCM Agreement explicitly *did not apply*. Here, the Panel said that it would not be addressing Japan's GATT Article VI claims in isolation from the AD Agreement as the two agreements form an "inseparable package of rights and obligations," and that the AD Agreement provides important context for the interpretation of the provisions in GATT Article VI. Moreover, citing the panel report in *India - ORs*, the Panel noted that the fact that the two agreements constitute a package does not preclude a panel from making findings under each agreement separately. (Japan Report, paras. 6.92-94) **Therefore, the Panel rejected the U.S. argument that the Panel does not have jurisdiction to examine Japan's claims under GATT Article VI independently from the AD Agreement.**

SUBSTANTIVE ISSUES

Applicability of GATT Article VI and the AD Agreement to the 1916 Act

The Panel considered whether GATT Article VI and the AD Agreement apply to the 1916 Act. In doing so, it first examined the relevance of the mandatory versus non-mandatory (discretionary) distinction, an issue raised by the United States.

Mandatory versus Non-Mandatory Distinction

The United States argued that the 1916 Act is a non-mandatory law, and therefore should not be found to he in violation of GATT Article VI and the AD Agreement. In support of its claim that the law is non-mandatory, the United States pointed to the following features of the law: 1) the Department of Justice has discretion as to whether or not to initiate criminal proceedings, and 2) U.S. courts have interpreted the 1916 Act in a WTO-consistent manner, and could interpret it in this manner in the future as well. (EC Report, para. 6.82, Japan Report, para. 6.95)

At the outset, the Panel made clear that only the first argument pertaining to the alleged discretion enjoyed by the Department of Justice is relevant with respect to the mandatory/non-mandatory doctrine, under traditional GATT practice and public international law. It explained that the second argument, pertaining to the nature of U.S. courts' interpretations of the 1916 Act, impacts simply upon the "*current meaning*" of the law, and not whether it is mandatory or discretionary for purposes of determining the applicability of GATT Article VI. (EC Report, para. 6.84, Japan Report, para. 6.97) In this regard, the Panel rejected U.S. reliance on the GATT panel report in *U.S. - Tobacco* for the proposition that a complainant bears the burden of proving that there is no possible WTO-consistent interpretation of the legislation at issue and, in turn, as support for the proposition that the 1916 Act does not mandate a WTO-illegal action. The Panel distinguished the case at hand from the situation in *U.S. - Tobacco,* on the following bases: 1) the question of the *applicability* of GATT Article VI arises at an earlier stage in the Panel's analysis than did the decision in *U.S. - Tobacco*, where the panel had to determine whether an ambiguous term contained in a statute mandated a violation of a GATT provision; and 2) unlike the 1916 Act, the law in *U.S. - Tobacco* had not yet been applied. In this way, given that the 1916 Act has already been applied, the Panel considered that Japan and the European Communities only need to prove "that the

1916 Act, as it has been interpreted and applied so far by US courts, meets the conditions to fall within the scope of Article VI." (EC Report, paras. 6.85-90, Japan Report, paras. 6.98-104)

As for the discretion enjoyed by the Department of Justice, the Panel decided to address this issue after it reached its determination as to the applicability of GATT Article VI to the 1916 Act. (EC Report, paras. 6.91-92, Japan Report, paras. 6.105-107) In the Japan dispute, however, the Panel did note that AD Agreement Article 18.4 contains language contrary to the traditional concept of mandatory/non-mandatory legislation, in that it requires Members to bring their laws into conformity with the AD Agreement at the time of the entry into force of that Agreement, not simply during instances of application of those laws. Furthermore, it noted that Article 18.4 is equivalent to a similar provision contained in the Tokyo Round Anti-Dumping Code and conforms with past GATT practice, where panels found that the discretion to initiate an investigation is insufficient to render a countervailing duty law "non-mandatory" so as to avoid review under the GATT. (Japan Report, paras. 6.105-107)

Scope of GATT Article VI and the AD Agreement

The Panel then turned to the issue of whether the 1916 Act falls within the scope of GATT Article VI and the AD Agreement. The European Communities brought its claims under the two agreements separately. Therefore, in the EC dispute, the Panel first noted that GATT Article VI can only be considered in its context, *i.e.*, along with the provisions of the AD Agreement. (EC Report, para. 6.97) Japan, on the other hand, raised its Article VI claims in conjunction with its claims under the AD Agreement. The Panel considered that based on the relationship between GATT Article VI and the AD Agreement, if it were to find that the 1916 Act falls within the scope of the provisions of GATT Article VI, then "[the Act] must also fall within the scope of the Anti-Dumping Agreement." (Japan Report, para. 6.108) The Panel decided to first address the text of the 1916 Act, and then examine its historical context, legislative history and finally subsequent *interpretations* (*e.g.*, relevant court cases) to determine whether they affect any conclusions reached on the basis of only the text. (EC Report, para. 6.98, Japan Report, para. 6.112)

The Panel first quoted the text of GATT Article VI:1, which provides:

> The Members recognize that *dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products*, is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry. *For the purpose of this article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another*
>
> *(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,*
>
> *(b) in the absence of such domestic price, is less than either*
>
> *(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or*
>
> *(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.*

> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

(EC Report, para. 6.102, Japan Report, para. 6.115; emphasis added)

The Panel in the two disputes approached this question differently. In the EC dispute, the Panel focused on the objectives of GATT Article VI and the 1916 Act, as discerned from their respective texts. Examining Article VI, the Panel in the EC case considered that the provision does not regulate the practice of dumping itself, but rather it addresses what Members may do in order to *counteract dumping*. (EC Report, para. 6.103) The panel concluded, "a law that would counteract 'dumping' as defined in Article VI:1 would fall within the scope of Article VI." In this regard, it dismissed the fact that in order to apply anti-dumping duties under Article VI, "material injury" must also be found; the Panel considered that the structure of Article VI requires "in the first place" a finding of "dumping" within the definition of Article VI:1. (EC Report, paras. 6.105-107)

In its analysis of the text of the 1916 Act, the EC Panel first noted the "strong similarity" between the definition of dumping in Article VI and the transnational price discrimination test found in the 1916 Act. (EC Report, para. 6.108) The Panel considered that differences in the tests, such as the 1916 Act's lack of a constructed value methodology or reference to wholesale prices, render the 1916 Act *narrower* than Article VI, but that they are insufficient to place the 1916 Act outside the realm of a law that counteracts dumping. The Panel reached similar conclusions with respect to the U.S. arguments regarding the different standards and the additional intent provision contained in the 1916 Act, all of which the Panel concluded simply make dumping harder to prove under the 1916 Act, but which fail to take the 1916 Act out of the "anti-dumping" category all together. (EC Report, paras. 6.109-113) Finally, the Panel rejected U.S. arguments concerning the stated purpose of the 1916 Act as an anti-trust regulation. (EC Report, para. 6.116)

In the dispute brought by Japan, on the other hand, the Panel approached this issue based on three questions raised by the parties during the proceedings: 1) "Does the 1916 Act address the same type of price differentiation as Article VI?" 2) "If this is the case, is the type of 'effects' targeted by the 1916 Act ... relevant to determining whether the 1916 Act falls within the scope of Article VI?"; and 3) "is the type of measures imposed under the 1916 Act relevant to determining whether the 1916 Act falls within the scope of Article VI?" (Japan Report, para. 6.114) The Panel examined the text of GATT Article VI, which it considered to establish three conditions for anti-dumping measures to be applied: (a) "dumping," *i.e.*, the pricing practice at the origin of the application of Article VI; (b) material injury or threat of material injury to an established domestic industry or material retardation of the establishment of a domestic industry, i.e. the effect of dumping; and (c) a causal link between the two. (Japan Report, para. 6.116)

In response to the first question, the Panel noted the similarities between the definition of dumping under Article VI:1 and the price discrimination test contained in the 1916 Act. As in the EC dispute, the Panel dismissed the fact that additional requirements contained in the 1916 Act make the demonstration of "dumping" under the 1916 Act more difficult than under Article VI, stating that "Members remain free to apply requirements which make the imposition of measures more difficult, but they may not exempt themselves from the rules and disciplines of the WTO Agreement when counteracting dumping as such." (Japan Report, paras. 6.119-121)

With respect to the second question, whether the 1916 Act targets effects encompassed by GATT Article VI, the Panel rejected U.S. arguments that the 1916 Act price discrimination test considers other "effects" than those provided for under GATT Article VI. In particular, the Panel considered that the

language contained in GATT Article VI, that dumping "'is to be condemned if it causes or threatens' to cause certain effects," is sufficiently broad to make clear that the drafters did not intend Article VI to apply only to Members desiring to apply anti-dumping *duties*, but rather the purpose of Article VI "is to define the conditions under which the imposition of anti-dumping measures is allowed." (Japan Report, paras. 6.131-132) Moreover, the Panel dismissed U.S. arguments pertaining to the objective of the 1916 Act, *i.e.*, to regulate cross-border price discrimination. It found that the applicability of GATT Article VI is not dependent upon the stated purpose of a piece of legislation, but rather on an objective test as to whether the Member's legislation falls within the terms of Article VI:1. (Japan Report, paras. 6.134-135)

With respect to the third question, relating to the relevance of the *type* of measures applied, based on the considerations discussed above the Panel found the type of measures imposed irrelevant to the question of whether domestic legislation falls within the scope of GATT Article VI. In particular, it recalled that Article VI provides the circumstances in which dumping may be targeted by a Member, making the type of measures imposed irrelevant. (Japan Report, paras. 6.136-137)

Having examined the text of the 1916 Act, the Panel then considered other aspects of the law. Recognizing that the 1916 Act is over 80 years old, the Panel found it appropriate to consider the historical context and legislative history of the 1916 Act. Upon examination of the legislative history, the Panel "found no indication that the terms of the price discrimination test found in the 1916 Act were understood differently at the time of its enactment than we understand them today." (EC Report, para. 6.122, Japan Report, para. 6.144) Again, the Panel stated that an anti-trust purpose does not detract from the fact that the test contained in the 1916 Act is a dumping test. (EC Report, para. 6.129, Japan Report, para. 6.147) Therefore, the Panel concluded that the historical context and legislative history does not alter the conclusions drawn from examining the text. (EC Report, para. 6.133, Japan Report, para. 6.151)

Finally, the Panel engaged in an analysis of all U.S. court cases addressing the 1916 Act, and concluded that no court has issued a definitive interpretation that the transnational price discrimination test of the 1916 Act is an anti-trust test. (EC Report, paras. 6.134-162, Japan Report, paras. 6.152-181))

On this basis, the Panel concluded that GATT Article VI and the AD Agreement are applicable to the 1916 Act. (EC Report, paras. 6.163-165, Japan Report, paras. 6.182-184) (On appeal, the Appellate Body upheld this conclusion. *See* *DSC for U.S. - 1916 Act (AB)*.)

Mandatory Nature of 1916 Act

Having found that GATT Article VI and the AD Agreement are applicable to the 1916 Act, the Panel in both disputes turned to the question of whether the 1916 Act is a mandatory law, within the meaning of GATT/WTO practice, given the DOJ's discretion on whether to bring a case. In this regard, the Panel adopted the reasoning used by the GATT panel in the unadopted report on *EC - Audio Cassettes*, which found the discretion to initiate an investigation insufficient to render anti-dumping legislation "non-mandatory" and outside the scope of GATT panel review. The Panel observed that because anti-dumping cases are always discretionary in terms of the choice to initiate, if it were the case that non-mandatory anti-dumping provisions are not reviewable, a challenge to an anti-dumping law outside the context of a specific investigation could never be brought. The Panel also relied on AD Agreement Article 18.4, which makes clear that Members shall bring their laws into "conformity" with the AD Agreement. (EC Report, paras. 6.168-170, Japan Report, paras. 6.188-191) **The Panel therefore concluded that the DOJ's discretion as to whether or not to bring criminal proceedings "should not be interpreted as making the 1916 Act a non-mandatory law."** (EC Report, para. 6.169, Japan Report, para. 6.191) (On appeal, the Appellate Body upheld this conclusion. *See* *DSC for U.S. - 1916 Act (AB)*.)

GATT Article VI:1

The European Communities argued that the 1916 Act violates Article VI:1. Specifically, it asserted that Article VI:1, along with AD Agreement Article 3, mandates a particular determination with respect to "material injury." Because that determination is not provided for, and is therefore not ensured, under the 1916 Act, the Act violates this provision. (EC Report, para. 6.178)

The Panel agreed with the EC argument. While it recognized that the 1916 Act requires a finding of an "intent" to cause injury, the Panel considered that the "intent" standard does not guarantee that an analysis of *actual material injury or threat thereof* to the domestic industry would be carried out. (EC Report, para. 6.180) **The Panel therefore concluded that the 1916 Act is inconsistent with Article VI:1 to the extent that it provides for the identification of an "intent" by the defendant to cause injury, rather than a finding of injury as required by of Article VI:1.** (EC Report, para. 6.181) (On appeal, the Appellate Body noted that the United States appealed these findings "on the sole basis that the 1916 Act does not fall within the scope of application of Article VI and the Anti-Dumping Agreement." Given that the Appellate Body upheld the Panel's conclusion that the 1916 Act falls within the scope of application of these provisions, the Appellate Body also upheld the findings of inconsistency with the substantive provisions. *See DSC for U.S. - 1916 Act (AB).*)

Japan raised a similar claim under GATT Articles VI:1 and VI:6(a). The Panel reached the same conclusion, that the 1916 Act is inconsistent with Article VI:1 to the extent that it provides for the identification of an "intent" to injure, rather than a finding of injury. (Japan Report, paras. 6.251-253) (On appeal, the Appellate Body upheld this conclusion, on the basis identified in the parenthetical in the preceding paragraph. *See DSC for U.S. - 1916 Act (AB).*) As for GATT Article VI:6(a), the Panel considered that the objective of this provision "is to require a *determination* by the authorities of the importing member that dumping is such as to cause material injury, threat thereof or material retardation," as opposed to imposing a *substantive* requirement of an injury finding. **As a result, it concluded that Japan failed to establish a *prima facie* case of violation of Article VI:6(a).** (Japan Report, para. 6.253)

GATT Article VI:2

The European Communities claimed that under Article VI:2, the only permissible remedy for injurious dumping is anti-dumping *duties*. (EC Report, para. 6.183) Japan made the same argument based on GATT Article VI:2 and AD Agreement Article 18.1. (Japan Report, para. 6.201) In this way, because the 1916 Act allows for other remedies, including imprisonment, the complainants argued that the 1916 Act violates those provisions.

The Panel interpreted GATT Article VI:2 in accordance with the rules of the VCLT, emphasizing that each factor listed in VCLT Article 31 "should be seen as part of one single process." (Japan Report, para. 6.206) It first examined the ordinary meaning of the terms of Article VI:2. The first sentence of that provision states:

> In order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.

(EC Report para. 6.188) The Panel observed that the issue is the meaning of the term "may" in Article VI:2. (EC Report, para. 6.189, Japan Report para. 6.211)

The Panel rejected the U.S. interpretation that the term "may" in Article VI:2 implies that remedies other than duties are permissible. In doing so, the Panel focused on the context of the term. It noted that the opening phrase of the provision indicates that the remedy is intended to "offset or prevent dumping." According to the panel, this phrase indicates that the purpose of anti-dumping measures is to "offset" dumping, as opposed to the imposition of *punitive* measures. The Panel considered that by specifying the offsetting of dumping, the provision "limits the meaning of the word 'may' to giving Members the choice between a duty equal to the dumping margin and a lower duty, not between anti-dumping duties and other measures." Therefore, the Panel concluded that the ordinary meaning of the terms of Article VI:2, first sentence "supports the view that anti-dumping duties are the only type of remedies allowed under Article VI of the GATT 1994." (EC Report, paras. 6.189-90, Japan Report, paras. 6.211-212)

The Panel found confirmation for its interpretation in the immediate context of Article VI:2. In this regard, the Panel found examination of the relevant provisions of the AD Agreement, specifically Articles 1 and 18.1, to be essential to its interpretation, either as "context" to GATT Article VI:2 (in the dispute brought by the European Communities) or as part of the same "package" of rights as Article VI:2 (as argued by Japan). (EC Report, para. 6.195, Japan Report, para. 6.214) Specifically, AD Agreement Article 1 requires that anti-dumping measures are to be applied only under the circumstances provided for in GATT Article VI. Moreover, AD Agreement Article 18.1 provides: "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." A footnote to this provision (AD Agreement footnote 24) reads: "This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate." The Panel concluded, "[i]n substance, we consider that the provisions of Articles 1 and 18.1 limit the anti-dumping instruments that may be used by Members to those expressly contained in Article VI and the Anti-Dumping Agreement." (EC Report, para. 6.196) In addition, the Panel observed that "[e]xcept for provisional measures and price undertakings, the only type of measures foreseen by the Anti-Dumping Agreement is the imposition of duties." In this regard, the Panel noted that AD Agreement Article 9.1 "establishes an intimate link between the calculation of a dumping margin provided for in Article 2 of the Agreement and the final measures that may be imposed." The Panel rejected the U.S. reliance on footnote 24 for the proposition that Members may take other measures to counteract dumping as long as their actions are in accordance with the GATT. While it agreed that footnote 24 does not preclude Members from using other trade policy instruments to address the causes or effects of dumping, it concluded that footnote 24 does not exempt a Member from the strict requirements of GATT Article VI. (EC Report, paras. 6.196-199, Japan Report, paras. 6.214-218)

In the dispute brought by Japan, the United States also referred to GATT Articles I:1 and II:1 as relevant context. Specifically, it argued that Article VI is a "carve-out" to those articles, such that Article VI should be read as a "right" and not as a limitation on the type of measures that a Member can take to counteract injurious dumping. (Japan Report, para. 6.219) The Panel rejected this argument, finding that this context of Article VI as a "carve-out" merely confirms that *duties* may be imposed under Article VI without violating GATT Articles I and II. The Panel reiterated that if a measure "objectively" addresses a form of price discrimination that meets the definition of "dumping" in GATT Article VI, then it must conform to Article VI and the provisions of the AD Agreement, which do not refer to any remedies other than duties. (Japan Report, paras. 6.220-222)

In the dispute brought by Japan, the Panel also considered the object and purpose of the GATT, the AD Agreement and the WTO Agreement in general. It found the U.S. position (*i.e.*, that any measure which conforms with the WTO Agreement should be permitted in order to counteract dumping) to be inconsistent with the objectives of the reduction of tariffs and the elimination of discriminatory treatment, as set forth in the preambles to the GATT and the WTO Agreement. (Japan Report, para. 6.223)

The Panel also considered that the negotiating history supports its earlier conclusions based on the text and context. (EC Report, paras. 6.200-203, Japan Report, paras. 6.226-229)

Based on these findings, the Panel concluded that "only measures in the form of anti-dumping duties may be applied to counteract dumping as such and that, by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994." (On appeal, the Appellate Body upheld this conclusion. *See DSC for U.S. - 1916 Act (AB).*) The Panel in the dispute brought by Japan noted that this holding is without prejudice to the acceptance of price undertakings as provided for in the AD Agreement. (EC Report, para. 6.204, Japan Report, para. 6.230)

Claims under the AD Agreement

AD Agreement Article 2

In the dispute brought by the European Communities, the Panel found that the European Communities failed to set out and clarify its arguments with respect to AD Agreement Articles 2.1 and 2.2. For that reason, the Panel decided that the European Communities failed to make its *prima facie* case on this issue. (EC Report, paras. 6.209-10)

Japan developed similar arguments under GATT Article VI:1(a) and AD Agreement Article 2. Specifically, under GATT Article VI:1(a) and AD Agreement Articles 2.1 and 2.2, Japan argued that the 1916 Act prohibits the importation of products at a price substantially less than a comparable wholesale price in principle countries of production or other foreign countries to which they are exported, as opposed to the "actual price of the product for sale in the exporting country" as required under the relevant WTO provisions. Moreover, Japan argued that the 1916 Act does not provide for the requisite adjustments to protect exporters' data against currency fluctuations, as set out in AD Agreement Article 2.4.1. (Japan Report, paras. 6.245-246)

The Panel rejected Japan's claims. As for the benchmark price, the Panel noted that the 1916 Act could be interpreted consistently with the WTO provisions. In particular, it noted that the 1916 Act, contrary to Japan's characterization, does not specify a particular preference for use of a specific comparison price. (Japan Report, paras. 6.243-244) With respect to the currency fluctuation issue, the Panel found that the 1916 Act does not expressly incorporate this requirement, but, at the same time, nothing in the Act would prevent the implementation of a currency fluctuation adjustment mechanism. In this regard, the Panel recalled that the United States had argued that pursuant to a U.S. Supreme Court doctrine established in the *Murray v. Schooner Charming Betsy* case, U.S. courts are required, whenever possible, to interpret U.S. laws in conformity with the international obligations of the United States. (Paras. 6.246-250) **On this basis, the Panel concluded that Japan failed to establish a *prima facie* case that the 1916 Act violates GATT Article VI:1(a) and AD Agreement Articles 2.1 and 2.2.** (Japan Report, para. 6.250)

AD Agreement Article 3

In both disputes, because the Panel had already found a violation of GATT Article VI based on the absence of an injury test in the 1916 Act, the Panel considered that it was not necessary to make specific findings under AD Agreement Article 3, which governs injury. (EC Report, para. 6.211, Japan Report, para. 6.254)

AD Agreement Articles 4 and 5

In the dispute brought by the European Communities, the Panel found a violation of AD Agreement Article 4 because the 1916 Act does not require that a complaint be made "on behalf of the domestic industry." (EC Report, paras. 6.213-14) Japan raised a similar claim under AD Agreement Articles 4 and 5. (Japan Report, para. 6.255) **Given that cases under the 1916 Act can be brought by "*any person* injured in his business or property," the Panel concluded that the 1916 Act fails to meet the requirements of AD Agreement Articles 4 and 5 relating to domestic industry representation.** (Japan Report, paras. 6.256-257)

Moreover, Japan argued that the 1916 Act fails to meet the requirements of AD Agreement Article 5.2, which requires that applications for dumping investigations must contain evidence of three elements -- dumping, injury and causation -- and that the level of dumping must meet a *de minimis* threshold. (Japan Report, para. 6.255) **Given the lack of any of these requirements in the U.S. Federal Rules of Civil Procedure, which would govern the filing of a lawsuit under the 1916 Act, and the Panel's earlier finding that the 1916 Act does not require the establishment of injury within the meaning of GATT Article VI, the Panel concluded that the 1916 Act violates AD Agreement Article 5.2 with respect to the type of evidence to he included in an application.** (Japan Report, para. 6.258)

Next, the Panel agreed with the European Communities that the 1916 Act violates AD Agreement Article 5.5 because it fails to provide for notification to the governments concerned before a case is initiated. (EC Report, paras. 6.215-16)

Japan also challenged the 1916 Act under AD Agreement Article 5.10, arguing that the 1916 Act does not contain the requisite deadline that an investigation and decision whether or not to impose duties must be completed within 18 months. Based on similar reasoning as mentioned above with respect to the U.S. *Charming Betsy* doctrine, the Panel found that the failure to include this deadline in the 1916 Act does not necessarily constitute a violation of this provision, as courts could interpret the rules consistently with the provision. **It concluded, therefore, that Japan failed to establish a *prima facie* case that the 1916 Act does not meet the deadline requirement contained in AD Agreement Article 5.10.** (Japan Report, paras. 6.259-260)

AD Agreement Articles 9 and 11

Finally, Japan argued that the 1916 Act violates AD Agreement Articles 9 and 11, which govern the imposition and collection of dumping duties and mandate periodic reviews of the need for the continued imposition of anti-dumping duties. Exercising judicial economy, the Panel found it unnecessary to address these claims in light of its earlier finding that the *type* of measures imposed under the 1916 Act is not compatible with GATT Article VI and the AD Agreement. (Japan Report, paras. 6.262-263)

Conclusion

In the dispute brought by the European Communities, in light of the violations found of Articles 4 and 5.5 of the AD Agreement, the Panel considered that the 1916 Act therefore violates AD Agreement Article 1, which requires that anti-dumping measures be imposed in conformity with the provisions of GATT Article VI and the AD Agreement. (EC Report, para. 6.217) **Similarly, in the dispute brought by Japan, in light of its earlier findings of violations under GATT Article VI:1 and AD agreement Articles 4.1, 5.1, 5.2 and 5.4, the Panel considered that the 1916 Act therefore also violates AD Agreement Article 1 and AD Agreement Article 18.1, which require that Memhers take specific action against dumping of exports only in accordance with the provisions of the GATT, as interpreted by the AD Agreement.** (Japan Report, para. 6.264) (On appeal, the

Appellate Body noted that the United States appealed these findings "on the sole basis that the 1916 Act does not fall within the scope of application of Article VI and the Anti-Dumping Agreement." Given that the Appellate Body upheld the Panel's conclusion that the 1916 Act falls within the scope of application of these provisions, the Appellate Body also upheld the findings of inconsistency with the substantive provisions. *See DSC for U.S. - 1916 Act (AB).*)

GATT Article III:4

Based on its findings of violations under GATT Article VI, the Panel considered that for reasons of judicial economy, it was not necessary for it to examine the consistency of the 1916 Act with GATT Article III:4. (EC Report, paras. 6.219-224, Japan Report, paras. 6.265-272). Moreover, in the dispute brought by Japan, the Panel also explained that because GATT Article VI and the AD Agreement deal "specifically, and in detail, with the administration of" anti-dumping laws, it is not necessary to make findings under GATT Article III:4. (Japan Report, para. 6.269)

GATT Article XI

Japan argued that by establishing impermissible import restrictions, the 1916 Act violates GATT Article XI. Based on its findings of violations under GATT Article VI, and given its view that Article VI more specifically addresses the basic features of the 1916 Act, the Panel considered that, for reasons of judicial economy, it was not necessary for it to examine the consistency of the 1916 Act with GATT Article XI. (Japan Report, paras. 6.273-281)

WTO Agreement Article XVI:4 and AD Agreement Article 18.4

The European Communities and Japan argued that violations of GATT Article VI necessarily constitute a violation of WTO Agreement Article XVI:4, which requires Members to bring their laws into conformity with the WTO Agreement. Japan also argued that violations of the AD Agreement necessarily constitute a violation of WTO Agreement Article XVI:4. Finally, Japan raised a similar claim under AD Agreement Article 18.4, which requires Members to ensure the conformity of their laws with the AD Agreement at the time of its entry into force. **The panel considered that a violation of GATT Articles VI:1 and VI:2 automatically establishes a violation of WTO Agreement Article XVI:4.** (EC Report, para. 6.223, Japan Report, para. 6.288) **Similarly, based on its findings of violations of specific provisions of the AD Agreement, the Panel also found a violation of AD Agreement Article 18.4, as argued by Japan.** (On appeal, the Appellate Body noted that the United States appealed these findings "on the sole basis that the 1916 Act does not fall within the scope of application of Article VI and the Anti-Dumping Agreement." Given that the Appellate Body upheld the Panel's conclusion that the 1916 Act falls within the scope of application of these provisions, the Appellate Body also upheld the findings of inconsistency with the substantive provisions. *See DSC for U.S. - 1916 Act (AB).*) For reasons of judicial economy, however, the Panel found it unnecessary to determine whether violations of the AD Agreement also lead to a violation of WTO Agreement Article XVI:4. (Japan Report, paras. 6.282-288)

COMMENTARY

For further reading on this dispute, see:

Jeffrey Beckington, "The World Trade Organization's Dispute Settlement Resolution in United States -- Anti-Dumping Act of 1916," 34 Vanderbilt Journal of Transnational Law 1, January 2001.

Mitsuo Matsushita and Douglas Rosenthal, "Was the WTO Mistaken in Ruling on Antidumping Act of 1916?," BNA International Trade Reporter, Volume 18, Number 36, September 13, 2001, page 1450.

Laurent A. Ruessmann, "Implications of the WTO 1916 Act Decision (Part 1): Did the WTO Outlaw the Use of National Antitrust Rules with Regard to Cross-border Predatory Pricing?", International Trade Law and Regulation, Volume 7, Issue 5, September 2001.

Laurent A. Ruessmann, "Implications of the WTO 1916 Act Decision (Part 2): National Anti-Circumvention Legislation Revisited," International Trade Law and Regulation, Volume 7, Issue 6, December 2001.

Hiroko Yamane, "The Anti-dumping Act of 1916: A Victory at What Cost?," International Trade Law and Regulation, Volume 7, Issue 1, February 2001.

Mandatory versus Discretionary Distinction

See DSC for U.S. - 1916 Act (AB).

Last Update: April 3, 2005

Appellate Body Report
United States - Anti-Dumping Act of 1916
(WT/DS136,162/AB/R) / DSR 2000:X, 4793

Participants
Appellant/Appellee: United States
Appellants/Appellees: EC, Japan
Third Participants: EC (in complaint brought by Japan), India, Japan (in complaint brought by EC), Mexico

Timeline of Dispute
Panel Request (EC): November 11, 1998
Panel Request (Japan): June 3, 1999
Panel Established (EC): February 1, 1999
Panel Established (Japan): July 26, 1999
Panel Composed (EC): April 1, 1999
Panel Composed (Japan): August 11, 1999
Interim Report Issued (EC): December 20, 1999
Interim Report Issued (Japan): February 28, 1999
Final Report Issued to Parties (EC): February 14, 2000
Final Report Issued to Parties (Japan): March 31, 2000
Final Report Circulated (EC): March 31, 2000
Final Report Circulated (Japan): May 29, 2000
Notice of Appeal (EC case): May 29, 2000
Notice of Appeal (Japan case): May 29, 2000
AB Report Circulated: August 28, 2000
Adoption: September 26, 2000

Appellate Body Division
Lacarte-Muró (Presiding Member), Ehlermann, Feliciano

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Key Findings

- Upheld Panel's conclusion that anti-dumping legislation can be challenged "as such," outside the context of a specific application of the legislation.
- Upheld Panel's conclusion that the 1916 Act falls within the scope of GATT Article VI and the AD Agreement, and therefore upheld Panel's conclusion that the 1916 Act is inconsistent with GATT Article VI and AD Agreement Articles 4 and 5.
- Upheld Panel's conclusion that, under GATT Article VI and the AD Agreement, the only permissible method of counteracting dumping is through anti-dumping duties.

BACKGROUND

This dispute concerns Title VIII of the Revenue Act of 1916 ("1916 Act") (15 U.S.C. § 72). This law provides as follows:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

(Panel Report, para. 2.1) Under this law, in order for an importer's behavior to be punishable, the importer must have: 1) sold a foreign-produced product within the United States at a price which is "substantially less" than the price sold in the home market or other comparison market; 2) undertaken this price discrimination "commonly and systematically"; and 3) undertaken this price discrimination with a particular intent, including the intent "of destroying or injuring an industry in the United States." Key features of this law in the context of this dispute are: 1) the private right of action; 2) the remedy of treble damages for a private complainant; and 3) the possibility of criminal penalties in an action brought by the U.S. Government. (Panel Report, paras. 2.2 -5)

In the U.S. legal system, the judicial branch is the "final authority" as to the interpretation of federal laws such as the 1916 Act. However, because the 1916 Act has been invoked infrequently, there are only a limited number of judicial interpretations of the law. The U.S. Supreme Court has never reviewed the 1916 Act. In addition, all judicial examinations of the 1916 Act to date have involved civil

complaints rather than criminal ones, and no complainant has ever collected treble damages. Nonetheless, in a recent case under the 1916 Act, a case which effectively triggered this challenge to the law under WTO dispute settlement procedures, the defendants elected to settle the dispute rather than proceed to trial. The U.S. Department of Justice, which is the agency responsible for prosecuting criminal violations of the 1916 Act, has never successfully prosecuted a criminal case under the law, such that no criminal sanctions have ever been imposed. (Panel Report, paras. 2.14-16)

The European Communities challenged the 1916 Act under GATT Articles III:4, VI:1 and VI:2, AD Agreement Articles 1, 2.1, 2.2, 3, 4 and 5.5, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"). Japan challenged the 1916 Act under the following WTO provisions, either separately or in combination with each other: GATT Articles III:4, VI:1, VI:2 and XI, AD Agreement Articles 1, 2, 3, 4, 5, 9, 11 and 18.4 and WTO Agreement Article XVI:4. Both the European Communities and Japan challenged the measure "as such," as opposed to a specific instance of application of the 1916 Act. The Panel found violations of GATT Article VI, AD Agreement Articles 4, 5 and 18.4, and WTO Agreement Article XVI:4.

The United States appealed the following findings reached by the Panel: 1) it challenged the jurisdiction of the Panel to hear claims against the 1916 Act "as such" 2) it requested the Appellate body to reverse the Panel's analysis and findings regarding the distinction between mandatory and discretionary legislation; 3) it challenged the Panel's finding that GATT Article VI is applicable to the 1916 Act; and 4) it challenged the Panel's findings that the 1916 Act violates GATT Articles VI:1 and VI:2, the AD Agreement and WTO Agreement Article XVI:4. The European Communities and Japan cross-appealed, challenging the Panel's refusal to grant them enhanced third party rights in one another's cases. In addition the European Communities and Japan raised conditional appeals that 1) if the Appellate Body were to reverse the Panel's finding regarding the applicability of GATT Article VI to the 1916 Act, then the Appellate Body should find that the 1916 Act violates GATT Articles III:4 and XI; and 2) if the Appellate Body were to agree with the U.S. arguments regarding the Panel's jurisdiction and the "non-mandatory" character of the 1916 Act, then it should find that the 1916 Act violates WTO Agreement Article XVI:4 (these conditions were never triggered, so the Appellate Body found it unnecessary to examine the conditional appeals).

Because the parties' claims and the two Panel Reports were so similar, the Appellate Body addressed these appeals in one comprehensive decision.

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Consolidation of Appeals

The United States filed separate notices of appeal in relation to the EC Panel Report and the Japan Panel Report. The Appellate Body noted, "[i]n view of the close similarity of the issues raised in the two appeals, it was decided, after consultation with the parties, that a single Division would hear and decide both appeals." (Para. 7)

DSU Article 10 - Third Party Rights

In their cross-appeals, the European Communities and Japan argued that the Panel erred in refusing to grant them "enhanced" third party rights in each other's case. (Para. 139)

The Appellate Body noted that rules governing the participation of third parties are set out in DSU Article 10 and Appendix 3. Specifically, Article 10.2 states:

> Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a 'third party') shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Article 10.3 provides:

> Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

And, Paragraph 6 of Appendix 3 states:

> All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

(Paras. 141-43) The Appellate Body also stated that, contrary to the complainants' arguments, DSU Article 9, which governs multiple complaints, does not address third party issues in this context. (Para. 144)

The Appellate Body rejected the appeal by the European Communities and Japan. It recalled its decision in *EC - Hormones*, in which it held that the granting of "enhanced" rights is a "matter that falls within the discretionary authority of that panel." **While the Appellate Body said that such discretion is circumscribed by, at the least, the requirements of due process, the Appellate Body concluded that, in the present case, the European Communities and Japan failed to show that the Panel exceeded the limits of its discretionary authority in refusing to grant the parties enhanced third party rights.** (Para. 150)

SUBSTANTIVE ISSUES

Claims Against the 1916 Act "As Such"

The Panel found, under GATT Article VI and the AD Agreement, that it had jurisdiction to consider the claims challenging the 1916 Act "as such" (also referred to as a claim against legislation "on its face," meaning a challenge to the statute itself, as opposed to a challenge to a Member's *application* of that statute in a particular instance). Based on AD Agreement Article 17.4 and the Appellate Body report in *Guatemala - Cement I*, the United States argued that "Members cannot bring a claim of inconsistency with the Anti-Dumping Agreement against legislation as such independently from a definitive anti-dumping duty, a price undertaking or, in some circumstances, a provisional measure." (Para. 55) Moreover, the United States argued that if a law cannot be challenged as such under the AD Agreement, then it also cannot be challenged as such under GATT Article VI, because Article VI and the AD Agreement are an "inseparable package of rights and obligations." (Para. 56) In addition to countering the U.S. argument on its merits, the European Communities responded that this U.S. appeal should be rejected in respect of the dispute brought by the European Communities, because, at the panel level, the United States failed to raise this issue in a timely manner. Specifically, in the dispute brought by the

European Communities, the United States did not make this argument until the interim review stage. (Paras. 51-53)

The Appellate Body first considered the procedural challenge made by the European Communities. While the Appellate Body agreed with the European Communities that the interim review stage is not an "appropriate stage" to raise jurisdictional objections for the first time, the Appellate Body also agreed with the Panel's ultimate conclusion that "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time." (Para. 54, citing EC Panel Report, para. 5.17)

The Appellate Body then turned to the substance of the U.S. challenge, and it rejected the U.S. appeal. It began with an examination of DSU Article 1.1, which it interpreted to require the following: for a Member to bring a claim against the 1916 Act *as such* under both GATT Article VI and the AD Agreement, a legal basis for those claims must be found in both agreements. The Appellate Body observed that the European Communities and Japan brought their claims of inconsistency pursuant to GATT Article XXIII and AD Agreement Article 17. In this regard, the Appellate Body recalled that GATT practice firmly establishes that a party may challenge legislation "as such" under GATT Article XXIII, independent from specific applications, and that Member have affirmed adherence to these principles through DSU Article 3.1. (Paras. 57-61)

As for AD Agreement Article 17, the Appellate Body first observed that this provision, similar to GATT Article XXIII, addresses dispute settlement. As a result, the Appellate body considered that, like Article XXIII, AD Agreement Article 17 should be regarded "as allowing a challenge to legislation as such, unless this possibility is excluded." Finding no express exclusion, the Appellate Body examined Article 17 as a whole, as well as the Appellate Body report in *Guatemala - Cement I* to determine whether Article 17 contains an *implicit* restriction on challenges to anti-dumping legislation "as such." Article 17.1 states:

> Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

(Para. 64) The Appellate Body considered that because this provision does not distinguish between "as such" challenges against anti-dumping legislation and "as such" challenges in the context of an anti-dumping measure, Article 17.1 implies that "as such" challenges are permissible unless excluded elsewhere in Article 17. Similarly, the Appellate Body noted the broad language of Article 17.2, which "refers to consultations with respect to 'any matter affecting the operation of this Agreement.'" Finally, citing its decision in *Guatemala - Cement I*, the Appellate Body considered that Article 17.3 mirrors GATT Article XXIII, which, as noted above, permits "as such" challenges of legislation. (Paras. 62-68)

The Appellate Body then examined Article 17.4, which is the specific provision relied upon by the United States in making this appeal. Article 17.4 states:

> If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if *final action* has been taken by the administering authorities of the importing Member to levy *definitive anti-dumping duties* or *to accept price undertakings*, it may refer the matter to the Dispute Settlement Body ('DSB'). When *a provisional measure has a significant impact* and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer *such matter* to the DSB.

(Para. 70, emphasis added by Appellate Body) In *Guatemala - Cement I*, the Appellate body had interpreted this provision to mean that when a Member brings a case under the AD Agreement, it must specifically challenge one of the three anti-dumping measures mentioned in the provision (provisional or definitive anti-dumping duties, or the acceptance of price undertakings). However, the Appellate Body distinguished that finding from the situation in this case, where the complainants were challenging anti-dumping legislation "as such." In particular, it explained that *Guatemala - Cement I* was about a situation in which a party challenged the initiation and conduct of an anti-dumping *investigation*. (Para. 72) The Appellate Body noted the important purpose served by Article 17.4 in the context of an anti-dumping *investigation*, in that, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation, it balances a Member's right to seek redress with the potential for harassment or the squandering of resources of the Member taking the action. On the other hand, the Appellate Body stated, Article 17.4 does not address or affect a member's right to bring an *"as such" challenge* to anti-dumping legislation. (Paras. 73-74)

As support for this interpretation, the Appellate Body considered the following factors. First, the United States had not identified any reason to distinguish anti-dumping legislation from other types of legislation, which under GATT precedent may be challenged on an "as such" basis. Next, the Appellate Body noted that Article 18 supports its conclusion that Members may bring claims against anti-dumping legislation as such. Specifically, Article 18.4 "imposes an affirmative obligation on each Member to bring its legislation into conformity with the provisions of the Anti-Dumping Agreement not later than the date of entry into force of the WTO Agreement for that Member." In this regard, the Appellate Body stated that if Members had to wait until the application of a piece of legislation to challenge its consistency, then the effectiveness of Article 18.4 would be diminished. Similarly, under Article 18.1, a Member must be able to challenge legislation that permits measures other than the three set forth in Article 17.4, or "it would be impossible to test the consistency of that legislation." (Paras. 75-81)

On this basis, the Appellate Body upheld the Panel's conclusion that anti-dumping legislation can be challenged "as such" under GATT Article VI and the AD Agreement.

Mandatory versus Discretionary Legislation

Under GATT practice, only laws that *mandate* specific action may be challenged "as such." By contrast, discretionary laws may only be challenged on the basis of a specific application of the law. The United States challenged the Panel's interpretation and application of the distinction between mandatory and discretionary legislation. (Para. 87) In the Panel proceeding, the United States had argued that the 1916 Act is discretionary legislation because: 1) in civil actions brought under the 1916 Act, U.S. courts had in the past interpreted, and/or could interpret in the future, the Act in a manner consistent with WTO obligations, and 2) the United States Department of Justice ("DOJ") has discretion whether to initiate criminal proceedings under the Act. Therefore, according to the United States, the 1916 Act is discretionary, and cannot be challenged "as such." (Para. 84)

Based on the GATT panel decision in *U.S. - Tobacco*, the Appellate Body considered that the key inquiry in determining whether legislation is discretionary is whether the "discretion vested [is] in the *executive branch* of government." It is only in these circumstances that legislation will be considered discretionary in the sense used here. With respect to civil actions under the 1916 Act, therefore, because there is no relevant discretion vested in the executive branch (*i.e.*, private parties decide whether or not to bring a civil case and the judiciary renders the decision), the 1916 Act is a mandatory law. (Para. 90) Moreover, citing the GATT Panel report on *U.S. - Malt Beverages*, the Appellate Body agreed with the Panel's conclusion that the discretion granted to the DOJ does not transform the criminal aspect of the 1916 Act into discretionary legislation. (Para. 91)

As for the U.S. claim that the Panel in this case had created a rule "that the mandatory/discretionary distinction can apply only if the challenged legislation has never been applied," the Appellate Body disagreed with the United States' understanding of the Panel's finding. Rather, the Appellate Body concluded that the Panel found the applied/not-applied distinction relevant only with respect to the *burden of proof.* (Paras. 92-93)

The Appellate Body also rejected the U.S. argument that the Panel had incorrectly characterized the mandatory/discretionary distinction as a "defense," thereby improperly placing the burden of proof on the United States. (Paras. 94-95) The Appellate Body considered that, based on the Appellate Body reports in *U.S. - Shirts and Blouses* and *EC - Hormones*, the Panel applied the correct standard, in that a complaining Member bears the burden of proving a *prima facie* case. After a *prima facie* case has been made, it is up to the responding party to rebut this case. Here, the United States attempted to rebut this case by, in part, arguing that the 1916 Act is discretionary. Therefore, the Appellate Body considered that the Panel properly allocated the burden of proof to the United States on this point. (Paras. 96-97)

Because the Appellate Body found that the 1916 Act is mandatory legislation, as did the Panel, the Appellate Body stated that it did not need to consider the U.S. argument that the Panel in the dispute brought by Japan incorrectly held that Article AD Agreement 18.4 has supplanted or modified the mandatory/discretionary distinction under the AD Agreement. (Para. 99)

Finally, the Appellate Body reiterated that the mandatory/discretionary distinction turns on executive branch discretion and not the interpretation of the courts. In this regard, the Appellate Body agreed with the Panel that a court's interpretation is relevant only for "determining the *meaning* of the law in order to examine its consistency with the United States' obligations." (Para. 101)

On this basis, the Appellate Body rejected the U.S. appeal that the Panel had incorrectly interpreted and applied the mandatory/discretionary doctrine as it pertains to the 1916 Act.

Applicability of GATT Article VI and the AD Agreement to the 1916 Act

The United States appealed the findings of the Panel that GATT Article VI and the AD Agreement apply to the 1916 Act. Specifically, the United States argued that Article VI, and therefore by implication the AD Agreement, only apply "when two criteria are satisfied: first, the law must impose anti-dumping duties and, second, it must 'specifically target' dumping within the meaning of Article VI:1." In this respect, the United States explained that the 1916 Act does not provide for anti-dumping duties, and that it targets predatory pricing, not dumping. (Paras. 103-104)

Based on the text of Article VI:1, the Appellate Body considered that the issue of whether Article VI applies to the 1916 Act "depends, first of all, on whether Article VI regulates all possible measures Members can take in response to dumping." In this regard, the Appellate Body noted that Article VI:1 makes clear that dumping "is to be *condemned*," but it does not address the possible remedies. Article VI:2 then explicitly authorizes anti-dumping duties, but it uses the phrase "*may* levy...an import duty." The United States argued that the use of the word "may" signals that Members may impose measures *other than* duties, in which case they are not bound by the specific requirements of Article VI. (Paras. 109-112) The Appellate Body disagreed. It referred to Article 9 of the AD Agreement for clarification. Article 9 states in relevant part:

> It is desirable that the imposition [of an anti-dumping duty] be permissive in the territory of all Members, and that the duty be less than the margin if

> such lesser duty would be adequate to remove the injury to the domestic industry.

(Para. 115) Based on this provision, the Appellate Body opined that Members have a choice *whether* to impose an anti-dumping duty (and a choice as to the *amount* of that duty), but they do not have a choice as between imposing anti-dumping duties or imposing *other anti-dumping measures*. (Para. 116)

As a result of its overall analysis of the text of Article VI, however, the Appellate Body concluded that this provision is inconclusive as to whether Article VI regulates *all measures* taken to counteract dumping or only *duties*. Therefore, the Appellate Body turned to other provisions of the AD Agreement for context. The Appellate Body explained that AD Agreement Article 1 makes clear that an "anti-dumping measure" must be taken in a manner consistent with GATT Article VI. In this regard, it noted that AD Agreement Article 18.1 clarifies the scope of GATT Article VI. Specifically, Article 18.1 provides: "No *specific action against* dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." (Emphasis added by Appellate Body) Under this provision, the Appellate Body considered that a "specific action against dumping" can be taken only when the constituent elements of "dumping" are present. Moreover, it concluded that it follows from this provision that GATT Article VI "is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping.'" (Paras. 117-26)

Therefore, the Appellate Body examined whether the 1916 Act provides for "'specific action against dumping,' of exports from another Member, and, thus, falls within the scope of application of Article VI of the GATT 1994." (Para. 127) As noted above, the United States argued that the 1916 Act does not "specifically target" dumping, but rather it targets predatory pricing. Nonetheless, based on the text of the 1916 Act, the Appellate Body found that "the civil and criminal proceedings and penalties contemplated by the 1916 Act require the presence of the constituent elements of 'dumping,'" and, therefore, it follows that they are a "specific action against dumping." The Appellate Body concluded that GATT Article VI applies. (Para. 130)

On this basis, the Appellate Body upheld the Panel's conclusion that GATT Article VI applies to the 1916 Act. The Appellate Body also upheld the Panel's conclusion that given the relationship between GATT Article VI and the AD Agreement, a finding that GATT Article VI applies to the 1916 Act also "implies" the applicability of the AD Agreement to the 1916 Act. (Para. 133)

Violation Findings under GATT Article VI, the AD Agreement and WTO Agreement Article XVI:4

The United States challenged all of the Panel's substantive findings of violations under GATT Article VI, the AD Agreement and WTO Agreement Article XVI:4. With the exception of the Panel's finding of a violation under GATT Article VI:2, the United States based this appeal on its arguments that the 1916 Act does not fall within the scope of application of GATT Article VI and the AD Agreement. **Because, as set forth above, the Appellate Body upheld the Panel's conclusion that the 1916 Act does fall within the scope of Article VI and the AD Agreement, the Appellate Body also upheld the Panel's findings with respect to the inconsistency of the 1916 Act with the substantive provisions of GATT Article VI:1, the AD Agreement and the WTO Agreement.** (Paras. 134-35)

In addition, the United States challenged the Panel's finding that the 1916 Act violates the requirement contained in GATT Article VI:2 that actions taken against dumping be limited to anti-dumping duties. That is, because the 1916 Act provides for the imposition of fines, imprisonment or treble damages as a response to dumping, the Panel held that it violates Article VI:2. The United States

argued that GATT Article VI:2 only regulates the imposition of anti-dumping duties and it does not address other measures imposed to counteract dumping. **The Appellate Body upheld the Panel's conclusion with the caveat that Article VI:2 "must be read together with the relevant portions of the Anti-Dumping Agreement."** (Paras. 136-38)

COMMENTARY

For further reading on this dispute, see:

Jeffrey Beckington, "The World Trade Organization's Dispute Settlement Resolution in United States -- Anti-Dumping Act of 1916," Vanderbilt Journal of Transnational Law, January 2001.

Mitsuo Matsushita and Douglas Rosenthal, "Was the WTO Mistaken in Ruling on Antidumping Act of 1916?," BNA International Trade Reporter, Volume 18, Number 36, September 13, 2001, page 1450.

Laurent A. Ruessmann, "Implications of the WTO 1916 Act Decision (Part 1): Did the WTO Outlaw the Use of National Antitrust Rules with Regard to Cross-border Predatory Pricing?", International Trade Law and Regulation, Volume 7, Issue 5, September 2001.

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Hiroko Yamane, "The Anti-dumping Act of 1916: A Victory at What Cost?," International Trade Law and Regulation, Volume 7, Issue 1, February 2001.

Application of GATT Article VI and the AD Agreement to the 1916 Act

Most disputes concerning Members' anti-dumping laws focus on whether the specific requirements of these laws are consistent with GATT Article VI and the AD Agreement. By contrast, with the 1916 Act, it was fairly clear that the specific requirements were not consistent with these rules. Rather, in respect of the 1916 Act, the question was, do those rules even *apply* to the 1916 Act? This issue arose because the United States characterized this law as an "anti-trust" statute, rather than an "anti-dumping" measure, and said that it provided for remedies other than anti-dumping *duties*. On this basis, the United States argued that the 1916 Act was not covered by GATT Article VI and the AD Agreement. In responding to this argument, the Panel and the Appellate Body focused their analysis on the actual terms of the statute, rather than on the type of measure imposed by the statute (*e.g.*, anti-dumping *duties* or some other remedy) or the measure's stated purpose. Both the Panel and the Appellate Body concluded that the 1916 Act is a specific action against "dumping," as that term is defined in GATT Article VI, and therefore concluded that GATT Article VI and the AD Agreement apply to the Act.

Mandatory/Discretionary Distinction

In its decision as to whether the 1916 Act constitutes mandatory or discretionary legislation, the Appellate Body offered some insights into the scope of this doctrine. In particular, the Appellate Body made clear that the only *type* of discretion that is even relevant to the doctrine is discretion given to the *executive* branch of government. This conclusion was reached in the context of the civil law aspects of the 1916 Act, namely the private right of action to bring a lawsuit under the law and the subsequent discretion of the court in which the lawsuit is brought as to whether to impose judgment. The Appellate

Body found that because this "discretion" is not held in the executive branch of government, it is not relevant to the mandatory versus discretionary distinction.

In addition, the *Panel* in this case had distinguished the 1916 Act from the legislation that was considered by the GATT panel on *U.S. - Tobacco*, explaining that, unlike the 1916 Act, the legislation in *Tobacco* had never been applied. In other words, the Panel's statement could be taken to mean that if a discretionary law has been applied in the past (regardless of whether it was applied in a WTO-consistent or inconsistent manner), then it may not escape review under WTO dispute settlement based on the mandatory/discretionary doctrine. The United States appealed the Panel's apparent reliance on the prior application of a law as a factor. However, the Appellate Body disagreed with the United States that the Panel ever reached such a finding, explaining that the applied/not applied distinction was relevant only to the Panel's discussion of the burden of proof when examining domestic legislation under the mandatory/discretionary doctrine.

In its decision in this case, the Appellate Body avoided any discussion of whether discretionary laws can ever be found to violate WTO rules. Because it found that the 1916 Act is a "mandatory" law, there was no need to reach this issue. Several WTO panels, however, have considered the applicability of the distinction to an examination of discretionary domestic laws, taking very different approaches. *See DSC for U.S. - Section 301 (Panel)*, *DSC for U.S. - Export Restraints (Panel)* and *DSC for Brazil - Aircraft, Article 21.5 (II) (Panel)*.

Burden of Proof - Mandatory Versus Discretionary Laws

It is worth noting the Appellate Body's finding regarding the burden of proof in respect of the issue of whether a law is mandatory or discretionary. In this case, the European Communities and Japan argued that the law was in violation of WTO rules. The United States responded that the law was discretionary, and therefore could not be found to be in violation. In this situation, the Appellate Body concluded that the United States, as the party asserting a fact, bears the burden of showing that the law being challenged is discretionary. (*See* para. 97) By contrast, the panel in *Brazil - Aircraft, Article 21.5 (II)* seems to have taken a different approach. That panel appears to have placed the burden on the complaining party to show that the law at issue was mandatory. (*See* para. 5.50). Moreover, in a later decision, the Appellate Body may have changed its approach to this issue. Specifically, in paragraph 157 of *U.S. - German Steel CVDs*, the Appellate Body implied that when there is an issue related to the mandatory / discretionary character of laws being challenged, the burden of proof will be on the complainant to show that the law is mandatory. *See DSC for U.S. - German Steel CVDs (AB)*.

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