WORLD TRADE ORGANIZATION

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JAPAN – MEASURES AFFECTING AGRICULTURAL PRODUCTS

AB-1998-8

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Japan – Measures Affecting Agricultural Products

Japan, *Appellant/Appellee*
United States, *Appellant/Appellee*

Brazil and the European Communities,
Third Participants

AB-1998-8

Present:

Beeby, Presiding Member
Lacarte-Muró, Member
Matsushita, Member

I. Introduction

1. Japan and the United States appeal from certain issues of law and legal interpretations in the Panel Report in *Japan - Measures Affecting Agricultural Products*.[1] The Panel dealt with a complaint by the United States relating to the requirement imposed by Japan to test and confirm the efficacy of the quarantine treatment for each variety of certain agricultural products ("the varietal testing requirement").

2. Under the Plant Protection Law of 1950[2] and the Plant Protection Law Enforcement Regulation[3] of the same year, Japan prohibits the importation of eight agricultural products originating from, *inter alia*, the United States on the ground that they are potential hosts of codling moth, a pest of quarantine significance to Japan. The prohibited products are apples, cherries, peaches (including nectarines), walnuts, apricots, pears, plums and quince. The import prohibition on these products can, however, be lifted if an exporting country proposes an alternative quarantine treatment which achieves a level of protection equivalent to the import prohibition. The exporting country bears the burden of proving that the proposed alternative treatment achieves the required level of protection. In practice, the alternative quarantine treatment proposed is fumigation with methyl bromide, or a combination of methyl bromide fumigation and cold storage. In 1987, Japan's Ministry of Agriculture, Forestry and Fisheries developed two guidelines as model test procedures for the confirmation of the efficacy of this alternative quarantine treatment: the *Experimental Guideline for*

[1]WT/DS76/R, 27 October 1998.

[2]Law No. 151 of 1950, enacted 4 May 1950, most recently amended in 1996.

[3]Ordinance No. 73 of the Ministry of Agriculture, Forestry and Fisheries, enacted 30 June 1950.

Lifting Import Ban – Fumigation, which outlines the testing requirement applicable to initial lifting of the import prohibition on a product, and the *Experimental Guide for Cultivar Comparison Test on Insect Mortality – Fumigation* (the "*Experimental Guide*"), which sets out the testing requirement for approval of additional varieties of that product. The latter requirement is the varietal testing requirement at issue in this dispute.[4] The United States claimed that this varietal testing requirement was inconsistent with the obligations of Japan under the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*").

3. The Panel Report was circulated to Members of the World Trade Organisation (the "WTO") on 27 October 1998. The Panel found that Japan had acted inconsistently with Articles 2.2, 5.6 and 7 of the *SPS Agreement*. In paragraph 9.1 of its Report, the Panel concluded that Japan:

> (i) by maintaining the varietal testing requirement in dispute with respect to apples, cherries, nectarines and walnuts, acts inconsistently with its obligation under Article 2.2 of the SPS Agreement not to maintain phytosanitary measures "without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5"; and
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> (ii) by maintaining the varietal testing requirement in dispute with respect to apples, cherries, nectarines and walnuts, acts inconsistently with its obligation in Article 5.6 of the SPS Agreement to "ensure that [its phytosanitary] measures are not more trade-restrictive than required to achieve [Japan's] appropriate level of … phytosanitary protection, taking into account technical and economic feasibility"; and
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> (iii) by not having published the varietal testing requirement in dispute with respect to any of the products at issue, acts inconsistently with its obligations under paragraph 1 of Annex B of the SPS Agreement and, for that reason, with its obligations contained in Article 7 of that Agreement.

In paragraph 9.3 of its Report, the Panel made the following recommendation:

> We *recommend* that the Dispute Settlement Body request Japan to bring its measure in dispute into conformity with its obligations under the SPS Agreement.

4. On 24 November 1998, Japan notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a notice of appeal with the

[4]The relevant factual aspects of this dispute are set out in greater detail in the Panel Report in paras. 2.1–2.33, as well as in paras. 6.1-6.119 and 10.1-10.300.

Appellate Body pursuant to Rule 20 of the Working Procedures for Appellate Review (the "*Working Procedures*").[5] On 4 December 1998, Japan filed an appellant's submission.[6] The United States also filed an appellant's submission on 9 December 1998.[7] The appellee's submissions of both participants were filed on 21 December 1998.[8] On the same day, Brazil and the European Communities filed separate third participant's submissions.[9]

5. The oral hearing in the appeal was held on 19 January 1999.[10] The participants and third participants presented oral arguments and responded to questions put to them by Members of the Appellate Body Division hearing the appeal.

II. Arguments of the Participants

A. *Claims of Error by Japan – Appellant*

1. Article 2.2 of the *SPS Agreement*

6. Japan argues that the Panel erred in its interpretation of the term "sufficient scientific evidence" in Article 2.2 of the *SPS Agreement*, and that, accordingly, its conclusion regarding Article 2.2 must be reversed. Specifically, Japan contends that the Panel erred in failing to interpret the term "sufficient scientific evidence" in relation to the SPS measure in question, in accordance with the rule in Article 31 of the *Vienna Convention on the Law of Treaties*[11], which stipulates that a term must be interpreted in its context.

7. It is Japan's submission that the basic rights and obligations concerning scientific evidence provided in Article 2.2 of the *SPS Agreement* are, in principle, substantiated in Articles 5.1 and 5.2 of the *SPS Agreement*. Japan sees these Articles, therefore, as the key operative provisions prescribing specific requirements of an SPS measure as it relates to scientific principles and scientific evidence of Article 2.2. According to Japan, the Panel should have dealt with the issues raised in this

[5]WT/DS76/5.

[6]Pursuant to Rule 21(1) of the *Working Procedures*.

[7]Pursuant to Rule 23(1) of the *Working Procedures*.

[8]Pursuant to Rule 22(1) and Rule 23(3) of the *Working Procedures*.

[9]Pursuant to Rule 24 of the *Working Procedures*.

[10]Pursuant to Rule 27 of the *Working Procedures*.

[11]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

dispute under Articles 5.1 and 5.2 since the United States has not provided any evidence which indicates that Japan's measure is patently inconsistent with the requirement under Article 2.2.

8. It is Japan's contention that the measure at issue is an information requirement for approval procedures and that any challenge to an information requirement under Article 2.2 should take into account the unique role of information in the SPS process, and the adequate balance that Article 8 of the *SPS Agreement* seeks to achieve. According to Japan, an information requirement is justifiable when there is some available information suggesting some risk. The fact that a measure is an information requirement should be considered in the discussion of sufficiency.

9. Japan notes that no language in Article 2.2 suggests that the measure has to be "based on" sufficient scientific evidence. Moreover, in Japan's view, the Panel eventually discarded the requirement of a rational relationship and, instead, based its finding under Article 2.2 on an "actual causal link" between the differences in test results and the presence of varietal differences. Not only does the notion of an "actual causal link" operate as a denial of the precautionary principle, it is also a concept that has no basis in the *SPS Agreement*.

10. In Japan's view, the Panel failed to give due regard to the precautionary principle, which was recognised in *EC Measures Concerning Meat and Meat Products (Hormones*) ("*European Communities – Hormones*")[12] and *Australia - Measures Affecting Importation of Salmon* ("*Australia – Salmon*").[13] Having lawfully established a prohibition on the importation of host plants of codling moth, Japan submits that it is in a position which warrants a precautionary approach and that Japan's varietal testing requirement, therefore, needs to be understood in the context of the precautionary principle, a principle which is echoed by the practice of Member States and reflected in the *Codex Alimentarius*[14] and the *FAO Guidelines for Pest Risk Analysis*.[15]

2. Article 5.7 of the *SPS Agreement*

11. Japan asserts that it has fulfilled the obligation under Article 2.2 to ensure that a measure is not maintained without sufficient scientific evidence, but that even if the Panel's contrary finding is to be upheld, the measure maintained by Japan is, in any case, consistent with Article 5.7 of the *SPS Agreement*. Japan disagrees with the Panel's interpretation according to which Japan has to fulfil

[12]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R.

[13]Adopted 6 November 1998, WT/DS18/AB/R.

[14]*General Principles for the Use of Food Additives*, Codex Alimentarius, Vol. A1, 1995.

[15]*International Standards for Phytosanitary Measures Part I – Import Regulations, Guidelines for Pest Risk Analysis*, Food and Agriculture Organisation Secretariat, 1996.

the requirements of both the first and second sentences of Article 5.7. According to Japan, the phrase "except as provided for in paragraph 7 of Article 5" in Article 2.2, should be interpreted to refer to the first sentence of Article 5.7, so that a Member should be allowed to claim exemption from the obligation in Article 2.2 when it fulfils the requirements of the first sentence. Japan further asserts that the varietal testing requirement is, in any event, maintained in accordance with the requirements of both the first and second sentences of Article 5.7.

12. With regard to the requirements of the first sentence, Japan rejects the contention of the United States that insufficient scientific evidence within the first sentence of Article 5.7 refers to a situation in which the amount of evidence is insufficient to perform a risk assessment. Japan argues that if this contention is accepted, the concept of "sufficiency" in Article 2.2, and that in Article 5.7, must be interpreted to have different meanings, which, according to Japan, cannot be the case.

13. With regard to the requirement of the second sentence of Article 5.7, "to seek to obtain additional information", Japan contends that this requirement is met by accumulating information through the experience of successful importation of varieties. In Japan's view, the collection of data through experience meets the express text of the requirement. The second sentence of Article 5.7 obligates Members to "seek" to obtain the information, but does not require actual results.

14. With regard to the requirement of the second sentence, "to review" the provisional SPS measure "within a reasonable period of time", Japan argues that reasonableness of a time-period should be judged according to the measure in question, and the time needed for the collection of information. The "reasonable period of time" should allow the time needed for the accumulation of knowledge through experience. Japan also submits that as the obligation regarding sufficient scientific evidence was first created by the *SPS Agreement*, the reasonable period of time should, therefore, start counting as of January 1995, the date when the *SPS Agreement* entered into force.

3. Article 7 and Paragraph 1 of Annex B, of the *SPS Agreement*

15. Japan contends that the "regulations" referred to in the first paragraph of Annex B are limited to legally enforceable instruments and, therefore, exclude the guidelines for varietal testing. Japan notes that the footnote to the first paragraph of Annex B defining the concept of "regulation" makes reference to laws, decrees or ordinances, all of which are considered to be legally enforceable. Japan submits further that the precedents cited by the Panel in support of its arguments, and in particular the Panel Reports in *Japan - Trade in Semi-conductors*[16] and *Japan - Measures Affecting Consumer*

[16]Adopted 4 May 1988, BISD 35S/116.

Photographic Film and Paper[17], are inapposite since they do not concern a publication obligation as set out in Article 7 of the *SPS Agreement*.

4. Burden of Proof

16. Japan contends that the conclusion reached by the Panel under Article 5.6 of the *SPS Agreement*, namely, that the determination of sorption levels is an alternative measure within the meaning of Article 5.6, is based on a factual finding which was neither argued nor proven by the party which bore the burden of proof. While the United States proposed "testing by product" as their only alternative measure within the meaning of Article 5.6, the Panel went on to find facts that the United States did not even allege to exist. It is Japan's submission that this finding unjustly exempts the United States from discharging the burden of proof. According to Japan, the Panel's finding is inconsistent with the DSU because it is contrary to the principle of burden of proof established in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States - Shirts and Blouses*").[18]

17. Japan submits that Articles 11 and 13 of the DSU should not be read to authorise panels to establish facts neither contained in the argument of, nor proven by, the parties to the dispute. In Japan's view, Articles 11 and 13 provide for a very conventional role of a judicial organ. If a panel were free to find material facts despite the absence of any argument or proof by the parties, the burden of proof rule would be deprived of any significance. Japan also argues that in a highly technical case, aggressive fact-finding by a non-expert panel can easily harm an objective assessment of the facts.

18. Japan argues further that if the Panel is allowed to find facts neither argued nor proven by the complainant, the Panel should be obligated in turn to find facts of rebuttal neither argued nor proven by the complainant. Japan, in its written submission, contends that it was not given an opportunity to express its position on whether the determination of sorption levels was a reasonably available measure and significantly less restrictive to trade than the current varietal testing requirement employed by Japan. At the oral hearing, however, Japan said that while it was able to make some comments after having seen the Panel's interim report, it was given very limited time to make comments on the alternative concrete suggestions.

5. Article 11 of the DSU

19. Japan argues that the Panel's finding under Article 2.2 disregarded or distorted the evidence before it, and thus violates Article 11 of the DSU. It is Japan's contention that there was lack of

[17]Adopted 22 April 1998, WT/DS44/R.

[18]Adopted 23 May 1997, WT/DS33/AB/R.

proper examination of evidence by the Panel, that the Panel cited the experts' opinions in an arbitrary manner and that its evaluation of evidence was contradictory. Japan submits that this is sufficient to reverse the findings of the Panel as it indicates lack of an objective assessment of the facts, as required by Article 11 of the DSU.

B. *Arguments of the United States – Appellee*

1. Article 2.2 of the *SPS Agreement*

20. The United States argues that the Panel correctly found that Japan's varietal testing requirement is maintained without sufficient scientific evidence because there was no "objective and rational relationship" between the SPS measure and the scientific evidence as required by Article 2.2 of the *SPS Agreement*. The United States asserts that Japan's criticism of the Panel's finding ignores the Appellate Body's stricture in *European Communities – Hormones*[19] that Articles 2.2 and 5.1 of the *SPS Agreement* should constantly be read together. According to the United States, the Panel did not err in relying on Appellate Body analysis under Article 5.1 when interpreting the obligation not to maintain an SPS measure without sufficient scientific evidence. In any event, the "objective or rational relationship" standard promulgated by the Panel represents no more than a minimal relevancy requirement.

21. With respect to the precautionary principle, the United States argues that Japan overstates the Appellate Body's conclusions in *European Communities – Hormones*[20], and notes that in that case, the Appellate Body cautioned against using the precautionary principle as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of the *SPS Agreement*. The United States notes that even if scientific evidence is insufficient under Article 2.2, a Member may nevertheless adopt a provisional measure if the conditions of Article 5.7 of the *SPS Agreement* have been met.

22. The United States submits that Japan can only speculate that there may be varietal differences which may affect treatment efficacy. Such speculation gives rise to no more than theoretical uncertainties, and Japan may not justify its measure on this basis.

23. With regard to the relationship between Articles 2.2 and 5.1, the United States argues that while Article 5.1 may help to interpret Article 2.2, nothing in Article 5.1 supports Japan's conclusion that "the direct application of Article 2.2 should be limited to situations patently inconsistent with the

[19]*European Communities – Hormones*, *supra*, footnote 12.

[20]*Ibid.*

requirement of 'sufficiency' ". The United States observes further that Article 5.1 does not itself specify the quantum of scientific evidence required in a risk assessment. Instead, this requirement is found in Article 2.2.

24. The United States disagrees with Japan that its varietal testing requirement is an "information requirement" under "approval procedures" within the meaning of paragraph 1(c) of Annex C to the *SPS Agreement*. The United States contends that the varietal testing requirement does not seek to obtain relevant information, since it is not designed to provide information relevant to the question whether there are significant sorption differences among varieties.

2. Article 5.7 of the *SPS Agreement*

25. To Japan's assertion that its varietal testing requirement is consistent with Article 5.7 of the *SPS Agreement*, the United States counters that Japan's varietal testing requirement does not meet the requirements of that provision. The United States contends that both sentences of Article 5.7 must be satisfied to qualify for the exemption from Article 2.2 of the *SPS Agreement*. There is, therefore, no basis, according to the United States, for Japan's claim that it may qualify for an exemption from its obligation under Article 2.2 when it meets the requirements of the first sentence of Article 5.7 alone. The reference in Article 2.2 to Article 5.7 is not qualified or limited to only the first sentence of Article 5.7. The second sentence of Article 5.7 limits the ability of Members to maintain provisional measures indefinitely. Without this limitation, Article 2.2 would be drained of content.

26. The United States submits that the information sought and obtained by Japan was not relevant to proving Japan's speculation that varietal sorption differences may exist. In the opinion of the United States, while Article 5.7 may be silent as to specific information collection procedures, it does specifically require Japan to seek the information necessary for a more objective assessment of risk. The obligation to review the measure within a reasonable period of time should not be examined in isolation from the issue of whether a Member is seeking to collect additional information. Japan has not sought to obtain information directly relevant to such a review, and has thereby precluded itself from being in a position to review the varietal testing requirement.

27. According to the United States, Japan is incorrect in claiming that the references to sufficiency in Articles 2.2 and 5.7 must be coextensive. The reference to sufficiency in Article 5.7 relates to the sufficiency of evidence to conduct a risk assessment. At the time the provisional measure is adopted, the information necessary for an objective assessment of risk is lacking. If there was sufficient information to conduct a risk assessment and that assessment indicated that a measure was not justified, a Member that was unable to adopt a measure under Article 5.1 of the

SPS Agreement should not then be free to adopt a measure "provisionally" under Article 5.7. Otherwise, the obligation in Article 5.1 would be rendered meaningless.

3. Article 7 and Paragraph 1 of Annex B, of the *SPS Agreement*

28. The United States argues that the Panel correctly noted that the definition of sanitary and phytosanitary regulations does not provide a requirement that such measures be legally enforceable. It is the United States' submission that Japan's appeal from the Panel's finding under Article 7 of the *SPS Agreement* rests on an unfounded and unexplained assertion that only prior panel interpretations of Article X of the GATT are relevant to this dispute. Furthermore, the United States asserts that the varietal testing requirement is mandatory, and from the exporter's perspective, this is no different from a measure which is "legally enforceable".

4. Burden of Proof

29. With regard to the issue of alternative measures under Article 5.6 of the *SPS Agreement*, the United States notes that it emphasised "testing by product" in its Article 5.6 arguments because this alternative meets the requirements of Article 5.6, and because there is no scientific evidence to support even limited sorption testing. This does not change the fact that the claims and proof presented by the United States in this case supported a *prima facie* case under Article 5.6 with respect to sorption testing. It is the United States' submission that the Panel did not independently embark upon the exploration of factual areas not already addressed, either directly or indirectly, by the United States, nor did they consider legal arguments not specifically advanced by the United States.

30. The United States submits that Japan has not, and cannot, identify any provision in the DSU that supports its contention that panels should be barred from either exploring the facts presented by the parties or reaching a factual finding that is distinct from one advanced by one of the parties should the factual evidence before a panel so justify. In the opinion of the United States, Article 11 of the DSU clearly authorises panels to seek clarification of factual and legal arguments from the parties and to seek the facts necessary to permit an "objective assessment of the matter before it …". Were this not the case, Article 13 of the DSU would not state that "[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate." In the United States' view, therefore, Japan argues for a limitation on panel fact-finding that is not justified by the provisions of the DSU.

31. With respect to Japan's contention that it was not given an opportunity to express its position concerning the alternative measure, the United States argues that Japan had more than adequate

opportunities to contest the facts found by the Panel on the basis of the statements of the experts, but chose not to do so.

5. Article 11 of the DSU

32. The United States submits that a finding of violation of Article 11 of the DSU requires a showing that the Panel demonstrated "deliberate disregard", "refused to consider", "wilfully distort[ed]" or "misrepresent[ed]" the evidence before it. According to the United States, Japan has failed to meet this high standard.

C. *Claims of Error by the United States - Appellant*

1. Article 5.7 of the *SPS Agreement*

33. The United States argues that should the Appellate Body reverse the Panel's finding on Article 5.7 of the *SPS Agreement*, it should still come to the conclusion that Japan failed to meet the requirements of Article 5.7 because: the relevant scientific information is, in fact, sufficient; the varietal testing requirement has not been adopted on the basis of available pertinent information; and the varietal testing requirement is not "provisional".

34. It is the United States' contention that for a measure to be imposed on a provisional basis, there must be an insufficient amount of relevant scientific evidence to be able to perform a risk assessment. With regard to the question of quarantine treatment efficacy, and the need for varietal testing, the United States believes that there is a sufficient amount of evidence, so that this case does not present a situation where there is insufficient relevant scientific evidence within the meaning of Article 5.7 of the *SPS Agreement*. The United States maintains that the varietal testing requirement is anything but provisional. The United States asserts that while Japan's obligation to fulfill the requirements of Article 5.7 may only date from 1 January 1995, this does not change the fact that the measure has been in place for at least 30 years.

2. Article 5.6 of the *SPS Agreement*

35. The United States submits that the Panel erred in law in failing to find that "testing by product" does not achieve Japan's appropriate level of protection. According to the United States, the Panel adopted a "no hypothetical risk" standard, a standard which erects an insurmountable hurdle for parties seeking to demonstrate that an alternative measure achieves a Member's appropriate level of protection, and a standard which was rejected by the Appellate Body in *European Communities –*

Hormones.[21] The United States believes, therefore, that the Appellate Body should complete the analysis based on the correct standard and conclude that "testing by product" is an alternative measure within the meaning of Article 5.6 of the *SPS Agreement*.

36. The United States requests that the Appellate Body modify the Panel's finding under Article 5.6 to clarify that this finding is a finding in the alternative, applicable only if the Appellate Body reverses the Panel's finding under Article 2.2 of the *SPS Agreement*. The United States believes that a clarification of the relationship between the Panel's findings under Articles 2.2 and 5.6 is necessary in order to avoid confusion in the implementation process and to secure a positive solution to the dispute. According to the United States, the alternative measure identified by the Panel, i.e., "determination of sorption levels", is a form of varietal testing and there is insufficient evidence to maintain any varietal testing. The United States is concerned that the Panel's Article 5.6 finding could lead Japan to conclude that it may adopt the "determination of sorption levels" option even though this option is inconsistent with Article 2.2.

3. Findings on Apricots, Pears, Plums and Quince

37. With regard to apricots, pears, plums and quince, the United States argues that the Panel erred in failing to extend its findings under Articles 2.2 and 5.6 of the *SPS Agreement* to these four products. According to the United States, the Panel found that the United States failed to establish a *prima facie* case of inconsistency with Articles 2.2 and 5.6 with regard to these products, on the basis of an absence in the record of information or studies specifically relating to them. However, no such information or studies currently exist.

38. The United States submits that the Panel's finding with respect to apricots, pears, plums and quince is based on contradictory logic and a legally incorrect interpretation of the *prima facie* case required of the United States. According to the United States, the contradiction in the Panel's reasoning is apparent on the face of its decision. The Panel found that because there was insufficient evidence of the existence or relevance of varietal differences, it could not find that the evidence was insufficient. Furthermore, the United States argues that if the Panel's interpretation is to be upheld, complaining parties would be required to prove a negative based on affirmative evidence, namely, to prove that there is no scientific evidence which supports a measure. This interpretation places an impossible burden on complaining parties, rendering the obligation under Article 2.2 unenforceable. It also requires complaining parties to prove the absence of hypothetical risks, an approach which the Appellate Body has already rejected.

[21] *European Communities – Hormones, supra*, footnote 12.

39. The United States argues that it met the burden of proof for all products, since it established that Japan had failed to provide any scientific evidence to support its measure. The Panel appears to have required the United States to provide evidence for each product, thereby specifically disproving Japan's speculation that variety is significant.

40. According to the United States, there is nothing in the Panel's analysis of Article 5.6 of the *SPS Agreement* which limits its applicability to any set of products within the Panel's terms of reference. The Panel, therefore, erred in limiting the scope of its Article 5.6 finding because there were no studies on the record specifically relating to apricots, pears, plums and quince. The United States submits that the absence of such studies was irrelevant to the Panel's analysis under Article 5.6.

4. Article 5.1 of the *SPS Agreement*

41. It is the United States' submission that if the Appellate Body does not extend the Panel's finding to apricots, pears, plums and quince, or if the Appellate Body reverses the Panel's finding under Article 2.2 in response to Japan's appeal, it should complete the legal analysis under Article 5.1 of the *SPS Agreement* and find that the varietal testing requirement violates that provision. The absence of evidence should have led the Panel to find that the varietal testing requirement is not based on a risk assessment in accordance with Article 5.1, and the Appellate Body should find so now.

42. In the view of the United States, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry. A proper risk assessment must evaluate the *likelihood*, i.e., the *probability* of entry. In the absence of scientific evidence relating to apricots, pears, plums and quince, any assessment can go no further than conclude that a hypothetical possibility of such a risk exists. According to the United States, Japan's risk assessment is completely silent as to the risk at issue in this case, namely, the risk of entry, establishment or spread of codling moth due to varietal differences which may affect quarantine treatment efficacy.

43. It is the United States' submission that a risk assessment must evaluate the likelihood of entry, establishment or spread of a pest "according to the SPS measures which might be applied". Japan's risk assessment should have, but did not, discuss the need for, and effectiveness of, varietal testing in reducing risks associated with the entry, establishment or spread of codling moth. Nor did it evaluate or compare the effectiveness of other measures such as product-based testing or integrated pest risk management. Furthermore, the United States asserts that, contrary to what Japan claims, Japan's risk assessment was not conducted in accordance with the *FAO Guidelines for Pest Risk Analysis*.

44. According to the United States, the above reasoning is applicable to all products; neither Japan's purported risk assessment nor the fact that it fails to address risks associated with varietal differences relates to any specific products.

5. Article 8 and Paragraph 1(c) of Annex C, of the *SPS Agreement*

45. In the event that the Appellate Body accepts Japan's argument that the varietal testing requirement is an information requirement within the meaning of paragraph 1(c) of Annex C of the *SPS Agreement*, and finds it consistent with Article 2.2, the United States argues that the Appellate Body should nevertheless find that the measure is inconsistent with Article 8 and paragraph 1(c) of Annex C, which requires Members to limit information requirements to "what is necessary for appropriate control, inspection and approval procedures". The United States disputes that Japan's varietal testing requirement is consistent with this obligation as it is not limited to what is necessary.

D. *Arguments of Japan - Appellee*

1. Article 5.7 of the *SPS Agreement*

46. With regard to Article 5.7 of the *SPS Agreement*, Japan argues that none of the arguments advanced by the United States counter any of the arguments advanced by Japan in its appellant's submission. Japan notes that while the United States attempts to define sufficiency in Article 5.7 to mean an insufficient amount of relevant scientific evidence to be able to perform a risk assessment, the concept of sufficiency should be interpreted to be common in both Article 2.2 and Article 5.7. Japan also notes that the Panel itself acknowledged that there is some scientific evidence to satisfy the requirement of the first sentence of Article 5.7.

2. Article 5.6 of the *SPS Agreement*

47. Japan argues that the United States' claim with respect to the alternative measure is a factual claim that is not subject to appellate review, as it deals exclusively with the evaluation of evidence by the Panel.

48. According to Japan, the United States makes nine arguments which are mainly an attempt to question Japan's appropriate level of protection, but fails, as a matter of factual proof, to establish a case of inconsistency with Article 5.6 of the *SPS Agreement*. The level of protection by itself cannot be inconsistent with the *SPS Agreement* in the absence of discrimination or a disguised restriction on international trade.

49. Japan also disputes the United States' claim that the finding under Article 5.6 would necessarily be alternative to the finding under Article 2.2. According to Japan, the United States attempts to equate "appropriate level of protection" which the importing Member may establish with "scientific justification". Japan submits that "sufficiency" of scientific evidence within the meaning of Article 2.2 must be ascertained in relation to the measure in question, which implies that the same scientific evidence may be sufficient for a certain purpose, but not for another. According to Japan, the finding of the Panel on Article 2.2 is limited to the varietal testing requirement as described in paragraphs 2.23 and 2.24 of the Panel Report. There can be other varietal measures which the Panel would find consistent with Article 2.2. Japan asserts, therefore, that the Panel's findings under Article 2.2 and those under Article 5.6 are not mutually inconsistent.

3. Findings on Apricots, Pears, Plums and Quince

50. Japan submits that the claim of error by the United States in respect of apricots, pears, plums and quince is a factual claim not subject to appellate review. Japan states that the United States' claim can be reduced to an argument that the absence of evidence implying presence of varietal difference in apricots, pears, plums and quince would be sufficient to establish a *prima facie* case. As such, this claim challenges factual evaluation of the evidence by the Panel and does not raise any legal issue. Japan argues further that the absence of scientific evidence in regard to these commodities does not constitute any basis for a *prima facie* case. In Japan's opinion, the complaining party should and can establish that such proof or testing is not necessary. Being required to do so does not raise the problem of proving the negative. Japan argues that the case that the United States purports to make is not a *prima facie* case, so that in the absence of an affirmative showing by the United States, Japan should not be required to make an affirmative defence.

51. With respect to apricots, pears, plums and quince, no finding of inconsistency with Article 5.6 can be made. Since there is no relevant data, it is impossible to find an alternative which would achieve Japan's appropriate level of protection.

4. Article 5.1 of the *SPS Agreement*

52. Japan submits that it is fully compliant with the requirements of a risk assessment, having evaluated the *likelihood* of entry, establishment or spread of the codling moth in Japan as described in its *1996 Pest Risk Assessment of Codling Moth*. Japan submits that this risk assessment was conducted in accordance with the *FAO Guidelines for Pest Risk Analysis*. According to Japan, its risk assessment considered the likelihood of entry, establishment or spread of the pest due to possible non-efficacy, to the extent that relevant scientific evidence was available.

53. Japan states further that it is impossible to make any finding under Article 5.1 with regard to apricots, pears, plums and quince because there is neither relevant data nor a treatment.

5. Article 8 and Paragraph 1(c) of Annex C, of the *SPS Agreement*

54. Japan argues that it did not claim that Article 2.2 of the *SPS Agreement* would not apply to an information requirement. Japan's argument is that the type or characterisation of an SPS measure will affect the question of sufficiency of scientific evidence under Article 2.2.

55. Japan also notes that the United States' claim that Japan's varietal testing requirement is in fact unnecessary was clearly contradicted by the Panel. According to Japan, the Panel indicated, in relation to Article 5.6, that it was not convinced that there was sufficient evidence before it that testing by product would achieve Japan's level of protection for any of the products in issue.

III. Arguments of the Third Participants

A. *Brazil*

56. With regard to Article 2.2 of the *SPS Agreement*, Brazil disagrees with Japan's submission that the varietal testing requirement is an information requirement which should be found to be maintained with sufficient scientific evidence within the meaning of Article 2.2. In Brazil's view, the phrase "sufficient scientific evidence" means that there has to be sufficient evidence to support a Member's SPS measure. Brazil also objects to Japan's attempt to compare its varietal testing requirement with the practices of the *Codex Alimentarius* concerning toxicological testing of any new food additive.

57. On the issue of the requirements of Article 5.7 of the *SPS Agreement*, Brazil submits that Japan is incorrect in stating that it suffices to meet the requirements of the first sentence of Article 5.7. In Brazil's view, the Panel was correct to find that Japan did not fulfill two of the requirements under Article 5.7 and was not, therefore, entitled to the exception provided for in that provision.

58. With regard to Article 5.6 of the *SPS Agreement*, Brazil submits that the Panel erred in not finding that the "testing by product" alternative would meet Japan's appropriate level of testing, as scientific evidence has demonstrated that this alternative would result in the proper protection of the Japanese fruit culture from codling moth infestation.

59. With regard to Article 7 of the *SPS Agreement*, Brazil agrees with the Panel that "… a non-mandatory government measure is also subject to WTO provisions, in the event that compliance with this measure is necessary to obtain an advantage from the government or, in other words, if sufficient incentives or disincentives exist for that measure to be abided by."

60. Brazil argues that the Panel should have concluded that the lack of evidence regarding apricots, pears, plums and quince is in itself the proof that the measure is based on insufficient scientific evidence. According to Brazil, the Panel's finding seems to reward an importing Member for its lack of evidence in support of its contested measure.

B. *European Communities*

61. With regard to Article 2.2 of the *SPS Agreement*, the European Communities submits that the empirical evidence submitted by the United States is useful, but not sufficient, to discharge the United States' burden of persuasion nor to overturn the presumption of SPS conformity of the measure at issue. According to the rules on burden of proof, the Panel should have ruled that the United States has not discharged its burden of proof.

62. The European Communities submits that while the rules on burden of proof under Article 2.2 should have led the Panel to reject the United States' claims, the Panel instead devised a new legal test that in judging the sufficiency of the scientific evidence, the Member maintaining the measure should establish an "actual causal link" between the measure and the scientific evidence on the basis of which it is maintained. It is the European Communities' contention that to require an "actual causal link" is contrary to the text, object, purpose and preparatory history of Article 2.2 of the *SPS Agreement*. Furthermore, the European Communities asserts that the "actual causal link" test is narrower in scope than the rational relationship test adopted by the Appellate Body in *European Communities - Hormones*.[22] In the opinion of the European Communities, a systematic interpretation of Articles 2.2 and 5.1 in context does not reveal that the "sufficiency" threshold under Article 2.2 should be more restrictive than that applied in deciding whether an SPS measure is "based on" a risk assessment.

63. According to the European Communities, since the concept of risk and risk assessment in the *SPS Agreement* is a qualitative and not a quantitative one, the word "sufficient" cannot be taken to refer to the quantitative, but should be seen as referring to the qualitative aspects of the scientific evidence used by the regulatory authorities of a Member.

[22]*European Communities – Hormones*, *supra*, footnote 12.

64. With regard to Article 5.7 of the *SPS Agreement*, the European Communities argues that the first sentence of Article 5.7 lays down the requirements that trigger the operation of Article 5.7 and, for that reason, the Panel's refusal to examine whether the measure at issue satisfies all the conditions of Article 5.7 is, in principle, unsatisfactory.

65. The European Communities submits that, contrary to what the United States claims, an insufficient amount of relevant information can be established not only when the Member having recourse to this provision is not able to perform a risk assessment, but also when the risk assessment shows that the relevant scientific evidence is, for example, insufficient, conflicting, inconclusive or uncertain. The explicit mention made of Article 5.7 in Article 2.2 implies that the conditions for the application of the one provision necessarily affect the application of the other.

66. The European Communities agrees with Japan that the Panel erred in finding that the obligation "to seek to obtain the additional information" means that the necessary information must be specific enough. The text of Article 5.7 does not lay down any information collection procedures.

67. The European Communities considers that the Panel erred in implying that the requirement to review the measure within a "reasonable period of time" extends also to the period of time prior to the entry into force of the *SPS Agreement*, or that a period of four years in the application of a measure is not reasonable. According to the European Communities, the obligation to seek to obtain information does not require that actual results be obtained within a specified period of time. The reasonableness of the period of time, as argued by Japan, should be judged according to the risk involved and the nature of the SPS measure which is required to be taken in order to achieve the Member's level of sanitary protection.

68. With regard to Article 5.6 of the *SPS Agreement*, the European Communities agrees with the Panel that an alternative measure exists, i.e., the "determination of sorption levels", which is reasonably available, significantly less trade-restrictive and achieves Japan's level of phytosanitary protection.

69. With regard to Article 7 of the *SPS Agreement*, the European Communities agrees with the Panel that the varietal testing requirement imposed by Japan is a phytosanitary measure according to the wording of Annex B of the *SPS Agreement*, and consequently, must be published in order to comply with the transparency requirement in Article 7.

70. With regard to Article 8 of the *SPS Agreement*, the European Communities agrees with the United States that the measure at issue is inconsistent with paragraph 1(c) of Annex C and with Article 8 of the *SPS Agreement*.

IV. Issues Raised in this Appeal

71. This appeal raises the following issues:

(a) whether the Panel erred in law in finding that the varietal testing requirement is maintained without sufficient scientific evidence within the meaning of Article 2.2 of the *SPS Agreement*;

(b) whether the Panel erred in law in its application of Article 5.7 of the *SPS Agreement* and in finding that the requirements of the second sentence of Article 5.7 are not fulfilled;

(c) whether the Panel erred in law by failing to find that "testing by product" achieves Japan's appropriate level of protection as required under Article 5.6 of the *SPS Agreement*;

(d) whether the Panel erred in law in making a finding under Article 5.6 of the *SPS Agreement* with regard to the "determination of sorption levels" irrespective of whether it had found the varietal testing requirement to be inconsistent with Article 2.2 of the *SPS Agreement*;

(e) whether the Panel correctly interpreted the scope of application of the publication requirement of paragraph 1 of Annex B of the *SPS Agreement*;

(f) whether the varietal testing requirement is consistent with Article 5.1 of the *SPS Agreement*;

(g) whether the varietal testing requirement is consistent with Article 8 and paragraph 1(c) of Annex C, of the *SPS Agreement*;

(h) whether the Panel's finding under Article 5.6 of the *SPS Agreement* with regard to the "determination of sorption levels" was reached in a manner consistent with the rules on burden of proof;

(i) whether the Panel erred in law by not extending its findings of inconsistency with Articles 2.2 and 5.6 of the *SPS Agreement* to the varietal testing requirement as it applies to apricots, pears, plums and quince; and

(j) whether the Panel's finding on Article 2.2 of the *SPS Agreement* is inconsistent with Article 11 of the DSU.

V. The *SPS Agreement*

A. *Article 2.2*

72. Article 2.2 of the *SPS Agreement* stipulates in relevant part:

> 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.

The Panel found that Japan's varietal testing requirement as it applies to apples, cherries, nectarines and walnuts is maintained without sufficient scientific evidence and is, therefore, inconsistent with Article 2.2 of the *SPS Agreement*.[23] Japan appeals this finding. According to Japan, the Panel erred in law in finding that the varietal testing requirement was "maintained without sufficient scientific evidence" within the meaning of Article 2.2.

73. Japan's appeal raises the issue of the meaning of the phrase "maintained without sufficient scientific evidence" in Article 2.2 and, in particular, the meaning of the word "sufficient". The ordinary meaning of "sufficient" is "of a quantity, extent, or scope adequate to a certain purpose or object".[24] From this, we can conclude that "sufficiency" is a relational concept. "Sufficiency" requires the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence.

74. The context of the word "sufficient" or, more generally, the phrase "maintained without sufficient scientific evidence" in Article 2.2, includes Article 5.1 as well as Articles 3.3 and 5.7 of the *SPS Agreement*.

75. Article 5.1 of the *SPS Agreement* requires that an SPS measure be based on a risk assessment. As we stated in our Report in *European Communities – Hormones*:

> … Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1.[25]

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[23]Panel Report, para. 8.43.

[24]C.T. Onions (ed.), *The Shorter Oxford English Dictionary*, Third Edition (1983), p. 2180.

[25]*European Communities – Hormones*, *supra*, footnote 12, para. 180.

76. In that Report, we found that:

> … Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant -- that is to say, reasonably support -- the SPS measure at stake. The requirement that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.[26]

We agree with the Panel that this statement provides guidance for the interpretation of the obligation under Article 2.2 not to maintain an SPS measure without sufficient scientific evidence.[27]

77. We also consider it useful in interpreting Article 2.2, and, in particular, the meaning of the word "sufficient", to recall the following statement on Article 5.1 in our Report in *European Communities - Hormones*:

> Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. … In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.[28]

78. Furthermore, in our Report in *Australia – Salmon*, we stated with regard to Article 5.1:

> … it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread … . A proper risk assessment … must evaluate the "likelihood", i.e., the "probability", of entry, establishment or spread … .[29]

We also made it clear in that Report that *some* evaluation of the likelihood is not enough.[30]

79. As mentioned above, the context of the phrase "not maintained without sufficient scientific evidence" in Article 2.2 also includes Article 3.3 of the *SPS Agreement.* Pursuant to Article 3.3, Members may introduce or maintain an SPS measure which results in a higher level of protection than

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[26]*European Communities – Hormones, supra*, footnote 12, para. 193.

[27]Panel Report, para. 8.29.

[28]*European Communities – Hormones, supra*, footnote 12, para. 194.

[29]*Australia – Salmon, supra*, footnote 13, para. 123.

[30]*Australia – Salmon, supra*, footnote 13, para. 124.

would be achieved by a measure based on a relevant international standard, *inter alia*, "if there is a scientific justification" and the measure is not inconsistent with any other provision of the *SPS Agreement*. In *European Communities – Hormones*, we stated:

> … the footnote to Article 3.3 … defines "scientific justification" as an "examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement …".[31]

We also stated:

> [t]his examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.[32]

In our opinion, there is a "scientific justification" for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information.

80. Finally, it is clear that Article 5.7 of the *SPS Agreement*, to which Article 2.2 explicitly refers, is part of the context of the latter provision and should be considered in the interpretation of the obligation not to maintain an SPS measure without sufficient scientific evidence. Article 5.7 allows Members to adopt provisional SPS measures "[i]n cases where relevant scientific evidence is insufficient" and certain other requirements are fulfilled.[33] Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless.

81. We note Japan's argument that the requirement in Article 2.2 not to maintain an SPS measure without sufficient scientific evidence should be interpreted in light of the precautionary principle. In our Report in *European Communities – Hormones*[34], we stated that the precautionary principle finds reflection in the preamble, Article 3.3 and Article 5.7 of the *SPS Agreement* and that this principle:

> … has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.

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[31] *European Communities – Hormones, supra*, footnote 12, para. 175.

[32] *Ibid.*

[33] See *infra*, para. 89.

[34] *European Communities – Hormones, supra*, footnote 12, para. 124.

82. We do not agree with Japan's proposition that direct application of Article 2.2 of the *SPS Agreement* should be limited to situations in which the scientific evidence is "patently" insufficient, and that the issue raised in this dispute should have been dealt with under Article 5.1 of the *SPS Agreement*. There is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the *SPS Agreement*, that requires or sanctions such limitation of the scope of Article 2.2. On the contrary, Article 2.2 sets out, as the title of Article 2 indicates, "Basic Rights and Obligations". In our Report in *European Communities – Hormones*, we agreed with a statement by the panel in that case that Article 5.1 may be viewed as a specific application of the *basic* obligations contained in Article 2.2.[35] This statement can not possibly be interpreted as support for limiting the scope of Article 2.2 "in favour" of Article 5.1. Furthermore, we note that we said the following in our Report in *European Communities – Hormones*:

> We are, of course, surprised by the fact that the Panel did not begin its analysis of this whole case by focusing on Article 2 that is captioned "Basic Rights and Obligations", an approach that appears logically attractive.[36]

83. We also do not agree with Japan's contention that the Panel "in the end" applied a standard different from its "rational relationship" standard, i.e., the "actual causal link" standard. We understand the Panel to refer, in paragraph 8.42 of its Report, to the absence of an actual causal link between test differences in CxT and LD_{50} values and varietal differences as an illustration or a strong indication of the absence of a rational relationship between the SPS measure and the scientific evidence.

84. In the light of the above considerations based on the text and context of Article 2.2 of the *SPS Agreement*, we agree with the Panel that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence.[37] Whether there is a rational relationship between an SPS measure and the scientific evidence 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.

85. We, therefore, reject Japan's appeal on this issue and uphold the Panel's finding in paragraph 8.43 of the Panel Report that the varietal testing requirement as it applies to apples,

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[35]*European Communities – Hormones, supra*, footnote 12, para. 180.

[36]*European Communities – Hormones, supra*, footnote 12, para. 250.

[37]Panel Report, paras. 8.29 and 8.42.

cherries, nectarines and walnuts is maintained without sufficient scientific evidence within the meaning of Article 2.2 of the *SPS Agreement*.

B. *Article 5.7*

86. As already discussed above, Article 2.2 of the *SPS Agreement* stipulates that Members shall not maintain SPS measures without sufficient scientific evidence "except as provided for in paragraph 7 of Article 5." In support of its varietal testing requirement, Japan invoked Article 5.7 before the Panel.

Article 5.7 of the *SPS Agreement* reads as follows:

> 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.

87. The Panel found that Japan had not fulfilled the requirements contained in the second sentence of Article 5.7. It did not examine whether Japan's varietal testing requirement met the requirements of the first sentence of Article 5.7. In this connection, the Panel stated:

> … we thus find that even if the varietal testing requirement were considered as a provisional measure adopted in accordance with the first sentence of Article 5.7, Japan has not fulfilled the requirements contained in the second sentence of Article 5.7.[38]

88. Japan appeals the Panel's finding under Article 5.7. According to Japan, the Panel erred in its application of Article 5.7 and in its finding that the requirements of the second sentence of Article 5.7 were not fulfilled.

89. Article 5.7 of the *SPS Agreement* sets out four requirements which must be met in order to adopt and maintain a provisional SPS measure. Pursuant to 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".

[38]Panel Report, para. 8.59.

Pursuant to 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".

These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.

90. Japan's proposition that the wording "except as provided for in paragraph 7 of Article 5" in Article 2.2 refers only to the first sentence of Article 5.7, and that a Member should, therefore, be allowed to claim exemption from the obligation under Article 2.2 when it fulfils the requirements of the first sentence, is without basis in the text of either Article 2.2 or Article 5.7. On the contrary, Article 2.2 refers to Article 5.7 as a whole and Article 5.7 links the first and second sentence with the words "[i]n *such* circumstances" (emphasis added).

91. We, therefore, conclude that the Panel did not err in its application of Article 5.7 by first examining whether the varietal testing requirement meets the requirements of the second sentence of Article 5.7. Having established that the requirements of the second sentence of Article 5.7 are not met, there was no need for the Panel to examine the requirements of the first sentence.[39]

92. As to the question whether the Panel erred in finding that Japan has not acted consistently with the requirements of the second sentence of Article 5.7, we note that the first part of the second sentence stipulates that the Member adopting a provisional SPS measure "shall seek to obtain the additional information necessary for a more objective assessment of risk". Neither Article 5.7 nor any other provision of the *SPS Agreement* sets out explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 does not specify what actual results must be achieved; the obligation is to "seek to obtain" additional information. However, Article 5.7 states that the additional information is to be sought in order to allow the Member to conduct "a more objective assessment of risk". Therefore, the information

[39]In *European Communities - Measures Affecting the Importation of Certain Poultry Products*, adopted 23 July 1998, WT/DS69/AB/R, para. 135, we stated that "[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU."

sought must be germane to conducting such a risk assessment, i.e., the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest, according to the SPS measures which might be applied. We note that the Panel found that the information collected by Japan does not "examine the appropriateness" of the SPS measure at issue and does not address the core issue as to whether "varietal characteristics cause a divergency in quarantine efficacy".[40] In the light of this finding, we agree with the Panel that Japan did not seek to obtain the additional information necessary for a more objective risk assessment.

93. The second part of the second sentence of Article 5.7 stipulates that the Member adopting a provisional SPS measure shall "review the … measure accordingly within a reasonable period of time." In our view, what constitutes a "reasonable period of time" has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure. In the present case, the Panel found that collecting the necessary additional information would be relatively easy.[41] Although the obligation "to review" the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement "within a reasonable period of time".[42]

94. We, therefore, uphold the Panel's finding that even if the varietal testing requirement were considered to be a provisional measure adopted in accordance with the first sentence of Article 5.7, Japan has not fulfilled the requirements contained in the second sentence of Article 5.7.

C. *Article 5.6*

95. Article 5.6 of the *SPS Agreement* prohibits SPS measures that are more trade-restrictive than required to achieve a Member's appropriate level of protection. According to the footnote to Article 5.6, a measure is considered more trade-restrictive than required if there is another SPS measure which:

(1) is reasonably available taking into account technical and economic feasibility;

(2) achieves the Member's appropriate level of protection; and

(3) is significantly less restrictive to trade than the SPS measure contested.[43]

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[40]Panel Report, para. 8.56.

[41]*Ibid*.

[42]Panel Report, para. 8.58.

[43]*Australia – Salmon*, *supra*, footnote 13, para. 194.

As we have stated in our Report in *Australia – Salmon*, these three elements are cumulative in nature.[44]

96. The United States argued before the Panel that the "testing by product" of the efficacy of the quarantine treatment is such an alternative measure within the meaning of Article 5.6. The Panel agreed with the United States that "testing by product" is a measure which is reasonably available, taking into account technical and economic feasibility.[45] It also agreed that "testing by product" is significantly less restrictive to trade than the varietal testing requirement.[46] On the remaining element under Article 5.6, the Panel concluded, however, that:

> … after having carefully examined all the evidence before us in light of the opinions we received from the experts advising the Panel, we are not convinced that there is sufficient evidence before us to find that testing by product would achieve Japan's appropriate level of protection for any of the products at issue.[47]

97. The United States appeals this finding. According to the United States, the Panel erred in law by failing to find that "testing by product" achieves Japan's appropriate level of protection. The United States asserts that in concluding that the statement by Dr. Ducom, one of the experts advising the Panel[48], is sufficient to preclude a finding that "testing by product" achieves Japan's appropriate level of protection, the Panel effectively adopted a "no hypothetical risk" standard.[49] According to the

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[44]*Australia – Salmon*, *supra*, footnote 13, para. 194.

[45]Panel Report, para. 8.78.

[46]Panel Report, para. 8.79.

[47]Panel Report, para. 8.84.

[48]Paragraph 8.83 of the Panel Report reads in relevant part as follows:

> However, at least one of the experts advising the Panel made equally clear that the US alternative of one treatment for all varieties, including those to be developed in the future, does not, to date, have a scientific basis either. In his answer to Panel question 16, Dr. Ducom states:
>
> > "The arguments put forth by Japan for requiring varietal trials are not based on scientific data. They are supported by a few experimental data in which varietal difference exists, in terms of LD_{50}, among a lot of other data in which it does not …
> >
> > The arguments put forth by the USA are based on a large number of experiments, of which Japan has thoroughly made use.
> >
> > Varietal difference appears several times, but each time, the confirmatory test has revealed sufficient efficacy. Extrapolation to all available varieties is no more scientific than the Japanese's contrary assertion. This sort of extrapolation is something along the order of intuition. It is unfortunate that there has not been a research program on the subject in order to try to present some scientific proof".

[49]Appellant's Submission of the United States, para. 38.

United States, we rejected such a standard in our Report in *European Communities – Hormones*. Furthermore, the United States contends that a "no hypothetical risk" standard erects an insurmountable hurdle for parties seeking to demonstrate that an alternative measure achieves a Member's appropriate level of protection.[50]

98. Contrary to what the United States asserts, the Panel did not base its conclusion with regard to "testing by product" under Article 5.6 exclusively on Dr. Ducom's statement. The Panel explicitly stated, in paragraph 8.84 of the Panel Report[51], that it carefully examined *all* the evidence before it in light of the opinions received from its experts and that it subsequently came to the conclusion that it was not convinced that there was sufficient evidence to find that "testing by product" would achieve Japan's appropriate level of protection. It appears to us that the United States' appeal in essence challenges the Panel's consideration and weighing of the evidence before it. As we stated in our Report in *Australia – Salmon*, a panel's consideration and weighing of the evidence before it relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU.[52]

99. Furthermore, we fail to understand how the Panel would have "effectively" adopted a "no hypothetical risk" standard by concluding that Dr. Ducom's statement[53] is sufficient to preclude a finding that "testing by product" does not achieve Japan's appropriate level of protection.

100. We, therefore, reject the United States' appeal from the Panel's finding under Article 5.6 with regard to "testing by product".

101. Apart from appealing the Panel's finding under Article 5.6 with regard to "testing by product", the United States also requests a modification of the Panel's finding under Article 5.6 with regard to the "determination of sorption levels" in order to clarify that this finding is a finding in the alternative, relevant only if the Appellate Body were to reverse the Panel's finding under Article 2.2. In paragraph 131 of this Report, however, we reverse the Panel's finding under Article 5.6 with regard to the "determination of sorption levels". We, therefore, see no further need to address the alternative argument raised here by the United States concerning the relationship between the Panel's finding of inconsistency under Article 2.2 and its finding of inconsistency under Article 5.6.

[50]Appellant's Submission of the United States, para. 39.

[51]See *supra*, para. 96.

[52]*Australia – Salmon, supra*, footnote 13, para. 261.

[53]See *supra*, footnote 48.

D. *Article 7 and Paragraph 1 of Annex B*

102. Article 7 of the *SPS Agreement,* that is captioned "Transparency", 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.

Paragraph 1 of Annex B of the *SPS Agreement* stipulates:

> 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, the sanitary and phytosanitary *regulations* to which this publication requirement applies are defined as:

> Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

103. In paragraph 8.111 of the Panel Report, the Panel found:

> Even though the varietal testing requirement is not mandatory – in that exporting countries can demonstrate quarantine efficiency by other means – in our view, it does constitute a "phytosanitary regulation" subject to the publication requirement in Annex B.

In paragraph 8.116 of the Panel Report, the Panel subsequently concluded that:

> … Japan, by not having published the varietal testing requirement, acts inconsistently with its obligations under paragraph 1 of Annex B of the SPS Agreement and, for that reason, with its obligations contained in Article 7 of that Agreement.

104. Japan appeals this finding. According to Japan, the "regulations" referred to in paragraph 1 of Annex B are limited to legally enforceable instruments. Japan contends that the varietal testing requirement, as set out in the *Experimental Guide*[54], is not a legally enforceable instrument and does, therefore, not fall within the scope of application of the publication requirement of paragraph 1 of Annex B.

105. We consider that the list of instruments contained in the footnote to paragraph 1 of Annex B is, as is indicated by the words "such as", not exhaustive in nature. The scope of application of the

[54]See *supra*, para. 2.

publication requirement is not limited to "laws, decrees or ordinances", but also includes, in our opinion, other instruments which are applicable generally and are similar in character to the instruments explicitly referred to in the illustrative list of the footnote to paragraph 1 of Annex B.

106. The object and purpose of paragraph 1 of Annex B is "to enable interested Members to become acquainted with" the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.

107. We note that it is undisputed that the varietal testing requirement is applicable generally. Furthermore, we consider in the light of the actual impact of the varietal testing requirement on exporting countries, as discussed by the Panel in paragraphs 8.112 and 8.113 of the Panel Report, that this instrument is of a character similar to laws, decrees and ordinances, the instruments explicitly referred to in the footnote to paragraph 1 of Annex B.

108. For these reasons, we agree with the Panel that the varietal testing requirement, as set out in the *Experimental Guide*, is a phytosanitary regulation within the meaning of paragraph 1 of Annex B, and, therefore, uphold the Panel's finding that Japan has acted inconsistently with this provision and with Article 7 of the *SPS Agreement*.

E. *Article 5.1*

109. The Panel made no finding on the consistency of Japan's varietal testing requirement with Article 5.1 of the *SPS Agreement.* In paragraph 8.63 of the Panel Report, the Panel stated:

> Since we have found earlier that the varietal testing requirement violates Article 2.2, we see no need to further examine whether it also needs to be based on a risk assessment in accordance with Articles 5.1 and 5.2 nor to determine whether in this dispute it is so based.

110. In its Appellant's Submission, the United States calls upon us to "complete the Article 5.1 analysis and find that the varietal testing requirement violates that provision", in the event that we do not extend the Panel's finding under Article 2.2 to apricots, pears, plums and quince, *or* in the event that we reverse the Panel's finding that the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts is inconsistent with Article 2.2.[55]

[55]Appellant's Submission of the United States, para. 62.

111. We note that there is an error of logic in the Panel's finding in paragraph 8.63. The Panel stated that it had found earlier in its Report that the varietal testing requirement violates Article 2.2, and that there was, therefore, no need to examine whether the measure at issue was based on a risk assessment in accordance with Articles 5.1 and 5.2 of the *SPS Agreement*. We note, however, that the Panel's finding of inconsistency with Article 2.2 only concerned the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts.[56] With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel found that there was insufficient evidence before it to conclude that this measure was inconsistent with Article 2.2. The Panel, therefore, made an error of logic when it stated, in general terms, that there was no need to examine whether the varietal testing requirement was consistent with Article 5.1 because this requirement had already been found to be inconsistent with Article 2.2. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, there was clearly still a need to examine whether this measure was inconsistent with Article 5.1. By not making a finding under Article 5.1 with regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel improperly applied the principle of judicial economy.[57] We believe 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.[58]

112. We consider it appropriate for us 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. As already noted above, Article 5.1 requires that an SPS measure be based on a risk assessment.[59] In our Report in *Australia – Salmon*, we stated 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

[56]Panel Report, para. 8.43.

[57]We note that the Panel, in paragraph 8.6 of its Report, stated that in light of its terms of reference it was called upon "to examine the [varietal testing requirement] as it applies to all products covered by the contested measure", i.e., apples, cherries, peaches (including nectarines), walnuts, *apricots*, *pears*, *plums* and *quince*.

[58]*Australia – Salmon*, *supra*, footnote 13, para. 223.

[59]See *supra*, paras. 75-78.

> (3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*[60]

113. Japan argued before the Panel that its varietal testing requirement is based on the *1996 Pest Risk Assessment of Codling Moth* (the "*1996 Risk Assessment*").[61] We note, 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 the risk. The *1996 Risk Assessment* does not, therefore, "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.

114. We, therefore, conclude that the varietal testing requirement as it applies to apricots, pears, plums and quince is inconsistent with Article 5.1 of the *SPS Agreement*.

F. *Article 8 and Paragraph 1(c) of Annex C*

115. In paragraph 8.117 of the Panel Report, the Panel stated:

> Given that we have found earlier that the varietal testing requirement is inconsistent with the requirements of Articles 2.2, 5.6 and 7 of the SPS Agreement, we see no need to further examine whether it is also inconsistent with Article 8, referring to Annex C, of that Agreement.

116. In the event that we accept Japan's argument that the varietal testing requirement is an information requirement within the meaning of paragraph 1(c) of Annex C, and that Japan's measure is, therefore, consistent with Article 2.2, the United States requests that we find the varietal testing requirement inconsistent with Article 8 and paragraph 1(c) of Annex C, of the *SPS Agreement*.[62]

117. We note that the United States does not appeal the Panel's failure to make a finding under Article 8 and Annex C of the *SPS Agreement*. It does not challenge the Panel's application of the principle of judicial economy. The United States merely submits to us arguments concerning the consistency of Japan's varietal testing requirement with Article 8 and paragraph 1(c) of Annex C for our consideration should we come the conclusion that the varietal testing requirement is an information requirement, and, therefore, is consistent with Article 2.2. We have not come to this

[60] *Australia – Salmon*, *supra*, footnote 13, para. 121.

[61] Panel Report, para. 4.145 and following.

[62] Appellant's Submission of the United States, para. 83.

conclusion[63] and we, therefore, do not consider it necessary to address the arguments on Article 8 and paragraph 1(c) of Annex C, submitted by the United States.

VI. General Issues

A. *Burden of Proof*

118. In paragraph 8.103 of the Panel Report, the Panel found:

> … - on the basis of the evidence before the Panel and the opinions of the experts advising the Panel - it can be presumed that an alternative measure exists (i.e., [the "determination of sorption levels"]) which would meet all of the elements under Article 5.6.

119. In its reasoning, the Panel explicitly stated that the complaining party, the United States, had "not specifically addressed" the question whether the "determination of sorption levels" is an alternative measure within the meaning of Article 5.6 of the *SPS Agreement*.[64] With regard to the first and third elements under Article 5.6, namely, the economic and technical feasibility of the alternative measure, and the question whether the alternative measure is significantly less trade-restrictive than the SPS measure at issue, the Panel noted, however, that the United States "has given views which are consistent with" the idea that the "determination of sorption levels" meets these two elements.[65] With regard to the second element under Article 5.6, namely, the question whether the alternative measure meets the Member's appropriate level of protection, the Panel stated that "the United States … suggests that [the "determination of sorption levels"] *would* meet Japan's appropriate level of protection".[66] The Panel noted that the United States submitted that "testing by product" would meet Japan's level of protection and that, since the determination of sorption levels "is more stringent than testing by product, it can thus be presumed that the US view on this alternative would be that it *a fortiori* meets Japan's level of protection".[67]

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[63]See *supra*, para. 85.

[64]Panel Report, footnotes 328, 332 and 333.

[65]Panel Report, paras. 8.91 and 8.95. The Panel noted, in footnotes 328 and 332, that it had considered all the other arguments of the United States and that none of these arguments went against the idea that the determination of sorption levels would be technically and economically feasible and would be significantly less trade-restrictive than the varietal testing requirement.

[66]Panel Report, para. 8.98.

[67]Panel Report, footnote 333.

120. Japan appeals the Panel's finding under Article 5.6 regarding the "determination of sorption levels", on the basis that it is contrary to the rules on burden of proof, as established by the Appellate Body in *United States – Shirts and Blouses*.[68] In Japan's view, panels cannot find facts neither argued nor proven by the parties.[69] Japan asserts that the Panel "exempts quite unjustly the United States from discharging the distributed burden of proof".[70]

121. With regard to the rules on burden of proof, we stated in our Report in *United States – Shirts and Blouses*:

> … various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[71]

122. With regard to the rules on burden of proof in proceedings under the *SPS Agreement*, we noted in our Report in *European Communities – Hormones*, that the panel in that case appropriately described the issue of the burden of proof as one of particular importance, in view of the multiple and complex issues of fact which may arise in disputes under that Agreement.[72] Furthermore, as we noted in *European Communities – Hormones*, the rules on burden of proof are rules "applicable in any adversarial proceedings".[73] We, therefore, agreed with the panel in that case that in proceedings under the *SPS Agreement*:

> The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.[74]

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[68]Appellant's Submission of Japan, para. 91

[69]Appellant's Submission of Japan, para. 90.

[70]*Ibid*.

[71]*United States – Shirts and Blouses, supra*, footnote 18, p. 14.

[72]*European Communities – Hormones, supra*, footnote 12, para. 97.

[73]*European Communities – Hormones, supra*, footnote 12, para. 98.

[74]*Ibid*.

123. In this dispute, the United States claimed that the varietal testing requirement is more trade-restrictive than required to achieve Japan's appropriate level of protection and is, therefore, inconsistent with Article 5.6. As already set out above[75], a measure is considered more trade-restrictive than required if there is another SPS measure which:

(1) is reasonably available taking into account technical and economic feasibility;

(2) achieves the Member's appropriate level of protection; *and*

(3) is significantly less restrictive to trade than the SPS measure contested.

124. As noted above, the United States argued that "testing by product" is an alternative measure which meets the three cumulative elements under Article 5.6. The Panel was not, however, convinced that there was sufficient evidence to find that "testing by product" would achieve Japan's appropriate level of protection.[76]

125. The Panel then turned its attention to an alternative measure which had been *suggested* by the experts advising the Panel, i.e., the "determination of sorption levels".[77] The Panel explained that it *deduced* this alternative measure from the written answers of the experts to the Panel's questions and from their statements at the Panel's meeting with the experts.[78] We note that the Panel explicitly stated that the United States, as complaining party, did *not specifically argue* that the "determination of sorption levels" met any of the three elements under Article 5.6.[79] On the basis of the evidence before it, including its deductions from the views expressed by the experts[80], the Panel came to the conclusion that it could be presumed that the "determination of sorption levels was an alternative measure which would meet all of the elements under Article 5.6".[81] The Panel pointed out that the United States had "given views which were consistent with" the argument that this alternative

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[75]See *supra*, para. 95.

[76]The United States appeals from this finding, but we have upheld it (*supra*, para. 100).

[77]Panel Report, para. 8.74.

[78]*Ibid*.

[79]Panel Report, footnotes 328, 332 and 333. See *supra*, para. 119.

We note that the United States stated in its Appellee's Submission, para. 79, that it "emphasized [testing by product] in its Article 5.6 arguments because this alternative meets the requirements of Article 5.6, and because *there is no scientific evidence to support even limited sorption testing.*" (emphasis added)

We also note that the United States declared before the Panel in its Comments on the Experts' Reponses (p. 3), that "it is not necessary in the context of this dispute for the United States to address the merits of [the "determination of sorption levels"], nor is it within the scope of the Panel's terms of reference to make findings with respect to the comparative efficacy of alternative treatments proposed by technical experts."

[80]See Panel Report, paras. 8.92 and 8.93 (on the first element) and para. 8.100 (on the second element).

[81]See Panel Report, para. 8.94 (on the first element), para. 8.97 (on the third element), para. 8.101 (on the second element) and para. 8.103 (on all three elements).

measure met the first and third elements under Article 5.6 and had "suggest[ed]" that it would meet the second element.[82]

126. Pursuant to the rules on burden of proof set out above, we consider that it was for the United States to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the "determination of sorption levels" is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the "determination of sorption levels" is an alternative measure within the meaning of Article 5.6.

127. In paragraph 7.10 of the Panel Report, the Panel stated:

> In deciding whether a fact or claim can … be accepted, we consider that we are called upon to examine and weigh all the evidence validly submitted to us, including the opinions we received from the experts advising the Panel in accordance with Article 13 of the DSU.

We agree. Article 13 of the DSU allows a panel to seek *information* from any relevant source and to consult individual experts or expert bodies to obtain their *opinion* on certain aspects of the matter before it. In our Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), we noted the "comprehensive nature" of this authority[83], and stated that this authority is "indispensably necessary" to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* … ."[84]

128. Furthermore, we note that the present dispute is a dispute under the *SPS Agreement*. Article 11.2 of the *SPS Agreement* explicitly *instructs* panels in disputes under this Agreement involving scientific and technical issues to "seek advice from experts".

129. Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts

[82]Panel Report, paras. 8.91, 8.95 and 8.98.

[83]Adopted 6 November 1998, WT/DS58/AB/R, para. 104.

[84]*United States – Shrimp, supra*, footnote 83, para. 106.

and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.

130. In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a *prima facie* case of inconsistency with Article 5.6 based on claims relating to the "determination of sorption levels". The United States did not even *argue* that the "determination of sorption levels" is an alternative measure which meets the three elements under Article 5.6.

131. We, therefore, reverse the Panel's finding that it can be presumed that the "determination of sorption levels" is an alternative SPS measure which meets the three elements under Article 5.6, because this finding was reached in a manner inconsistent with the rules on burden of proof.

B. *Findings on Apricots, Pears, Plums and Quince*

132. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel found in paragraph 8.45 of its Report:

> After careful examination we do not consider, therefore, that there is sufficient evidence before us to extend our finding in paragraph 8.43 also to apricots, pears, plums and quince. We only find that Japan maintains the varietal testing requirement without sufficient scientific evidence with respect to apples, cherries, nectarines and walnuts.

In paragraph 8.104 of the Panel Report, the Panel found that, for the same reasons as set out above, it was unable to extend its finding of inconsistency with Article 5.6 of the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts to the varietal testing requirement as it applies to apricots, pears, plums and quince.

133. The United States appeals these findings. With regard to the Panel's finding under Article 2.2, the United States argues that, under the Panel's interpretation of the burden of proof, complaining parties would be required, based on affirmative evidence, to prove a negative, namely, that there is *no* scientific evidence which supports a measure. According to the United States, this interpretation places an impossible burden on complaining parties and would render Article 2.2

unenforceable.[85] Furthermore, the United States asserts that it did establish a *prima facie* case under Article 2.2 with regard to all products, since it established that Japan failed to provide any specific evidence to support its measure.[86]

134. We note that the Panel defined, on the basis of the United States' request for the establishment of a panel, the measure in dispute as Japan's varietal testing requirement as it applies to "*US products on which Japan claims that codling moth may occur*".[87] According to Japan, these products are apples, cherries, peaches (including nectarines), walnuts, apricots, pears, plums and quince. The Panel, thus, considered:

> … we are called upon to examine the measure before us as it applies to *all* products covered by the contested measure.[88] (emphasis added)

135. As the parties had only submitted evidence with respect to apples, cherries, nectarines and walnuts, the Panel stated that it would:

> … therefore, examine the measure at issue on the basis of that evidence and refer to the experts advising the Panel when it comes to evaluating the relevance of that evidence for the other products covered by the measure in dispute.[89]

At its meeting with the experts, the Panel asked them whether their statements about varietal differences concerning apples, cherries, nectarines and walnuts were also valid for apricots, pears, plums and quince. Dr. Heather answered this question with an unqualified "yes" and the two other experts concurred.[90] After having noted that the experts did not further elaborate on their answers and that neither of the parties provided any additional comments or information, the Panel came to the conclusion that there was not sufficient evidence before it to extend its finding of inconsistency with Article 2.2 to apricots, pears, plums and quince.[91]

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[85]Appellant's Submission of the United States, paras. 7 and 22.

[86]Appellant's Submission of the United States, para. 18.

[87]Panel Report, para. 8.6.

[88]*Ibid*.

[89]*Ibid*.

[90]Panel Report, para. 8.45.

[91]We note that the Panel failed to make a finding on peaches which are not nectarines. We consider the Panel's failure to make a finding on peaches other than nectarines, a product at issue in this dispute, to be an error of law (see Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 26). This error on the part of the Panel was not, however, appealed by the United States.

136. According to the rules on burden of proof already discussed above[92], the onus was on the United States to make a *prima facie* case that the varietal testing requirement was inconsistent with Article 2.2. In order to do this, the United States was required to adduce evidence sufficient to raise a presumption that the varietal testing requirement was maintained "without sufficient scientific evidence". With regard to the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts, the Panel considered that the United States did adduce sufficient evidence to raise such a presumption.[93] With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel considered, after taking into account both the evidence submitted by the United States (or the absence thereof) and the opinions received from the experts[94], that the United States did *not* adduce sufficient evidence to raise such a presumption. As we have already stated in our Report in *Australia – Salmon*[95], the Panel's consideration and weighing of the evidence before it relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU.

137. Furthermore, we disagree with the United States that the Panel imposed on the United States an impossible and, therefore, erroneous burden of proof by requiring it to prove a negative, namely, that there are *no* relevant studies and reports which support Japan's varietal testing requirement. In our view, it would have been sufficient for the United States to raise a presumption that there are no relevant studies or reports. Raising a presumption that there are no relevant studies or reports is *not* an impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the *SPS Agreement*, to provide "an explanation of the reasons" for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports. The United States could also have asked the Panel's experts specific questions as to the existence of relevant scientific studies or reports or it could have submitted to the Panel the opinion of experts consulted by it on this issue. The United States, however, did not submit *any* evidence relating to apricots, pears, plums and quince.[96]

[92]See *supra*, paras. 121 and 122.

[93]Panel Report, para. 8.42.

[94]Panel Report, para. 7.9.

[95]*Australia – Salmon*, *supra*, footnote 13, para. 261.

[96]Panel Report, para. 8.6.

138. We, therefore, conclude that the Panel did not err in law in failing to extend its finding of inconsistency with Article 2.2 to the varietal testing requirement as it applies to apricots, pears, plums and quince.

139. With regard to the question whether the Panel should have extended its finding of inconsistency with Article 5.6 to the varietal testing requirement as it applies to apricots, pears, plums and quince, we recall that we have reversed the Panel's finding of inconsistency with Article 5.6. This question, therefore, is moot.

C. *Article 11 of the DSU*

140. Japan claims that the Panel acted inconsistently with Article 11 of the DSU in making its finding under Article 2.2 on the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts.[97] Article 11 of the DSU reads in relevant part:

> … a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case …

Japan contends that there was a lack of proper examination of evidence by the Panel, that the Panel cited the views of the experts in an arbitrary manner and that the Panel's evaluation of the evidence was contradictory.

141. As we stated in our Report in *European Communities – Hormones* [98], not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts as required by Article 11 of the DSU. Only egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU.

142. In our view, Japan has not demonstrated that the Panel, in its examination of the consistency of the varietal testing requirement with Article 2.2, has made errors of the gravity required to find a violation of Article 11 of the DSU. We, therefore, conclude that the Panel did not abuse its discretion contrary to the requirements of Article 11 of the DSU.

[97] Appellant's Submission of Japan, paras. 51-55.

[98] *European Communities – Hormones, supra*, footnote 12, para. 133.

VII. Findings and Conclusions

143. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding that the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts is maintained without sufficient scientific evidence within the meaning of Article 2.2 of the *SPS Agreement*;

(b) upholds the Panel's finding that even if the varietal testing requirement were considered to be a provisional measure adopted in accordance with the first sentence of Article 5.7, Japan has not fulfilled the requirements contained in the second sentence of Article 5.7 of the *SPS Agreement*;

(c) concludes that the Panel's consideration and weighing of the evidence in support of the claim of the United States that "testing by product" achieves Japan's appropriate level of protection relates to the Panel's assessment of the facts and, therefore, falls outside the scope of appellate review;

(d) concludes that, as we have reversed the finding of inconsistency under Article 5.6 of the *SPS Agreement*, there is no need to address the issue of the relationship between the Panel's finding of inconsistency under Article 2.2 of the *SPS Agreement* and its finding of inconsistency under Article 5.6;

(e) upholds the Panel's finding that the varietal testing requirement, as set out in the *Experimental Guide*, is a phytosanitary regulation within the meaning of paragraph 1 of Annex B of the *SPS Agreement*, and that Japan has acted inconsistently with this provision and Article 7 of the *SPS Agreement*;

(f) finds that the varietal testing requirement as it applies to apricots, pears, plums and quince is not based on a risk assessment and, therefore, is inconsistent with Article 5.1 of the *SPS Agreement*;

(g) concludes that there is no need to address the issue of inconsistency with Article 8 and paragraph 1(c) of Annex C, of the *SPS Agreement* as we have upheld the Panel's finding under Article 2.2;

(h) reverses the Panel's finding that it can be presumed that the "determination of sorption levels" is an alternative SPS measure which meets the three elements under Article 5.6 of the *SPS Agreement*, because this finding was reached in a manner inconsistent with the rules on burden of proof;

(i) concludes that the Panel did not err in law in failing to extend its finding of inconsistency with Article 2.2 to the varietal testing requirement as it applies to apricots, pears, plums and quince, and concludes that, as we have reversed the Panel's finding of inconsistency with Article 5.6, the issue of extending this finding is moot; and

(j) concludes that the Panel did not abuse its discretion contrary to the requirements of Article 11 of the DSU.

144. The Appellate Body *recommends* that the DSB request that Japan bring its varietal testing requirement found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *SPS Agreement*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 4th day of February 1999 by:

_____

Christopher Beeby

Presiding Member

_____ _____

Julio Lacarte-Muró

Member

Mitsuo Matsushita

Member