

JAPAN – AGRICULTURAL PRODUCTS II¹

(DS76)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>SPS Arts. 2.2, 5.7, 5.6 and 5.1</i>	Establishment of Panel	<i>18 November 1997</i>
			Circulation of Panel Report	<i>27 October 1998</i>
Respondent	<i>Japan</i>		Circulation of AB Report	<i>22 February 1999</i>
			Adoption	<i>19 March 1999</i>

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Varietal testing requirement (Japan's Plant Protection Law), under which the import of certain plants was prohibited because of the possibility of their becoming potential hosts of codling moth.
- **Product at issue:** Eight categories of plants originating from the United States, namely, apricots, cherries, plums, pears, quince, peaches (including nectarines), apples and walnuts.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **SPS Art. 2.2 (sufficient scientific evidence):** The Appellate Body upheld the Panel's finding that Japan's varietal testing requirement was maintained without sufficient scientific evidence in violation of Art. 2.2.³
- **SPS Art. 5.7 (provisional measure):** The Appellate Body upheld the Panel's finding that the varietal testing requirement was not justified under Art. 5.7 because Japan did not meet all the requirements for the adoption and maintenance of a provisional SPS measure as set out in Art. 5.7.
- **SPS Art. 5.6 (appropriate level of protection – alternative measures):** Having found that the United States, as a complainant, did not claim and, therefore, could not have established a prima facie case of Japan's inconsistency with the existence of an alternative measure (determination of sorption levels) under Art. 5.6, the Appellate Body reversed the Panel's finding that Japan acted inconsistently with Art. 5.6.

Then, as to the alternative measure proposed by the United States – i.e. testing on a product-by-product basis, the Appellate Body upheld the Panel's finding that the United States failed to prove that Japan's measure was “more trade-restrictive than required” in relation to the alternative measure proposed by the United States (testing by product) and thus that it had violated Art. 5.6 because testing by product did not achieve Japan's appropriate level of protection.⁴

- **SPS Art. 5.1 (risk assessment):** As the Appellate Body had found that the Panel improperly applied judicial economy to the US claim under Art. 5.1 in relation to apricots, pears, plums and quince – the four products that were not examined by the Panel, it completed the legal analysis and found that Japan's measure violated Art. 5.1 for these four products as it was not based on a proper risk assessment.

¹ *Japan – Measures Affecting Agricultural Products*

² Other issues addressed: objective assessment (DSU Art. 11); SPS Agreement Art. 7 and Annex B, para. 1 (measures); judicial economy; burden of proof; consultation with scientific experts; and terms of reference/specificity of panel request.

³ The Appellate Body also agreed with the Panel's legal standard for the analysis of Art. 2.2: the obligation in Art. 2.2 not to maintain an SPS measure without “sufficient scientific evidence” requires that “there be a rational or objective relationship between the SPS measure and the scientific evidence”.

⁴ The Appellate Body referred back to *Australia – Salmon* for the three elements that an alternative measure should meet within the meaning of Art. 5.6: the alternative measure (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of phytosanitary protection; and (iii) is significantly less restrictive to trade than the measure at issue.