AUSTRALIA - MEASURES AFFECTING IMPORTATION OF SALMON

Report of the Appellate Body
WT/DS18/AB/R

Adopted by the Dispute Settlement Body on 6 November 1998

Australia, *Appellant/Appellee*
Canada, *Appellant/Appellee*
European Communities, India, Norway and the United States, *Third Participants*

Present:
Ehlermann, Presiding Member
Beeby, Member
El-Naggar, Member

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I. INTRODUCTION

1. Australia and Canada appeal from certain issues of law and legal interpretations in the Panel Report, *Australia - Measures Affecting Importation of Salmon*.[1] The Panel was established to consider a complaint by Canada regarding Australia's prohibition on the importation of fresh, chilled or frozen salmon from Canada under Quarantine Proclamation 86A ("QP86A")[2], dated 19 February 1975 and any amendments or modifications thereto.

2. Before the promulgation of QP86A on 30 June 1975, Australia imposed no restrictions on the importation of salmonid products. QP86A "prohibit[s] the importation into Australia of dead fish of the sub-order Salmonidae, or any parts (other than semen or ova) of fish of that sub-order, in any form unless: [...] prior to importation into Australia the fish or parts of fish have been subject to such treatment as in the opinion of the Director of Quarantine is likely to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals or plants". Pursuant to QP86A and in accordance with the authority delegated therein, the Director of Quarantine has permitted the entry of commercial imports of heat-treated salmon products for human consumption as well as non-commercial quantities of other salmon (primarily for scientific purposes) subject to prescribed conditions.[3] Canada requested access to the Australian market for fresh, chilled or frozen, i.e., uncooked, salmon. Australia conducted an import risk analysis for uncooked, wild, adult, ocean-caught Pacific salmonid product ("ocean-caught Pacific salmon"). This category of salmon is to be distinguished from the other categories of salmon for which Canada seeks access to the Australian market ("other Canadian salmon").[4] The risk analysis on ocean-caught Pacific salmon was first set forth in the 1995 Draft Report[5], revised

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1 WT/DS18/R, 12 June 1998.

2 Quarantine Proclamation No. 86A, *Australian Government Gazette*, No. S33, 21 February 1975.

3 Panel Report, para. 2.16. With regard to the requirements laid down by the Director of Quarantine in relation to salmon imports, the Panel refers explicitly to, *inter alia*, the following:

- *Guidelines for the Importation of Smoked Salmon and Trout into Australia*, Chief Quarantine Officer (Animals) Circular Memorandum 82/83, dated 25 July 1983 (the "1983 Guidelines").
- *Conditions for the Importation of Salmonid Meat and Roe into Australia*, Chief Quarantine Officer (Animals) Circular Memorandum 166/88, dated 9 June 1988 (the "1988 Conditions").
- *Requirements for the Importation of Individual Consignments of Smoked Salmonid Meat*, Quarantine Operational Notice 1996/022 of the Australian Quarantine and Inspection Service ("AQIS"), dated 24 January 1996 (the "1996 Requirements").

4 I.e., adult, wild, freshwater-caught Pacific salmon; adult, Pacific salmon cultured in seawater on the Pacific coast; adult, Atlantic salmon cultured in seawater on the Pacific coast; and adult, Atlantic salmon cultured in seawater on the Atlantic coast.

5 AQIS, *Import Risk Analysis, Disease risks associated with the importation of uncooked, wild, ocean-caught Pacific salmon product from the USA and Canada*, Draft, May 1995.

in May 1996[6] and finalized in December of 1996 (the "1996 Final Report").[7] The 1996 Final Report concluded that:

> ... it is recommended that the present quarantine policies for uncooked salmon products remain in place.[8]

The Director of Quarantine, on the basis of the 1996 Final Report, decided on 13 December 1996 that:

> ... having regard to Australian Government policy on quarantine and after taking account of Australia's international obligations, importation of uncooked, wild, adult, ocean-caught Pacific salmonid product from the Pacific rim of North America should not be permitted on quarantine grounds.[9]

The relevant factual aspects of this dispute are set out in greater detail in the Panel Report, in particular, at paragraphs 2.1 to 2.30 as well as at paragraphs 6.1 to 6.157 and Annex 2, which deal with the Panel's consultation with scientific experts.

3. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 12 June 1998. The Panel found that Australia has acted inconsistently with Articles 5.1, 5.5 and 5.6 and, by implication, Articles 2.2 and 2.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"). In paragraph 9.1 of its Report, the Panel reached the following conclusions:

> (i) Australia, by maintaining a sanitary measure which is not based on a risk assessment, has acted (both in so far as the measure applies to salmon products at issue from adult, wild, ocean-caught Pacific salmon and the other categories of salmon products in dispute), inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground, has also acted inconsistently with the requirements contained in Article 2.2 of that Agreement;
>
> (ii) Australia, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to

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6 AQIS, *An assessment by the Australian Government of quarantine controls on uncooked, wild, ocean-caught Pacific salmonid product sourced from the United States of America and Canada*, Revised Draft, May 1996.

7 Department of Primary Industries and Energy, *Salmon Import Risk Analysis: An assessment by the Australian Government of quarantine controls on uncooked, wild, adult, ocean-caught Pacific salmonid product sourced from the United-States of America and Canada*, Final Report, December 1996.

8 1996 Final Report, page 70.

9 AQIS, File Note by Paul Hickey, Executive Director, 13 December 1996 (the "1996 Decision").

be appropriate in different situations (on the one hand, the salmon products at issue from adult, wild, ocean-caught Pacific salmon and, on the other hand, whole, frozen herring for use as bait and live ornamental finfish), which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground, has also acted inconsistently with the requirements contained in Article 2.3 of that Agreement;

(iii) Australia, by maintaining a sanitary measure (with respect to those salmon products at issue from adult, wild, ocean-caught Pacific salmon) which is more trade-restrictive than required to achieve its appropriate level of sanitary protection, has acted inconsistently with the requirements contained in Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

Since Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", we conclude that to the extent Australia has acted inconsistently with the SPS Agreement it has nullified or impaired the benefits accruing to Canada under the SPS Agreement.

In paragraph 9.2 of its Report, the Panel made the following recommendation:

> We *recommend* that the Dispute Settlement Body request Australia to bring its measure in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures.

4. On 22 July 1998, Australia 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[10] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 3 August 1998, Australia filed an appellant's submission.[11] On 6 August 1998, Canada also filed an appellant's submission.[12] On 14 August 1998, both Australia[13] and Canada[14] filed appellee's submissions. On the

[10] WT/DS18/5, 22 July 1998.
[11] Pursuant to Rule 21(1) of the *Working Procedures*.
[12] Pursuant to Rule 23(1) of the *Working Procedures*.
[13] Pursuant to Rule 22 of the *Working Procedures*.

same day, the European Communities, India, Norway and the United States filed separate third participant's submissions.[15]

5. The oral hearing in the appeal was held on 21 and 22 August 1998. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

A. Australia - Appellant

1. Terms of Reference

6. Australia contends that inasmuch as the request for the establishment of a panel contained no information on the specific measures that might be at issue, other than a general claim that the measures include QP86A, Australia had no knowledge of the "specific claims of fact in regard to the identification of the measures at issue". Since QP86A covers all salmonid products, including live, fresh, chilled, frozen, smoked and canned salmon and trout, the request for a panel did not indicate the specific measures that might be at issue. According to Australia, Canada "did not clarify" the measure at issue in its first written submission, while Australia's first submission did, by contesting Canada's claim about the measure, and by asserting that the measure at issue *is* the December 1996 Decision of the Director of Quarantine. Since the differences between the parties on this matter were apparent from the beginning, Australia considers that the Panel's terms of reference required it to first examine conflicting claims of fact, which otherwise, could lead to wrong factual presumptions.

7. On a more substantive point, Australia argues that the Panel exceeded its terms of reference in respect of "both the product covered and the applicable quarantine measures for consideration". Australia contends that the Panel erred in law by extending its terms of reference beyond a sanitary and phytosanitary ("SPS") measure having application to fresh, chilled or frozen salmon to include heat treatment, an SPS measure which applies only to smoked salmon. Australia argues that the Panel demonstrated "sharply flawed logic" by describing a quarantine measure for smoked salmon as the sanitary aspect of a trade measure for fresh, chilled or frozen salmon ("the other side of a single coin"). According to Australia, it is not a consequence of the requirement that smoked salmon be heat-treated that imports of fresh, chilled or frozen salmon are prohibited. Australia stresses that smoked salmon and fresh, chilled or frozen salmon are different products and that the quarantine measures for each are not two sides of the same coin.

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[14] Pursuant to Rule 23(3) of the *Working Procedures*.
[15] Pursuant to Rule 24 of the *Working Procedures*.

8. Australia further contends that the Panel erred in law by extending the product coverage, as set out in its terms of reference, to heat-treated salmonid products. Australia concedes that while the Panel expressly stated that heat-treated products fall outside the coverage of this dispute, nevertheless, the Panel, "by the time of its examination of consistency of 'the measure' with the provisions of Article 5.1 [of the *SPS Agreement*], seemingly decided that its terms of reference cover all forms of salmon product processed from the 'initial' product, i.e., fresh salmon". As confirmed by the experts advising the Panel, fresh, chilled or frozen salmon is not the same product as heat-treated (smoked) salmon. These products enter Australia through different tariff classifications. Although the title of the 1988 Conditions - "Conditions for the Importation of Salmonid Meat and Roe into Australia" - is "superficially broad", Australia asserts that the substantive provisions of the 1988 Conditions relating to heat treatment are "clearly more narrowly directed" in their product scope and apply only to smoked salmon and salmon roe. According to Australia, this was substantiated by factual evidence before the Panel.

9. Australia also complains that the Panel exceeded its terms of reference by extending the scope of its examination of Article 5 of the *SPS Agreement* to include Article 6 of the same Agreement. Australia argues that the Panel "construed a 'doubt' about the 'strictness' of Australia's approach to internal controls on movement of salmon products" on the basis of "an uncollaborated reference" to Article 6. According to Australia, this "suggests that the Panels 'doubt' was based on an implied finding of inconsistency with Article 6", a provision not included in the Panel's terms of reference.

2. Burden of Proof

10. Australia contends that the Panel failed to properly assess, in its consideration of the evidence before it, whether Canada had discharged its burden of proof in relation to Articles 5.1, 5.5 and 5.6 of the *SPS Agreement*. In particular, Australia asserts that Canada failed to raise a *prima facie* presumption on the following claims: that the SPS measure at issue is not based on a risk assessment; that the different situations the Panel examined are comparable on a scientific basis; that the SPS measure is unjustified; that there is a causal connection between the arbitrary or unjustifiable distinction in levels of sanitary protection and resultant discrimination or disguised restriction on international trade; that there are alternative measures available which are economically and technically feasible; and that at least one of these alternative measures could meet Australia's appropriate level of protection.

11. Australia argues that the Panel did not require directly relevant scientific data to support Canadian assertions, and thereby created an imbalance in the evidentiary standards demanded of the complainant and respondent. According to

Australia, while the Panel "superficially" adopted the interpretative approach of the Appellate Body in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities - Hormones*")[16], it failed to follow the interpretative guidance provided by the Panel Reports in the same case.[17] It maintained a conceptual approach to the *SPS Agreement* modelled on Article III and Article XX of the GATT 1994 in regard to its interpretations of the provisions of Articles 5.1, 5.5 and 5.6 and by association, Articles 2.2 and 2.3, even in the manner of allocating the burden of proof.

3. Objective Assessment of the Matter

12. Australia asserts that a corollary of the requirement that a *prima facie* case be made out and that a panel not undertake a *de novo* review, is that a panel should accord due deference to certain matters of fact put forward by parties to a dispute. The Panel was obliged under WTO jurisprudence and rules of customary international law to give due deference to certain evidence put before it by Australia. Its failure to do this, according to Australia, is evident in its treatment of Australia's determination of its appropriate level of protection, Australia's characterization of the legal status and application of its own SPS measures, and Australia's domestic practices and processes in risk assessment including the role of draft reports and recommendations as part of the risk communication stage.

13. According to Australia, the Panel partially or wholly ignored relevant evidence placed before it, or misrepresented evidence in a way that went beyond a mere question of the weight attributed to it, but constituted an egregious error amounting to an error of law.

4. Other Procedural Matters

14. Australia and Canada were informed by the Panel that all evidence were to be submitted by 7 October 1997. According to Australia, the Panel erred in law by permitting Canada to submit evidence of a scientific nature until 5 February 1998 and by drawing on some of this evidence in reaching its findings. This evidence includes, in particular, two versions of an import risk analysis by David Vose. Australia further complains that the Panel considered evidence on the effect of low-range heat treatment on the growth of disease pathogens which Canada referred to in its oral statement at the second substantive meeting with the Panel but which it never submitted.

15. Australia asserts that at the second substantive meeting, the Panel denied Australia the right to submit a formal written rebuttal submission to Canada's oral statement which raised many "new matters". Its grant of one week for a written comment limited to specific matters was not sufficient to fully address the sub-

[16] Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R.
[17] Adopted 13 February 1998, WT/DS/26/R/USA and WT/DS48/R/CAN.

stantive issues raised in the statement, in accordance with the time periods provided by the Working Procedures of Appendix 3 of the DSU.

5. *Article 5.1 of the* SPS Agreement

16. Australia claims that the Panel's finding of a violation of Article 5.1 is fundamentally flawed as it rests on the absence of a risk assessment on the heat-treatment requirement, a measure that does not have application to the products in dispute, hence outside of the Panel's terms of reference.

17. Australia argues that the Panel failed to interpret the requirement for a measure to be based on a "risk assessment" in accordance with the plain meaning and proper context of "risk". The term "risk" needs to be interpreted in the sense of the definitional terms of Annex A of the *SPS Agreement*, as interpreted by the Appellate Body in *European Communities - Hormones*. In the specific matter before the Panel, Australia posits that the "risk" to be assessed is the risk of the potential biological and economic consequences for salmonid populations in Australia, arising from the entry or establishment of diseases associated with the products in dispute.

18. Australia claims that the Panel also failed to interpret the obligations of Article 5.1 in their proper context, including Articles 5.2 and 2.2 of the *SPS Agreement*. Article 5.2 provides that: "In the assessment of risks, Members shall take into account ... relevant processes and production methods ...". Clearly, a process method is only "relevant" if it is actually used in producing the product to be imported in fresh, chilled or frozen form. Thus, if a process method embodied in a "measure" is not a relevant process method for fresh, chilled or frozen salmon, there is no obligation on WTO Members to assess that process method. According to Australia, there is no basis in the *SPS Agreement* for concluding that for a measure to be based on a risk assessment, it is required that the risk be assessed on a process method which does not have application to the product at issue. To suggest that a risk assessment on heat treatment could provide the basis for an import prohibition on fresh, chilled or frozen product is not only a logical absurdity but would nullify the meaning of the term based on as used in Article 5.1 of the *SPS Agreement*.

6. *Article 5.5 of the* SPS Agreement

19. According to Australia, the Panel imputed an incorrect meaning to the term "risk" in identifying the existence of "different situations" and in finding the existence of "arbitrary or unjustifiable distinctions" in the levels of protection applied in those different situations. The Panel thereby erred in confining its examination of "different situations" to the risk of introduction of disease agents. On the basis of the definition in paragraph 4 of Annex A of the *SPS Agreement*, the "risk" to be examined is *not either* the risk of entry, establishment or spread *or* the risk of the associated biological and economic consequences *but* the risk of

entry, establishment or spread of disease *and* the associated biological and economic consequences.

20. According to Australia, the Appellate Body's statement in *European Communities - Hormones* on the need for the "different situations" in Article 5.5 to "present some common element or elements sufficient to render them comparable" was misapplied by the Panel, since the statement should not be read, as the Panel did in this case, to provide a basis for ignoring the explicit wording of the *SPS Agreement*. Australia argues that: "If Article 5.5 is applied correctly in the context of the plain reading of paragraphs 1 and 4 of Annex A, then if the risks of entry, establishment or spread of one disease and the associated biological and economic consequences is the same or similar to the risk of 24 diseases, a comparison would be legitimate." According to Australia, it is not necessary to have 24 diseases in common; the fundamental issue is that the risks - as defined by the *SPS Agreement* - should be comparable.

21. Australia also argues that the Panel incorrectly interpreted "entry, establishment or spread" as "introduction" in the sense of "entry", contrary to the explicit wording of Articles 5.1 to 5.3 and Annex A, paragraphs 1 and 4 of the *SPS Agreement,* and has thereby failed to give effect to all the terms of the treaty. This has led the Panel into serious legal error in failing to examine the consequences of disease entry, establishment or spread.

22. According to Australia, the Panel failed to establish that there were sufficient elements in common with regard to the biological and economic consequences for Australia's salmonid population which will arise from the importation of salmonid species *vis-à-vis* those from widely different species of other aquatic animals. Evidence and scientific opinion were disregarded by the Panel because they were extraneous to the Panel's oversimplified examination which did not take it beyond a "concern" for the aquatic environment in general, and a view that there might be more risks associated with the importation of non-salmonid species than previously understood.

23. Australia asserts that the Panel, in determining that its examination of "arbitrary or unjustifiable distinctions in levels of protection in different situations" must be limited solely to disease agents positively detected, failed to interpret those terms in their proper context. The Panel thereby diminished Australia's WTO right to adopt a cautious approach in determining its own appropriate level of protection. The Panel has, therefore, failed to observe the provisions of Articles 3.2 and 19.2 of the DSU.

24. Australia argues that the Panel misused the statement in paragraph 215 of the Appellate Body Report in *European Communities - Hormones* to justify its use of arbitrary distinctions in levels of protection as a "warning signal" in the third test of Article 5.5. Not only has it erred in effectively using this single element in three different guises in three of its "warning signals" and "other factors", but it has gone beyond using it as a "warning signal" that something "might" be the case, and given it greater and inappropriate evidential weight by including it