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➤ The *Japan-Apples* Dispute: Implications for African Agricultural Trade

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tralac Trade Brief
Agri Conference /2004
September 2004

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- * This paper was prepared for the *tralac* conference “Critical Issues in Agricultural Trade in the African Context” presented in Stellenbosch South Africa on 30 September 2004. *Tralac* appreciates the author’s collaboration in advancing the trade debate within an African context.

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1 Context

“Lack of technical, infrastructural and financial capacity makes it difficult to developing country Members to fulfil the sanitary and phyto-sanitary requirements of an importing developed country Member and thus restricts market access opportunities for the product involved.”

(Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, to the Special Session of the Committee on Trade and Development, ‘Special and Differential Treatment Provisions’ TN/CTD/W/2, dated 14 May 2002)

2 Introduction¹

The protection of human, animal and plant life and health is a sovereign duty of all governments. For this purpose, governments have in place regulatory measures aimed at protection against risks contained in food and agricultural products. These measures can focus on human or animal life or health (sanitary measures) or on plant life or health (phytosanitary measures). Together, they are termed sanitary and phytosanitary (“SPS”) measures.

Sanitary and phytosanitary measures can create significant problems for developing country exports of food and agricultural products. In fact, a recent survey indicates that many developing countries consider SPS measures the most important barrier to their agricultural exports to the European Union, exceeding in importance traditional market barriers such as tariffs and quantitative restrictions.² The importance of SPS measures

¹ This Trade Brief is largely based on the following publication by this author: “The Agreement on the Application of Sanitary and Phytosanitary Measures” (with P. Van den Bossche) in Appelton, A., Macrory, P. and Plummer, M. (eds) *Kluwer Companion to the World Trade Organisation*, Kluwer (forthcoming 2005). It additionally draws upon the following publications, also by this author: “Health and Environmental Regulation - Selected international developments regarding health and environmental regulation of relevance to the European Union”, *European Environmental Law Review*, 38-60 13(2) (2004); and “The SPS Agreement”, Module 3.9, *Course on Dispute Settlement*, United Nations Conference on Trade and Development (2003).

² This study involved a survey of all countries classified as low- and middle-income countries by the World Bank that were Members of the WTO and/or the Codex Alimentarius Commission in March 1999. The results are based on a 72% response rate. See Spencer Henson *et al.*, ‘How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports,’ in *Agriculture and the New Trade Agenda: Creating a New Global Trading Environment for Development*, eds. M.D. Ingco and L.A. Winters (Cambridge: Cambridge University Press, 2004), 359-375: 361-362. Henson *et al.* report that other technical requirements (such as labelling and compositional requirements) were also regarded as

as market barriers can be partly ascribed to the lack of resources, both technical and financial, in many developing countries to address sanitary and phytosanitary risks. Information on US border inspections shows that the main reasons for the rejection of products from Africa, Asia, Latin America and the Caribbean relate to basic sanitary and phytosanitary problems, namely microbiological contamination, filth and decomposition.³ In addition, problems arise due to the differences in SPS requirements and regulatory regimes in developing and developed countries. Faced with more pressing health concerns and other competing development priorities, developing countries often do not prioritise SPS regulation as an area of government spending. Developed countries, on the other hand, tend to maintain high levels of SPS protection, in keeping with their technological and financial capabilities as well as the demands of their consumers and agricultural industries. The proliferation of SPS regulations and standards in developed countries in recent decades is a reflection of these differences.

2.1 Importance of SPS measures for Agricultural Trade

The nature of trade in food and agricultural products is changing. Not only are consumer tastes, especially in developed countries, increasingly international so that demand for foreign food products is growing, but there has also been a growth in the number of countries, especially developing countries, that participate in food and agricultural trade.⁴ Agricultural trade is also shifting towards high-value, perishable products such as fresh fruit and vegetables, meat and fish, which are more vulnerable to infection by pathogens and pests than traditional products such as dried grains and pulses. In addition, there is growing demand for processed food products. As a result of these developments, there has been a proliferation of SPS regulations to deal with the increase in volume, variety and technical sophistication of food and agricultural products

important but that tariffs and quantitative restrictions were seen as less important. A possible reason for this suggested by the authors is the fact that many developing countries benefit from preferential market access to EU markets, thus decreasing the relevance of traditional market barriers.

³ This information is referred to by Henson *et al.* who point out that only the US systematically collects this type of information and makes it publicly available. *Ibid.*, 361.

⁴ W.C.K. Hammer, 'Food Trade and Implementation of the SPS and TBT Agreements: Current Status of Food Trade, Including Food Quality and Safety Problems,' presented at the Conference on International Food Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition, (Melbourne Australia: Food and Agriculture Organization of the United Nations, 11-15 October 1999): 1.

being traded. The number of SPS notifications to the WTO has increased four-fold between 1995 and 2002.⁵ This increase is concentrated in developed country Members.

Three main reasons can be identified for the sharp increase in SPS measures in developed countries. First, regulators have to respond to the elevation in consumer expectations and demands with regard to food standards in developed countries. Due to increased affluence, greater consumer awareness of food-safety risks and rising life expectancy (making the long-term health effects of chemicals and contaminants in food more significant) regulators face higher consumer demands in this area. Second, regulators are confronted with pressure from the agriculture and food industry lobbies in the face of increased competition due to agricultural trade liberalisation. These lobby groups push for strict SPS requirements to limit market access for competing imported products. Fourth, advances in science and technology have contributed to the creation of comprehensive regulatory systems and control mechanisms. The substantial progress made in technological capacity to test for the presence of risk-causing elements, such as bacteria, chemicals and metabolites, have made it possible to lay down extremely strict requirements and to control that these are being met through ever-stricter conformity assessment mechanisms.

As a result, the number and stringency of SPS regulations adopted is steadily increasing and market access for food and agricultural products is greatly reduced. The impact of the proliferation of SPS requirements on African country exporters of food and agricultural products is great. Many African countries largely depend on the agricultural sector for their export revenue and are particularly vulnerable to market barriers in this area. In addition, SPS requirements are particularly burdensome for some African countries due to their lack of technical and financial capacity to comply with many of these requirements.⁶

⁵ John S. Wilson and Tsunehiro Otsuki, 'Food Safety in Food Security and Food Trade: Balancing Risk Reduction and Benefits from Trade in Setting Standards,' *2020 Vision for Food, Agriculture and the Environment*, Focus 10, no. 6, (Washington D.C.: International Food Policy Research Institute, September 2003).

⁶ Otsuki *et al.* point to the fact that developing countries are more vulnerable to SPS regulatory changes than developed countries due to the scarcity of public funding in the former to finance compliance with new SPS requirements. Tsunehiro Otsuki *et al.*, 'Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports,' *Food Policy* 26, (2001), 495-514: 503. (Ng and Yeats 1999).

2.2 Background to the SPS Agreement

One important aim of the Uruguay Round of trade negotiations was the liberalization of the agricultural sector. This sector had remained subject to much protectionism, despite the existing GATT rules. However, negotiators were very aware of the possibility that progress towards lowering traditional trade barriers in the agricultural sector, through the negotiation of an Agreement on Agriculture, could be made ineffective by the increased use of SPS measures for protectionist purposes. They realized that, aside from those SPS measures that are based on legitimate health concerns, many SPS measures exist with more questionable bases. Clearly governments, under the influence of domestic industry pressure groups, may misuse SPS measures as disguised trade barriers for protectionist purposes.

Thus special disciplines for SPS measures were seen as crucial and inherently linked to the attempts to liberalize the agricultural sector. The Punta Del Este Declaration, which set out the agenda for the Uruguay Round negotiations, called for the liberalization of trade in agricultural products and for bringing “...all measures affecting import access...under strengthened and more operationally active GATT rules and disciplines” by, *inter alia*, “minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.”⁷

At first, the idea was to strengthen the rules in the Tokyo Round Agreement on Technical Barriers to Trade (known as the Standards Code) with respect to SPS measures. However, as negotiations progressed, the issue of SPS measures was seen as meriting special attention, apart from the larger genus of technical standards. As a result, two separate agreements on technical barriers to trade emerged from in the Uruguay Round: first, the Agreement on Technical Barriers to Trade (“TBT Agreement”) applicable to technical regulations, standards and conformity assessment procedures other than sanitary or phytosanitary measures; and second, the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”).

⁷ Ministerial Declaration on the Uruguay Round: Declaration of September 20, 1986, Sept. 20, 1986, GATT B.I.S.D. 33S/19 (1987) at 20.

2.3 Main Features of the SPS Agreement

The SPS Agreement aims to balance two competing interests. On the one side is the sovereign right of Member governments to enact measures for the protection of human, animal and plant life or health in their territories against risks contained in imported products. On the other side is the goal of liberalizing trade in agricultural and food products. The SPS Agreement tries to balance these interests by recognizing the right of Members to enact SPS measures and to determine the level of health protection they want to ensure in their territories, while setting certain limits for the exercise of these rights.

The SPS Agreement lays down specific rules and disciplines applicable to SPS measures. Going further than a mere elaboration and clarification of the relevant rules of the GATT 1994, the SPS Agreement establishes a new, comprehensive set of norms for the adoption, maintenance and enforcement of SPS measures.

The SPS Agreement introduces scientific disciplines into WTO law by using science as the benchmark against which SPS measures are tested. It requires that Members not maintain SPS measures without sufficient scientific evidence and that they base their SPS measures on a risk assessment. Certain requirements are set for risk assessments. Where insufficient scientific evidence exists, Members are allowed to take provisional measures, subject to certain requirements. Further, the SPS Agreement encourages, without obliging, Members to harmonize their SPS measures around international standards, where these exist. If Members wish to adopt SPS measures that are not based on international standards, they must provide scientific justification for these deviating measures.

In addition to the scientific disciplines on SPS measures, the SPS Agreement incorporates and elaborates GATT disciplines relevant to measures for the protection of human, animal or plant life or health. For example, SPS measures must be necessary to protect human, animal or plant life or health. Members may not adopt measures that are more trade restrictive than required to achieve their chosen level of protection and must take into account the aim of minimizing negative trade effects when choosing their appropriate level of protection. The SPS Agreement prohibits SPS measures that discriminate between Members or between a Member's own territory and that of other Members or are applied so as to constitute a disguised restriction on trade. Members

may not make arbitrary or unjustifiable distinctions in the levels of protection they deem appropriate in different but comparable situations.

The SPS Agreement also creates novel disciplines, specifically designed to minimize the trade-restrictive effect of legitimate SPS measures. It obliges Members to accept different SPS measures as equivalent to their own where they have been shown to achieve the same level of protection, and to adapt their measures to take account of differences such as pest- and disease free status (and low pest and disease prevalence) in different countries and regions.

Further, the SPS Agreement sets out procedural rules to ensure that the adoption and application of legitimate SPS measures do not unnecessarily limit trade. It lays down transparency requirements for new or amended SPS measures. It also obliges Members to restrict administrative procedures for control, inspection and approval to ensure that they are no more burdensome, lengthy or costly than is reasonable and necessary. An SPS Committee is established to oversee the operation and implementation of the SPS Agreement and special rules are established to deal with scientific expertise in dispute settlement.

Finally, particular rules are in place to address the special position of developing countries. These rules are aimed at the provision of technical assistance to developing country Members as well as special and differential treatment of developing countries.

The rules of the SPS Agreement have been clarified and given content by the rulings of panels and the Appellate Body in disputes brought under this Agreement. The most recent in this line of decided cases is the *Japan-Apples* dispute.

3 Facts of the *Japan-Apples* dispute

Like many island countries, Japan maintains strict phytosanitary controls to prevent the introduction of pests and diseases into its territory. One of the quarantine pests regulated against is the fire-blight bacterium.

The fire-blight bacterium causes infected parts of plants to wither, darken and die. Fire blight is believed to be native to the United States, and since its discovery in 1793, has evinced trans-oceanic dissemination. It is now found in some parts of Canada, Mexico, Great Britain, Egypt, New Zealand, Europe and the Mediterranean. Latin America, and

large parts of Africa and Asia, including Japan, appear to be fire blight-free. Hosts of fire blight are apple fruit, pears, quince, loquats and several garden plants.

Under the Plant Protection Law and the Enforcement Regulations, Japan prohibits the importation of host plants of 15 quarantine pests, including the bacterium fire blight. However, the prohibition may be lifted on a case-by-case basis subject to certain conditions. With respect to imports of apple fruit from the United States, Japan lifted the prohibition, provided that ten cumulative requirements were met. These included that: the fruit must be produced in designated fire blight-free orchards; the export orchards must be free of plants infected with fire blight and other host plants of fire blight; the fire blight-free orchards must be surrounded by a 500-meter buffer zone; the orchards must be inspected three times a year (twice by US officials and once by US and Japanese officials jointly); harvested apples, harvesting containers and packing facilities must be disinfected; fruit destined for Japan must be kept separated from other fruit; US officials must certify that the fruit are fire blight-free and disinfected; and Japanese officials must confirm that the certification was made by the US official, and that the disinfection treatment and orchard designations were properly done.

The United States challenged the SPS requirements imposed by Japan on the grounds that they were in violation of certain obligations under the SPS Agreement. The Panel found that Japan's SPS measure violated the following provisions of the SPS Agreement: the obligation not to maintain an SPS measure without sufficient scientific evidence under Article 2.2; the requirement in Article 5.7 that relevant scientific evidence be insufficient in order to justify the application of provisional measures; and the requirement that an SPS measure be based on a risk assessment within the meaning of Article 5.1.⁸ On appeal, the Appellate Body upheld all the challenged findings of the Panel.⁹

In their rulings on the *Japan-Apples* dispute, the Panel and the Appellate Body built upon the interpretations of the SPS Agreement developed in previous decisions, and further clarified the meaning of the obligations contained therein. In doing so, they lent more precise content to the disciplines that the SPS Agreement imposes on

⁸ Panel Report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, as upheld by the Appellate Body Report, WT/DS245/AB/R: para. 9.1 (hereinafter "Panel Report, *Japan-Apples*").

⁹ Appellate Body Report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003: para. 243 (hereinafter "Appellate Body Report, *Japan-Apples*").

governments' ability to apply SPS measures that affect international trade. This makes the *Japan-Apples* dispute of interest for African trade in agricultural products as it establishes the grounds for possible challenges to the SPS measures of their trading partners. For this reason, the main findings in this case will be discussed below and their possible implications for African agricultural exports will be highlighted.

4 Sufficient Scientific Evidence

In *Japan-Apples*, the US claimed that Japan's SPS requirements violated Article 2.2 of the SPS Agreement. This article establishes science as the touchstone against which SPS measures will be judged. It requires that SPS measures be based on scientific principles and not be maintained without "sufficient scientific evidence", except as provided by Article 5.7. The interpretation of these requirements in the case law is important in clarifying the content of the scientific disciplines against which SPS measures can be challenged.

The *Japan-Apples* dispute is interesting in this regard as it is the first case ever where a panel examined the meaning of the words "scientific evidence" in Article 2.2. In this case, the Panel held that in order to be "scientific" the evidence must be gathered through scientific methods.¹⁰ It also established that both direct and indirect evidence can be regarded as "scientific", although the probative value ascribed to each would differ.¹¹ According to the Panel, "evidence" excludes insufficiently substantiated information and non-demonstrated hypotheses.¹²

A second question that arose in this dispute was when the scientific evidence would be regarded as "sufficient" for purposes of Article 2.2. The Appellate Body in *Japan-Agricultural Products II* had already examined this issue and had found that sufficiency is a relational concept and thus that there must be a sufficient or adequate relationship between the SPS measure and the scientific evidence.¹³ In *Japan-Apples*, the meaning of the word "sufficient" in Article 2.2 was again at issue. The Panel followed the interpretation of the Appellate Body in *Japan-Agricultural Products II*, which it took to

¹⁰ Panel Report, *Japan-Apples*, para 8.92.

¹¹ *Id.*, paras 8.91 and 8.98-8.99.

¹² *Id.*, para 8.93.

¹³ Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999: para. 73 (hereinafter "*Japan-Agricultural Products II*").

mean that an objective or rational relationship between the scientific evidence and the SPS measure is required.¹⁴ It then stated that although the term “sufficient” is clearly to be considered in relation to the SPS measure itself, “scientific evidence relates to a risk and is supposed to confirm the existence of a given risk.”¹⁵ It thus linked the concept of sufficiency in Article 2.2 to the extent to which the scientific evidence indicates the existence of a risk.

After examining the scientific evidence submitted to it, the Panel held that a *negligible*¹⁶ risk of transmission of fire blight through apple fruit was shown and there was no sufficient scientific evidence that apple fruit was likely to serve as a pathway for the entry, establishment or spread of fire blight in Japan.¹⁷ In coming to this conclusion, the Panel disassembled the sequence of events on the transmission pathway for fire blight, in order to identify the risk, and then compared the risk so identified with the measure at issue.¹⁸ As a result, the Panel held that Japan’s measure, which consisted of the range of cumulative requirements described above, was “clearly disproportionate” to the negligible risk identified.¹⁹ The Panel thus introduced a *proportionality test* into the “rational relationship” requirement in Article 2.2.²⁰

¹⁴ *Id.*, paras 8.101-8.103.

¹⁵ *Id.*, para. 8.104.

¹⁶ One of the experts consulted by the Panel, Dr Hayward, indicated that the standard scientific definition of “negligible” was a likelihood of between zero and one in one million.

¹⁷ Panel Report, *Japan-Apples*, paras. 8.169 and 8.176.

¹⁸ The Panel based this finding on its conclusions on the basis of the evidence available to it with regard to mature symptomless apples and other apples. With regard to mature, symptomless apples, it found that infection with fire blight had not been established; that populations of endophytic bacteria have not been found and epiphytic bacteria are very rare; and that the risk of completion of the transmission pathway is negligible. With regard to apples other than mature, symptomless fruit, it held that infected apples are capable of harbouring populations of bacteria which could survive through the various stages of commercial handling, storage and transportation; that risks of errors of handling or illegal actions could legitimately be taken into account, although the experts considered these risks small or debatable; but that completion of the last stage of the transmission pathway (the transmission of the bacteria to the host plant) was not shown to be likely. This was because only a reduced number of bacteria would survive commercial storage, handling and transportation and the existence of a vector (such as rain splash or bees), which could transmit the bacteria from the imported apples to the host apple plant in Japan, had not been established. Panel Report, *Japan-Apples*, paras 8.136, 8.139, 8.153, 8.157, 8.161, 8.168.

¹⁹ *Id.*, paras 8.181 and 8.198.

²⁰ The Panel proceeded to examine two elements of Japan’s measure, namely the buffer-zone requirement and the requirement of inspections three times yearly, as instances of elements most obviously maintained without sufficient scientific evidence either as such or when applied cumulatively with other elements. *Id.*, paras 8.182-8.197.

On appeal, the Appellate Body accepted as appropriate the methodology of the Panel of disassembling the sequence of events and comparing the risk to the measure, in its Article 2.2 analysis, but noted that this does not exhaust the range of possible methodologies and that the circumstances of each case will determine the appropriateness of a given methodology.²¹ The Appellate Body also did not take issue with the Panel's view that "clear disproportion" between the risk and the measure implies that a "rational or objective" relationship does not exist.²² It rejected Japan's contention that the Panel should have accorded Japan a "certain degree of discretion" in the way in which it chose, weighed and evaluated the scientific evidence, finding that deference by panels to the findings of national authorities would not be compatible with the standard of review²³ applicable to panels.²⁴

Since the *Japan-Apples* dispute it is clear that the SPS measure of a WTO Member is vulnerable to challenge if it is not proportionate to the risk it is meant to address. If the risk established by the scientific evidence is negligible, rigorous SPS requirements will not pass muster under Article 2.2.

5 Provisional Measures

The reliance of the SPS Agreement on scientific evidence as the benchmark against which SPS measures are tested for legitimacy is not absolute. Instead, the Agreement recognises the fact that situations may arise where governments need to act promptly to prevent suspected risks without waiting for conclusive scientific evidence confirming the existence and extent of the risk. This is sometimes referred to as acting in accordance with the precautionary principle, or the precautionary approach, and is a highly controversial aspect of risk regulation. According to the Appellate Body in *EC-Hormones*, the precautionary principle "finds reflection in Article 5.7 of the SPS Agreement."²⁵

²¹ Appellate Body Report, *Japan-Apples*, para. 164.

²² *Id.*, para. 163.

²³ It is well-established case law that the standard of review to be applied by panels is that of an "objective assessment" of the matter, which implies neither total deference by panels to national authorities' determinations, nor *de novo* review. The issue of the appropriate standard of review is discussed in section 8.3 below.

²⁴ Appellate Body Report, *Japan-Apples*, para. 165.

²⁵ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, adopted 13 February 1998, DSR 1998 I, 135: para. 124.

Article 5.7 allows Members to take provisional measures, provided four cumulative requirements are met, namely: (1) measure is imposed in respect of a situation where “relevant scientific information is insufficient”; (2) the measure is adopted “on the basis of available pertinent information”; (3) the Member maintaining the measure seeks to “obtain the additional information necessary for a more objective assessment of risk”; and (4) reviews the measure accordingly “within a reasonable period of time”.²⁶

The first requirement of Article 5.7 is particularly important as it can be regarded as the trigger for the application of this article justifying the use of provisional measures. In *Japan-Apples*, the first requirement of Article 5.7 was addressed for the first time ever in the case law, making this a particularly interesting case for the understanding of the role of the precautionary principle in the SPS Agreement.

In this case, Japan argued that, if the Panel were to find that its SPS measure violated Article 2.2, its measure could be justified as a provisional measure under Article 5.7. The Panel began its examination of this issue by determining whether the first requirement for Article 5.1 was met. The Panel held that the fact that a measure has been found to be maintained “without sufficient scientific evidence” under Article 2.2 does not automatically mean that “relevant scientific evidence is insufficient” under Article 5.7, which is a separate question.²⁷ The sufficiency requirement under Article 2.2 requires that the evidence *supporting* the SPS measure applied be sufficient, whereas the evidence to be considered under Article 5.7 “includes not only evidence supporting Japan’s position, but also evidence supporting other views.”²⁸ In this case, the Panel found that a wealth of relevant, high quality, scientific evidence was available²⁹ on the matter at issue and that this was thus “clearly not the type of situation Article 5.7 was intended to address.”³⁰ According to the Panel, Article 5.7 was instead “obviously designed to be invoked where little, or no, reliable evidence was available on the

²⁶ Appellate Body Report, *Japan-Agricultural Products II*, para. 89.

²⁷ Panel Report, *Japan-Apples*, para. 8.215.

²⁸ *Id.*, para. 8.216. The Panel later concluded that the term “insufficient scientific evidence” in Article 5.7 refers to evidence in general on the SPS question at issue (in this case the risk of transmission of fire blight through apple fruit). *Id.*, para. 8.218.

²⁹ The Panel noted that much relevant evidence had been submitted by the parties and panel experts, and scientific studies and practical experience on the matter had accumulated for the past 200 years. *Id.*, paras 8.216 and 8.219.

³⁰ *Id.*, para. 8.219.

subject matter at issue.”³¹ It thus concluded that the first requirement of Article 5.7 was not met and that Japan’s measure could therefore not be justified under this Article.³²

Japan appealed against the Panel’s finding of non-compliance with the first requirement of Article 5.7. In addressing Japan’s arguments, the Appellate Body further clarified the meaning of this requirement. It identified a contextual link between the first requirement of Article 5.7 and the obligation to perform a risk assessment in Article 5.1.³³ Thus, relevant scientific evidence will be regarded as “insufficient” for purposes of Article 5.7 if it “does not allow, in qualitative or quantitative terms, the performance of an adequate assessment of risks as required under Article 5.1.”³⁴ According to the Appellate Body, the factual findings of the Panel showed that the scientific evidence available *did* permit the performance of a risk assessment under Article 5.1 and the relevant scientific evidence was thus not insufficient within the meaning of Article 5.7.

Japan also appealed the Panel’s finding that Article 5.7 is intended only to address situations where little, or no, reliable evidence is available on the subject matter at issue. Japan argued that this would not provide for situations of “unresolved uncertainty”. According to Japan, Article 5.7 covers not only situations of “new uncertainty” (where a new risk is identified) but also “unresolved uncertainty” (where there is considerable scientific evidence but still uncertainty remains). The Appellate Body, however, upheld the Panel’s finding, pointing out that Article 5.7 “is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence”.³⁵ Moreover, it held that the Panel’s finding referred to the availability of *reliable* evidence, and thus did not exclude cases “where the available evidence is more than minimal in quantity, but has not led to reliable or conclusive results.”³⁶

This analysis of the first requirement of Article 5.7 is groundbreaking. It clarifies the role of Article 5.7, establishing that it is there to address situations where there is a true lack

³¹ *Id.*, para. 8.219.

³² *Id.*, para. 8.222.

³³ The Appellate Body found these contextual elements in the following: first, the concepts of relevance and insufficiency in Article 5.7 imply a relationship between scientific evidence and something else; second, Article 5.1, obliging Members to base their measures on a risk assessment, contains a key discipline under Article 5 and informs the other provisions of Article 5; and third, Article 5.7 itself refers to “a more objective assessment of risks”. *Id.*, para. 179.

³⁴ *Id.*, para. 179. The requirements for a risk assessment are discussed in section 6 below.

³⁵ *Id.*, para. 184.

³⁶ *Id.*, para. 185.

of sufficient scientific evidence regarding the risk at issue, either due to the small quantity of evidence on new risks, or due to the fact that accumulated evidence is inconclusive or unreliable. In either case, the insufficiency of the evidence must be such as to make the performance of an adequate risk assessment impossible. Thus Article 5.7 cannot be used to justify measures that are adopted in disregard of existing scientific evidence. The Panel and Appellate Body's findings establish the fact that the precautionary principle, as embodied in Article 5.7, does not create a broad loophole in the scientific disciplines of the SPS Agreement through which protectionist measures can slip. Rather, it creates a limited exception for cases where there is a true lack of relevant and reliable scientific evidence on the risk at issue.

6 Risk Assessment

A second, more concrete, scientific discipline on SPS measures is contained in Article 5.1 of the SPS Agreement. According to this Article, an SPS measure must be "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." What is meant by a risk assessment with regard to phytosanitary risks is defined in paragraph 4 of Annex A to the SPS Agreement as: "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences".

In *Japan-Apples*, the US claimed that the obligation to base its SPS measure on a risk assessment was not complied with by Japan. The Panel therefore examined the requirements of Article 5.1 and the definition in Annex A, to determine whether Japan had violated the obligations contained therein. According to the Panel, under these provisions, this determination involves an evaluation of whether the risk assessment: (1) meets the requirements of the definition in Annex A paragraph 4 (quoted above); (2) is "appropriate to the circumstances"; and (3) takes "into account risk assessment techniques developed by the relevant international organizations." As the Panel found that the last two factors pervade the entire assessment of risk, it examined them first.³⁷

³⁷ Panel Report, *Japan-Apples*, para. 8.237.

With regard to the question whether Japan's risk assessment was "appropriate to the circumstances", the Panel first found, rather obviously, that as Japan's measure was a phytosanitary measure, the risk assessment must focus on risks related to plant life and health.³⁸ It then noted that the term "as appropriate to the circumstances" has been interpreted, in *Australia-Salmon*, to provide some flexibility for risk assessments, on a case-by-case basis, including consideration of country-specific situations.³⁹ It therefore found that Japan's fire blight-free status and its climatic conditions, which were favourable to the spread of fire blight, were relevant "circumstances" to be taken into account in Japan's risk assessment.⁴⁰

With regard to the requirement that a risk assessment take into account the risk assessment techniques developed by the relevant international organizations, the Panel noted that Article 5.1 merely requires that these risk assessment techniques be "taken into account", rather than that a risk assessment be "based on" or "in conformity with" them. Thus the Panel found that although such techniques should be considered relevant, a failure to respect each and every aspect of them would not necessarily imply a violation of the requirements of Article 5.1. Nevertheless, the Panel held that reference to these risk assessment techniques could provide very useful guidance as to whether the risk assessment at issue constitutes a proper risk assessment within the meaning of Article 5.1.⁴¹

It is thus clear that the risk assessment techniques developed by the relevant international organizations, while useful, are not determinative to the evaluation whether a risk assessment complies with Article 5.1.

The Panel then examined the first requirement, namely that the risk assessment must comply with the definition in paragraph 4 of Annex A. This definition, quoted above, requires, *inter alia*, that the risk assessment evaluate the likelihood of entry,

³⁸ *Id.*, para. 8.238.

³⁹ Panel Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS/18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R: para. 8.71.

⁴⁰ *Id.*, para. 8.240 and note 372.

⁴¹ Panel Report, *Japan-Apples*, para. 8.241. In this context, the Panel examined two relevant standards set by the International Plant Protection Convention, ISPM 2 on Guidelines for Pest Risk Analysis, and ISPM 11 on Pest Risk Analysis for Quarantine Pests. The parties agreed that both instruments build upon the same framework, thus the Panel focused on the key issue of whether Japan's risk assessment sufficiently identified and assessed the possible pathways for the introduction and spread of fire blight through apple fruit and the likelihood for their being realised, as required by both instruments. *Id.*, para. 8.244.

establishment or spread of a pest or disease. In previous case law, a requirement that the risk assessment be sufficiently *specific* has been read into this provision. The issue of specificity was again addressed in *Japan-Apples*. In this case Japan's risk assessment evaluated the risk of entry, establishment and spread of fire blight through a collection of possible hosts, including apples. The Panel found that as Japan's risk assessment did not evaluate the risks in relation to apple fruit separately from those posed by other hosts, whereas scientific evidence showed that the risks vary significantly depending on the vector (host plant) involved, it did not meet the requirement of specificity.⁴²

On appeal, Japan argued that the methodology of a risk assessment is not regulated by the SPS Agreement and a Member may thus decide for itself whether to analyse the risk on the basis of a particular pest or disease, or on the basis of a particular commodity.⁴³ The Appellate Body upheld the Panel's finding, holding that it did not limit a Member's choice of risk assessment methodology. Members are free to organise their risk assessments along the lines of pests or diseases, or of the imported commodity or host, provided that a likelihood of entry, establishment or spread of the disease is attributed to *each agent specifically*.⁴⁴ The Appellate Body emphasised that, as held in *EC-Hormones*, the risk to be specified in a risk assessment is the harm concerned as *well as* the precise agent that may cause the harm.⁴⁵

In addition, the Panel found that Japan had not evaluated the risk according to the SPS measures "which might be applied" as required by the Annex A definition, as its risk assessment examined only the SPS requirements it had actually imposed to address the risk of fire blight. The Panel held that "consideration should be given not just to those specific measures which are currently in application, but at least to a potential range of relevant measures."⁴⁶ On appeal, the Appellate Body found:

We agree with the Panel that this phrase "refers to the measures *which might* be applied, not merely to the measures which *are being* applied." The phrase "which might be applied" is used in the conditional tense. In this sense, "might" means: "were or would be or have been able to, were or would be or have been allowed to, were or would perhaps". We understand this phrase to imply that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing

⁴² Panel Report, *Japan-Apples*, paras 8.268-271.

⁴³ Appellate Body Report, *Japan-Apples*, para. 204.

⁴⁴ *Id.*

⁴⁵ *Id.*, para. 202.

⁴⁶ Panel Report, *Japan-Apples*, para. 8.285.

Member. In other words, the evaluation contemplated in paragraph 4 of Annex A to the *SPS Agreement* should not be distorted by preconceived views on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*.⁴⁷

Risk assessments must therefore evince an evaluation of a range of possible SPS measures which could be applied to address the risk at issue, and their relative effectiveness, not merely address the measure actually applied. Otherwise they could be regarded as prejudging their own outcome⁴⁸ by showing that the measure actually applied is appropriate and effective, without regard for possible alternatives.

These findings show that panels and the Appellate Body take a strict view of the requirements for a risk assessment. While risk assessments do not have to conform to the risk assessment techniques developed by the relevant international organizations, and some flexibility is allowed in the evaluation of a risk assessment “as appropriate to the circumstances”, the risk assessment itself must be rigorous to comply with the requirements of the Annex A definition. Not only must it specifically evaluate the risk from the particular pest or disease and from the specific host or agent involved, but it must also do so in the light of the various alternative SPS measures that could be applied to address the risk. Not to do so would mean that the risk assessment would fall foul of the requirements of the SPS Agreement.

7 Transparency

An important, though often overlooked, achievement of the SPS Agreement is its promotion of transparency with regard to SPS measures, through its obligations on publication and notification of new and changed measures in Article 7 and Annex B. These obligations enable interested parties to become acquainted with proposed SPS measures in advance, so as to be able to raise their concerns regarding such measures at a stage when their comments could still be taken into account. This enables disputes regarding proposed SPS measures to be resolved through bilateral discussions between the concerned Members and multilateral discussions in the SPS Committee.

The notification obligations in paragraph 5 of Annex B apply to proposed new SPS measures whenever an international standard on the relevant matter does not exist or

⁴⁷ Appellate Body Report, *Japan-Apples*, para. 208 (footnotes omitted).

⁴⁸ This comment was made by one of the experts advising the Panel in *Japan-Apples*. Panel Report, *Japan-Apples*, para. 6.177.

the content of the proposed SPS measure is not substantially the same as the international standard, and if the SPS measure may have a significant effect on trade of other Members. In *Japan-Apples*, the issue arose whether certain changes in Japan's phytosanitary measure "may have a significant effect on trade of other Members" and should thus have been notified. The Panel referred to the guidelines on this concept adopted by the SPS Committee and held that:

...the most important factor in this regard is whether the change affects the conditions for market access for the product concerned, that is, would the exported product (apple fruit from the United States in this case) still be permitted to enter Japan if they complied with the prescription contained in the previous regulations. If this is not the case, then we must consider whether the change could be considered to potentially have a *significant* effect on trade of other Members. In this regard it would be relevant to consider whether the change has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time-consuming administrative formalities.⁴⁹

The crux of the issue is therefore whether the changes have an actual or potential effect on the conditions for market access. If so, the changes must be notified.

This clarification promotes transparency by establishing the wide scope of the notification obligation. An important hurdle faced by exporters of food and agricultural products is a lack of transparency regarding SPS measures with which they must comply. SPS measures are often complex and subject to change, as a result of which exporters have no certainty that their products will have access to the markets in the country of destination. The obligation in the SPS Agreement to notify draft measures before they come into force allows exporters time to become acquainted with possible new measures and to raise their concerns regarding such measures with their governments. In addition, the notification of draft SPS measures assists Members whose exporters are faced with the proposed SPS barriers to trade to obtain information about these measures in order to identify whether they are legitimate measures or whether they could be challenged under the SPS Agreement, either bilaterally with the Member concerned, multilaterally at SPS Committee meetings or in dispute settlement proceedings. For this reason, this finding has the potential to ameliorate the trade impact of new or changed SPS measures.

8 Dispute Settlement

⁴⁹ Panel Report, *Japan-Apples*, para. 8.314. After comparing the two existing measures (which predated the SPS Agreement) with the two new measures, the Panel did not consider that the changes in one measure could have a significant effect on the trade of other Members, and was unable to determine if the changes to the second measure were strictly editorial or introduced substantial changes. It therefore found that the US had failed to make a *prima facie* case of violation of Article 7 SPS.

Most disputes regarding compliance with the rules of the SPS Agreement are addressed either in bilateral consultations between the Members involved, or by means of multilateral discussions raised at SPS Committee meetings. However, Members can also always have recourse to the dispute settlement system of the WTO, as embodied in Articles XXII and XXIII of GATT 1994 and elaborated in the Dispute Settlement Understanding (the “DSU”) to resolve their disputes under the SPS Agreement. Thus, under Article 11.1 of the SPS Agreement, the DSU applies fully and unconditionally to disputes under the SPS Agreement, except as otherwise specifically provided in the SPS Agreement.

To date, there have been thirty formal complaints under the SPS Agreement regarding twenty-six separate issues, three of which only involved minor SPS issues. Consultations are still pending in fifteen cases. A mutually agreed solution has been reported in six cases. Eight disputes, regarding five separate issues, have proceeded to adjudication by a panel under the SPS Agreement and four panel reports have thus far been issued.⁵⁰ All of these have been appealed, resulting in four Appellate Body reports.⁵¹ One dispute is currently still before a panel.⁵² Developing countries⁵³ have been involved in thirteen disputes, in nine cases as complainant and in nine as defendant. However, no African country or LDC has ever initiated a complaint under the SPS Agreement. In only one of the disputes involving developing countries, namely *EC-Biotech Products*, has the dispute proceeded to adjudication.⁵⁴

It is important for African countries to become acquainted with the rules and procedures applicable to the settlement of disputes under the SPS Agreement, in order to promote their use of the dispute settlement system in cases where disputes cannot be otherwise

⁵⁰ See the Panel Reports in *EC – Hormones*, *Australia – Salmon*, *Japan - Agricultural Products*, and *Japan-Apples*.

⁵¹ See the Appellate Body Reports in *EC – Hormones*, *Australia – Salmon*, *Japan - Agricultural Products*, and *Japan - Apples*.

⁵² A panel is ongoing regarding the complaints of the US, Argentina and Canada against the EC’s measures with regard to the products of biotechnology (WT/DS291, 292 and 293).

⁵³ Developing countries here is interpreted broadly to include economies in transition.

⁵⁴ In *Australia-Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (Complaint by the Philippines)*, WT/DS270, the Philippines requested the establishment of a panel once, on July 10, 2003. This panel request was blocked by Australia. The Philippines has not yet submitted its second panel request to the DSB (at which time the decision to establish a panel would be taken by reverse consensus in the DSB and could therefore not be blocked), and thus no panel has yet been established to hear this dispute. In *Turkey-Certain Import Procedures for Fresh Fruit (Complaint by Ecuador)*, WT/DS237, a panel request was submitted by Ecuador on June 14, 2002, but a mutually agreed solution was subsequently reached.

resolved. While financial and resource constraints may play an important role in decisions whether or not to proceed to dispute settlement, a lack of familiarity with the system may also be a hurdle to participation.⁵⁵ For this reason, certain findings in the *Japan-Apples* dispute relevant to the procedural aspects of dispute settlement under the SPA Agreement merit attention here.

8.1 Burden of Proof

Due to the complexity of the facts and scientific evidence in disputes under the SPS Agreement, the question of which party bears the burden of proof with regard to the claims made is particularly significant. The general rule in WTO dispute settlement, also applicable to disputes under the SPS Agreement, is that the initial burden rests on the complaining party to establish a *prima facie* case of inconsistency of the measure complained about with a particular provision of a WTO agreement. When that *prima facie* case is made, the burden of proof moves to the defending party to counter the claimed inconsistency.⁵⁶

The issue of burden of proof arose in *Japan-Apples*. In that case, the US had claimed that there was insufficient scientific evidence, for purposes of Article 2.2, that mature, symptomless apples could form a transmission pathway for fire blight. To counter these arguments, Japan averred that, due to failures in export control systems, infected or immature apples could be exported, and these apples could serve as a pathway for fire blight. The US limited its arguments to the issue of mature, symptomless apples. On the basis of the scientific evidence presented to it, the Panel agreed with the US that Japan's measure, as it applied to mature, symptomless apples, was maintained without sufficient scientific evidence and concluded that it had not been established with sufficient scientific evidence that infected or immature apples could serve as a pathway for the transmission of fire blight.⁵⁷ On appeal, Japan argued that the Panel had erred in shifting the burden of proof to Japan in respect of infected or immature apples before

⁵⁵ This is perhaps illustrated by the fact that other developing countries that have more experience with the system have proceeded to dispute settlement with regard to SPS disputes (for example Ecuador, Argentina, the Philippines, Thailand, India and Nicaragua)

⁵⁶ Appellate Body Report, *EC-Hormones*, para. 98.

⁵⁷ This was due to the fact that Japan did not present sufficient scientific evidence that the last stage of the transmission pathway of fire blight from the infected imported apple to the host plant, was likely to be completed. Panel Report, *Japan-Apples*, para. 8.168.

the US had made a *prima facie* case in that regard. The Appellate Body rejected Japan's contention, holding:

It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof. In fact, the two principles are distinct. In the present case, the burden of demonstrating a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, rested on the United States. Japan sought to counter the case put forward by the United States by putting arguments in respect of apples other than mature, symptomless apples being exported to Japan as a result of errors of handling or illegal actions. It was thus for Japan to substantiate those allegations; it was not for the United States to provide proof of the facts asserted by Japan. Thus, we disagree with Japan's assertion that "the shift of the burden of proof to Japan was made prematurely *before* the demonstration of a *prima facie* case by the United States." There was no "shift of the burden of proof" with respect to allegations of fact relating to apples other than mature, symptomless apples, for Japan was solely responsible for providing proof of the facts it had asserted. Moreover, it was only after the United States had established a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, that the Panel had to turn to Japan's attempts to counter that case.⁵⁸

This finding is useful in clarifying the issue of the burden of proof in cases where there are several hypotheses regarding the perceived risks underlying an SPS measure. It is not necessary for the complainant to address all possible hypotheses and establish that there is insufficient evidence of risk for each.⁵⁹ According to the Appellate Body in this case, the Panel had evidently found it sufficient for the US, in order to establish a *prima facie* case, to address whether mature symptomless apples could serve as a transmission pathway for fire blight. It noted, referring to its previous finding in *US-Wool Shirts and Blouses* that "the nature and scope of evidence required to establish a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case.'"⁶⁰

Once a *prima facie* case is established, the respondent will bear the burden of proving the allegations it makes to refute the complainant's case.

8.2 Experts

In cases under the SPS Agreement, panels are faced with complex scientific and factual evidence. Since panellists are trade experts rather than scientists, they may find it difficult to understand all the scientific issues involved in a dispute. For this reason, the SPS Agreement, in Article 11.2, provides that a panel should consult experts chosen by it in consultation with the parties. The panel may set up advisory technical experts

⁵⁸ Appellate Body Report, *Japan-Apples*, para. 157 (footnotes omitted).

⁵⁹ This was argued by Japan but rejected by the Appellate Body. *Id.*, ¶ 159.

⁶⁰ Appellate Body Report, *Japan-Apples*, para. 160 (footnote omitted).

groups or consult individual experts. In all the SPS disputes so far, the Panels have consulted individual experts.

The question of the role of these panel experts was first discussed in *Japan-Agricultural Products II*, where the Appellate Body clarified that the role of panel experts is to help the panel to understand and evaluate the evidence submitted and the arguments made by the parties. The evidence of panel experts cannot be used by the panel to rule in favour of a party that has not made a *prima facie* case of inconsistency. In *Japan-Apples*, Japan referred to this finding by the Appellate Body to challenge on appeal the Panel's use of experts. Japan argued that the US had not made claims or submitted evidence in respect of the risk of transmission of fire blight by apples other than mature symptomless apples, yet the Panel had made findings of fact with regard to these "other" apples. Japan claimed that the Panel had thus exceeded the bounds of its investigative authority.⁶¹ The Appellate Body rejected Japan's argument, finding that the Panel had acted within the limits of its investigative authority, as "it did nothing more than assess the relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts."⁶² It thus clarified that a panel may use the evidence of its experts to assist it in assessing not only the claims of the complaining Member, but also the allegations of the responding Member. In doing so, it cannot be said to be exceeding its authority under Article 11.2.

This finding is important in clarifying the respective roles of the panel, its experts and the parties. The panel process is adversarial, with the panel acting as impartial arbiter between the parties. Parties remain responsible for bringing arguments and evidence to support their claims. The role of panel experts is limited to assisting the panel to understand the complex facts and arguments brought before it by the complainant or the respondent, and cannot be used by the panel to make the case for one of the parties.

8.3 Standard of Review

An additional issue that arises with regard to dispute settlement is the standard of review to be applied by panels in their examination of the matter before them. This raises the question whether panels are entitled to interfere with the regulatory

⁶¹ *Id.*, para. 158.

⁶² *Id.*

determinations of Member governments, or should instead defer to these determinations. In previous cases it has been established that the standard of review to be applied by panels is neither deferential nor one of *de novo* review. Instead, a panel must make “an objective assessment” of the matter before it, including the facts of the case, according to Article 11 of the Dispute Settlement Understanding (DSU).

The issue which arose in *Japan-Apples* with regard to the standard of review was whether the precautionary principle should guide a panel’s evaluation of the evidence before it. Japan argued, on appeal, that the Panel had failed to adequately take into account the precautionary principle in its evaluation of the evidence. The panel experts in this case had recognized the need for caution with respect to the elimination of the phytosanitary measures protecting Japan from fire blight. According to Japan, this fact should have been given greater weight by the Panel in considering the evidence regarding the completion of the transmission pathway for fire blight.⁶³

The Appellate Body noted that Japan did not argue that the precautionary principle should have been applied as distinct from the provisions of the SPS Agreement, nor did it argue that the Panel should have used the precautionary principle as part of its interpretative analysis of the Agreement. Instead, it understood Japan to argue that the principle was embodied in the cautionary opinions of the experts and *should have been given greater weight* in the Panel’s conclusions on the completion of the pathway. The Appellate Body then noted that it is established case law that the credibility and weight to be properly ascribed to a particular piece of evidence is in the discretion of a panel as the trier of facts. This discretion is limited only by a panel’s duty to make an “objective assessment” of the facts. Since Japan made no argument challenging the objectivity of the Panel’s assessment, it failed to establish a violation of Article 11 of the DSU.⁶⁴

This finding of the Panel reinforces the conclusion that the possible relevance of the precautionary principle for purposes of the SPS Agreement is limited to the particular formulation it has been given in Article 5.7. Outside this article, the precautionary principle plays no role, according to the case law, in guiding the interpretation of the SPS Agreement or the evaluation of the evidence. The standard of review to be applied

⁶³ This evidence was considered for purposes of the Panel’s finding under Article 2.2 SPS.

⁶⁴ Appellate Body Report, *Japan-Apples*, para. 283.

by panels remains an “ objective assessment” of the matter, even in cases of scientific uncertainty.

9 Recent Developments

The WTO’s Dispute Settlement Body (DSB) adopted the Panel and Appellate Body reports in the *Japan-Apples* dispute on 10 December 2003. As the Panel and the Appellate Body reports found Japan’s SPS measure to be in violation of the SPS Agreement, the DSB recommended that Japan bring its measure into conformity with that agreement. An agreement was reached between Japan and the US, giving Japan a reasonable period of time, expiring on 30 June 2004, to do so. During the agreed period, Japan adopted new measures to comply with the DSB’s recommendations and rulings, cutting down the frequency of sampling of fruit-bearing trees from three times a year to once a year.

A dispute arose between Japan and the US, regarding whether Japan’s new measures are in conformity with the SPS Agreement. According to the US, Japan’s new measures retain almost all the phytosanitary restrictions of the original measure found to violate the SPS Agreement. On 19 July 2004, the United States requested the establishment of a compliance panel to determine whether Japan’s new measures are consistent with the SPS Agreement, the GATT 1994 and the Agreement on Agriculture.⁶⁵ In addition, on the same day the United States requested the DSB to grant it authorisation to retaliate against Japan by suspending concessions and other obligations with respect to Japan at a level of US\$143.4 million per year, which it claims is equivalent to the level of nullification and impairment of benefits it is suffering due to Japan’s non-compliance.⁶⁶ Japan disputes this level of retaliation and has requested that the matter be referred to arbitration under Article 22.6.⁶⁷

10 Concluding remarks

The implications of the Panel and Appellate Body reports in the *Japan-Apples* dispute for African agricultural trade lie in the way in which they have fleshed out and further

⁶⁵ *Recourse to Article 21.5 of the DSU by the United States: Request for the Establishment of a Panel*, WT/DS245/11, dated 20 July 2004.

⁶⁶ *Recourse to Article 22.2 of the DSU by the United States*, WT/DS245/12, dated 20 July 2004.

⁶⁷ *Request by Japan for Arbitration under Article 22.6 of the DSU*, WT/DS245/13, dated 29 July 2004.

clarified the disciplines of the SPS Agreement on the application of SPS measures. In many respects the disciplines have been tightened, making it easier to challenge an SPS measure of a trading partner. The relevant findings in this dispute can be summarised as follows:

- Since the *Japan-Apples* dispute it is clear that the SPS measure of a WTO Member is vulnerable to challenge if it is not proportionate to the risk it is meant to address. This means that if a Member imposes a very strict and burdensome SPS measure in a situation where the risk is negligible, its measure is vulnerable to a challenge under the SPS Agreement.
- The *Japan-Apples* dispute has clarified the trigger of “insufficient scientific evidence” for the application of provisional measures under Article 5.7. In so doing, it has elucidated the role of Article 5.7, establishing that it does not create a broad loophole in the disciplines of the SPS Agreement for cases where a Member alleges that there is scientific uncertainty regarding the risk at issue. Instead, Article 5.7 is only there to address situations where there is a true lack of sufficient scientific evidence regarding the risk, either due to the small quantity of evidence on new risks, or due to the fact that accumulated evidence is inconclusive or unreliable. In either case, the insufficiency of the evidence must be such as to make the performance of an adequate risk assessment impossible.
- The *Japan-Apples* dispute has also reaffirmed previous case law regarding the strict requirements for a risk assessment under Article 5.1. While risk assessments do not have to conform to the risk assessment techniques developed by the relevant international organizations, and some flexibility is allowed in the evaluation of a risk assessment “as appropriate to the circumstances”, the risk assessment itself must be rigorous to comply with the requirements of the Annex A definition. Not only must it specifically evaluate the risk from the particular pest or disease and from the specific host or agent involved, but it must also do so in the light of the various alternative SPS measures that could be applied to address the risk.
- The transparency of SPS measures has been promoted by the *Japan-Apples* case, in establishing when amended SPS measures have to be notified. It is now clear that the crux of the issue is whether the changes in the SPS measure have an actual or

potential effect on the conditions for market access. If so, the changes must be notified. If such a measure is not notified, it may be challenged under paragraph 5 of Annex B.

- The *Japan-Apples* dispute has shed light on the issue of the burden of proof in cases where there are several hypotheses regarding the perceived risks underlying an SPS measure. It is now clear that it is not necessary for the complainant to address all possible hypotheses and establish that there is insufficient evidence of risk for each. Instead, once the complainant has made a *prima facie* case, the burden of proof shifts to the respondent to bring evidence to support its claims regarding additional possible risks.

- The role of panel experts in SPS disputes has been further clarified by the *Japan-Apples* dispute. It is now established that a panel may use the evidence of its experts to assist it in assessing not only the claims of the complaining Member, but also the allegations of the responding Member. In doing so, it cannot be said to be exceeding its authority under Article 11.2. However, the parties are still responsible for proving their own cases.

- *Japan-Apples* has established that the precautionary principle plays no role in guiding the evaluation of the evidence by a panel. The standard of review to be applied by panels remains an “objective assessment” of the matter, even in cases of scientific uncertainty. Thus a panel will not give greater weight to certain evidence merely because it embodies a cautionary opinion.

It is hoped that this discussion of the *Japan-Apples* dispute will contribute to elucidating the disciplines of the SPS Agreement and encourage reliance thereon by African countries, to challenge the SPS market barriers faced by their exporters of agricultural products on the markets of their trading partners.



11 Further Reading

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