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THE WTO PANEL DECISION ON AUSTRALIA'S SALMON IMPORT GUIDELINES: EVIDENCE THAT THE SPS AGREEMENT CAN EFFECTIVELY PROTECT HUMAN HEALTH INTERESTS

Matthew D. Taylor[†]

Abstract: On July 19, 1999, Australia lifted its ban on salmon imports and announced new salmon import guidelines. The new guidelines were promulgated in response to a World Trade Organization ("WTO") Appellate Body determination that the import ban violated the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). Canada challenged Australia's new import guidelines, alleging that the new guidelines also violate the SPS Agreement. The WTO dispute settlement panel held that, with the exception of only one provision, Australia's new salmon import guidelines are based on appropriate scientific risk analyses and are now in line with comparable import guidelines for non-salmonid fish. By rejecting most of Canada's challenges and substantially upholding Australia's new import guidelines, the dispute settlement panel demonstrated that the SPS Agreement can be used by WTO member countries to protect their human health interests.

I. INTRODUCTION

In 1975, Australia prohibited the importation of fresh, chilled, and frozen salmonid¹ products from Canada by issuing Quarantine Proclamation 86A.² This import ban was designed to protect diverse recreational fisheries³ in Australia from exotic diseases.⁴ Canada opposed the import

[†] The author would like to thank his wife, Dalia Williams Taylor, and his children, Summer and Luke Taylor, for their patience and understanding while he spent many hours away from home writing this Comment.

¹ Salmonid is the name given to members of the Salmonidae and Plecoglossidae finfish families. Non-salmonids are all other finfish species caught in marine or brackish waters. Australian Quarantine & Inspection Service, *Import Risk Analysis on Non-viable Salmonids and Non-salmonid Marine Finfish* xii (visited Dec. 20, 1999) <<http://www.aqis.gov.au/docs/anpolicy/finalfinfish.pdf>> [hereinafter 1999 IRA].

² Quarantine Proclamation 86A prohibited

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.

Quarantine Proclamation 86A, AUSTRALIAN GOV'T GAZETTE, No. S33, available in Australian Quarantine and Inspection Service, *Salmon Import Risk Analysis—Draft 1995* app. 1 (Feb. 21, 1995) <<http://www.aqis.gov.au/docs/anpolicy/appendices.doc>> [hereinafter 1995 Draft IRA].

³ Australia's marine fauna include more than 3,600 species of fish in 303 families, and Australia ranks as the third largest fishing zone in the world. The gross value of Australia's fishery production from 1997 through 1998 was 1.86 billion Australian dollars (approximately 1.1 billion United States dollars). 1999 IRA, *supra* note 1, at 43.

ban, arguing that salmon products for human consumption were not associated with the spread of salmon diseases.⁵ Canadian authorities further contended that the microorganisms of concern to Australia were unlikely to be present in headless, eviscerated salmon in concentrations sufficient to transmit exotic diseases.⁶

At Canada's request, the World Trade Organization ("WTO") established a dispute settlement panel⁷ in April 1997 to resolve the conflict over Australia's import ban.⁸ Canada alleged, among other things, that the ban was inconsistent with the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").⁹ The SPS Agreement is an agreement annexed to the WTO Agreement¹⁰ that allows member countries to adopt and enforce trade restrictions that are "necessary to protect human, animal, or plant life or health."¹¹ Australia argued that the import ban was a scientifically grounded measure that would protect indigenous fish species from exotic disease and was therefore permissible under the SPS Agreement.¹² In June 1998, the dispute settlement panel ruled against Australia.¹³ Australia appealed the panel's ruling.¹⁴ In October 1998, the Appellate Body, which is the body that hears appeals of dispute settlement

⁴ 1995 Draft IRA, *supra* note 2, background § 2.1.

⁵ *Id.*

⁶ *Id.*

⁷ Dispute settlement panels settle trade disagreements that arise between WTO members. WORLD TRADE ORG., GUIDE TO THE URUGUAY ROUND AGREEMENTS 17-19 (1999) [hereinafter GUIDE]. A panel is composed of three to five "well-qualified governmental or non-governmental individuals" who are independent and of diverse background and have wide experience. *Id.* at 21. Appropriate persons are former panel members, former government representatives to the WTO or the General Agreement on Tariffs and Trade ("GATT"), or those who have taught or published on international trade law or policy. *Id.*; see also *infra* Part II.C.1.

⁸ Australian Quarantine & Inspection Service, *Revised Fish Import Guidelines Announced*, attachment B, *Chronology of Events Relating to the Fish Import Risk Analyses and the World Trade Organisation (WTO) Process* (media release) (July 19, 1999) <<http://www.aqis.gov.au/docs/pr/salmonattachb.htm>> [hereinafter *Chronology of Events*].

⁹ See Overview of WTO Disputes, *Australia—Measures Affecting the Importation of Salmonids* (visited Nov. 10, 1999) <http://www.wto.org/wto/dispute/bulletin.htm#_Toc466793428> [hereinafter Overview]; see also Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, available in WTO Goods, Agriculture—Sanitary and Phytosanitary Measures (visited Nov. 10, 1999) <<http://www.wto.org/wto/goods/spsagr.htm>> [hereinafter SPS Agreement].

¹⁰ The WTO Agreement is the agreement establishing the WTO. See Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

¹¹ SPS Agreement, *supra* note 9, preamble.

¹² *Australia—Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/R (report of the panel), available in WTO Dispute Settlement, Panel and Appellate Body Reports (June 12, 1998) <<http://www.wto.org/wto/dispute/18r00.doc>> [hereinafter Initial Panel Report].

¹³ *Chronology of Events*, *supra* note 8.

¹⁴ *Id.*

panel decisions,¹⁵ affirmed the panel's decision in part, finding that Australia's import ban violated the SPS Agreement because it was not based on a proper risk assessment.¹⁶ The Appellate Body also found that the ban violated the SPS Agreement because it did not apply to the import of other kinds of fish that present a similar or greater risk of disease.¹⁷

Australia conducted a new Import Risk Analysis ("IRA")¹⁸ to address the Appellate Body's finding that its previous risk analysis violated the SPS Agreement.¹⁹ Australia lifted the import ban as a result of the new IRA.²⁰ Even though Australia ended its prohibition on salmon imports, Canada asked the WTO to find that the new guidelines violate the SPS Agreement and do not comply with the Appellate Body report.²¹ With the exception of just one provision, the WTO dispute settlement panel²² concluded that Australia's new import guidelines are consistent with the SPS Agreement.²³

This Comment examines the salmon dispute and discusses the implications of the WTO dispute settlement panel's decision to uphold most of Australia's new guidelines.²⁴ Part II provides an overview of GATT and

¹⁵ Parties to a dispute are given the right to appeal the decision of a dispute settlement panel. Three members of the seven-person Appellate Body hear an appeal. GUIDE, *supra* note 7, at 22.

¹⁶ *Australia—Measures Affecting Importation of Salmon* 123-24, WTO Doc. WT/DS18/AB/R (report of the Appellate Body), available in WTO Dispute Settlement, Panel and Appellate Body Reports (Oct. 20, 1998) <<http://www.wto.org/wto/dispute/ds18abr.pdf>> [hereinafter Appellate Body Report].

¹⁷ *Id.* at 110-11.

¹⁸ The Australian Quarantine and Inspection Service ("AQIS") import risk analysis process provides for thorough consideration of scientific information relevant to an evaluation of quarantine risk. In cases of unusual complexity or risk, AQIS makes arrangements for more detailed consultation with independent scientists. Australian Quarantine & Inspection Service, Animal Quarantine Policy Memorandum 1999/26, *Australia's Appropriate Level of Protection and AQIS's Import Risk Analysis (IRA) Process* (Apr. 22, 1999) <<http://www.aqis.gov.au/docs/anpolicy/a99-26.htm>>.

¹⁹ Australian Quarantine & Inspection Service, Animal Quarantine Policy Memorandum 1999/51, *Final Reports of Import Risk Analyses on Non-viable Salmonid Products, Non-viable Marine Finfish Products and Live Ornamental Finfish and Adoption of New Policies* (July 19, 1999) <<http://www.aqis.gov.au/docs/anpolicy/1999-51.doc>> [hereinafter AQPM 1999/51].

²⁰ *Id.*

²¹ *Australia—Measures Affecting Importation of Salmon—Request by Canada for Determination of Consistency of Implementation Measures*, WTO Doc. WT/DS18/14 (Aug. 3, 1999), available in WTO Document Dissemination Facility, WT/DS18/14 <<http://www.wto.org/wto/ddf/ep/public.htm>> [hereinafter Request by Canada].

²² Canada's request for a ruling on whether Australia's new import guidelines are consistent with the SPS Agreement is being handled by the same dispute settlement panel that decided the original case. *Id.* at 21.

²³ See *Australia—Measures Affecting Importation of Salmon—Recourse to Article 21.5 by Canada*, para. 8.1, WTO Doc. WT/DS18/RW (report of the panel), available in WTO Dispute Settlement, Panel and Appellate Body Reports (Feb. 18, 2000) <<http://www.wto.org/wto/dispute/2000a.pdf>> [hereinafter Panel Report]. In addition to reviewing Australia's new salmonid import guidelines, the dispute settlement panel reviewed restrictive import measures adopted by Tasmania (one of Australia's regional governments). *Id.* para. 2.32.

²⁴ This Comment does not discuss the panel's conclusion that Australia, by means of a measure enacted by Tasmania, violated the SPS Agreement. *Id.* para. 8.1.

the WTO, including the WTO dispute resolution system. Part III describes the procedural history of this case, including the panel and Appellate Body reports on Australia's import ban. Part IV outlines Australia's new fish import guidelines and Canada's challenges to the new guidelines. Part V reviews the dispute settlement panel report on the new guidelines. Part VI evaluates the new guidelines in light of other WTO cases that involve the SPS Agreement and argues that the panel's decision is evidence that the SPS Agreement can be used to protect the human health interests of WTO members.

II. BACKGROUND: THE WTO, GATT, AND DISPUTE RESOLUTION

A. *Brief Overview of the WTO and GATT*

Australia and Canada are both members of the WTO, an organization that provides the institutional and legal foundation for a multinational trading system.²⁵ The WTO's stated objectives include expanding production and trade throughout the world, raising standards of living, ensuring full employment, and protecting the environment.²⁶ Prior to the establishment of the WTO, world trade matters were handled through the General Agreement on Tariffs and Trade of 1947 ("GATT 1947"),²⁷ an agreement that defined the rules for the trade of goods by GATT members.²⁸ Many countries came to believe that GATT 1947 and its dispute resolution process did not function effectively, and thus had to be reformed.²⁹ The 1994 Uruguay Round negotiations³⁰ to reform GATT 1947 established the WTO, which replaced GATT 1947 as the basis for institutional cooperation and dispute settlement on trade matters among its members.³¹ The General Agreement on Tariffs and Trade 1994 ("GATT 1994")³² adopted the basic set of trade rules set forth in GATT 1947.³³ GATT 1994 is an annex to the

²⁵ GUIDE, *supra* note 7, at 3.

²⁶ WTO Agreement, *supra* note 10, preamble, para. 1.

²⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

²⁸ GUIDE, *supra* note 7, at 38.

²⁹ Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1199 (1998).

³⁰ GATT is based on tariff concessions that are set during multilateral trade negotiations (rounds). See John H. Jackson & Alan O. Sykes, *Introduction and Overview*, in IMPLEMENTING THE URUGUAY ROUND 1, 3 (John H. Jackson & Alan O. Sykes eds., 1997).

³¹ GUIDE, *supra* note 7, at 1-2, 38.

³² Multilateral Agreements on Trade in Goods, Apr. 15, 1994, WTO Agreement, *supra* note 10, Annex 1A [hereinafter GATT 1994].

³³ GUIDE, *supra* note 7, at 38.

WTO Agreement which, in conjunction with the other agreements in Annex 1A of the WTO Agreement, describes the goods-related obligations of WTO members.³⁴

B. *Dispute Resolution Under GATT 1947*

Articles XXII and XXIII of GATT 1947 established the initial dispute resolution process for member countries.³⁵ Article XXII granted GATT member countries the right to “consult” with each other.³⁶ Under Article XXIII, a member that felt it had been denied the benefits of GATT by another member could exercise this right to consultation.³⁷ The purpose of these provisions was to encourage the parties to a dispute to seek a mutually satisfactory resolution without outside interference.³⁸ If the consultations were unsuccessful, a panel could convene to review the submissions of interested parties, hear oral arguments, and rule on a dispute.³⁹ A panel consisted of either three or five independent experts who were usually delegates of countries not involved in the dispute.⁴⁰ After making its decision, the panel submitted its ruling to the parties to encourage further settlement negotiations.⁴¹ The panel’s recommendation became binding only when adopted by the GATT Council.⁴² The GATT Council was composed of representatives from all of the GATT member countries.⁴³

Many countries believed that the GATT 1947 dispute resolution process was ineffective.⁴⁴ Under GATT 1947 the party against whom a complaint was filed could make use of several procedures to block dispute

³⁴ *Id.*

³⁵ *Id.* at 18.

³⁶ Article XXII of GATT 1947 is the same as Article XXII of GATT 1994. See *supra* note 33 and accompanying text. Article XXII provides:

(1) Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

(2) The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

GATT 1994, *supra* note 32, art. XXII.

³⁷ GUIDE, *supra* note 7, at 18.

³⁸ Lichtenbaum, *supra* note 29, at 1198-99.

³⁹ *Id.* at 1199.

⁴⁰ GUIDE, *supra* note 7, at 18-19.

⁴¹ Lichtenbaum, *supra* note 29.

⁴² GUIDE, *supra* note 7, at 19.

⁴³ Lichtenbaum, *supra* note 29.

⁴⁴ *Id.*

resolution efforts.⁴⁵ For example, until reforms in 1989, a party to a dispute had the power to prevent the establishment of a panel.⁴⁶ Even after a party agreed to establish a panel, the party could delay setting the panel's terms of reference⁴⁷ and choosing the panel members.⁴⁸ In addition, a single party could block the GATT Council's adoption of a panel report.⁴⁹ Even when the GATT Council adopted a panel report, GATT provided no mechanism to force the offending party to alter measures found inconsistent with its GATT obligations or to provide compensation to injured parties.⁵⁰ Further, the GATT Council did not always authorize the injured party to retaliate against the offending party.⁵¹

C. *The WTO Dispute Settlement System*

The ineffectiveness of the dispute resolution system was a major factor in the decision of GATT members to modify GATT 1947.⁵² Thus, dispute resolution was a main topic of discussion at the Uruguay Round negotiations to reform GATT 1947.⁵³ The Uruguay Round agreement established the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")⁵⁴ that overhauled the GATT 1947 dispute resolution system.⁵⁵ Articles XXII and XXIII of GATT 1947 were incorporated without change as part of GATT 1994, but now form only part of the WTO dispute settlement system.⁵⁶ The WTO dispute settlement system includes dispute settlement panels as well as an appellate process.⁵⁷

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The panel's "terms of reference" refer to the issues before the panel as determined by the complaining member's request for panel formation. *Id.* at 1225.

⁴⁸ GUIDE, *supra* note 7, at 19.

⁴⁹ Lichtenbaum, *supra* note 29.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² GUIDE, *supra* note 7, at 19.

⁵³ Lichtenbaum, *supra* note 29, at 1200.

⁵⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 10, Annex 2; 33 I.L.M. 1226 (1994) [hereinafter DSU].

⁵⁵ *Id.*

⁵⁶ GUIDE, *supra* note 7, at 18.

⁵⁷ *Id.* at 21-22.

1. *The Dispute Settlement Panel*

Under the current WTO dispute settlement system, panels of three or five independent experts settle trade disputes between member countries.⁵⁸ However, before a dispute settlement panel is established, a complaining party must request consultations with the offending party.⁵⁹ If the offending party does not respond to a request for consultations within ten days or the consultations have not succeeded after sixty days, the complaining member may ask the WTO General Council,⁶⁰ acting as the Dispute Settlement Body,⁶¹ to establish a panel.⁶² After the panel is established, it receives written submissions from the parties and hears oral arguments.⁶³ The panel then submits its conclusions in an interim report that can be reviewed by the parties.⁶⁴ The final report is submitted to the parties and circulated to all WTO members.⁶⁵ The Dispute Settlement Body automatically adopts the panel report within sixty days unless a party appeals or there is consensus not to adopt it.⁶⁶

The current WTO dispute settlement system is more efficient than the GATT 1947 system. A complaining party can now establish a panel, obtain a ruling from the panel, and obtain authority to retaliate⁶⁷ without the consent of the defending party.⁶⁸ In addition, the WTO system provides strict deadlines for the completion of each phase of the dispute resolution process. A normal case should not take more than one year to resolve although if appealed it may take up to fifteen months.⁶⁹

⁵⁸ *Id.* at 21.

⁵⁹ *Id.* at 27.

⁶⁰ The WTO General Council consists of representatives from all WTO member countries. WTO Agreement, *supra* note 10, art. IV(2).

⁶¹ The WTO General Council, when acting as the Dispute Settlement Body, has the sole authority to "establish panels, adopt panel and Appellate Body reports, [and] maintain surveillance of implementation of rulings and recommendations." *Id.* Annex 2, art. 2.1; *see also* GUIDE, *supra* note 7, at 20.

⁶² GUIDE, *supra* note 7, at 27.

⁶³ Lichtenbaum, *supra* note 29, at 1201.

⁶⁴ *Id.*

⁶⁵ GUIDE, *supra* note 7, at 28.

⁶⁶ *Id.*

⁶⁷ Retaliation is a remedy available to a complaining country that prevails in the dispute settlement process. *See generally id.* at 23. Retaliation involves suspending tariff concessions such that the complaining country can impose substantial penalties on the import of goods from the offending country. *Id.*

⁶⁸ Lichtenbaum, *supra* note 29, at 1201.

⁶⁹ *Id.*

2. *The Appellate Body*

Under the DSU, parties to a dispute have the right to appeal a panel decision to the Appellate Body.⁷⁰ The Appellate Body is appointed by the Dispute Settlement Body and consists of “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements.”⁷¹ An appeal from a panel decision is heard by three of the seven members of the Appellate Body.⁷² Generally, appellate proceedings take less than ninety days.⁷³

The issue of whether Appellate Body decisions are binding on subsequent panels has not yet been resolved.⁷⁴ However, the Appellate Body decision in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*⁷⁵ provides insight into this issue. In *Wool Shirts*, the Appellate Body stated that the DSU was not “meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.”⁷⁶ This statement suggests that the Appellate Body would not hold that its decisions are binding.⁷⁷ Even so, the issue of whether Appellate Body decisions are binding is largely academic as most dispute settlement panels are strongly motivated to act consistently with prior Appellate Body decisions in order to avoid being reversed.⁷⁸ In fact, dispute resolution panels and the Appellate Body frequently cite previous Appellate Body reports as authority for their decisions.⁷⁹

⁷⁰ GUIDE, *supra* note 7, at 22.

⁷¹ *Id.*; see also DSU, *supra* note 54, art. 17.14.

⁷² Lichtenbaum, *supra* note 29, at 1202.

⁷³ GUIDE, *supra* note 7, at 28.

⁷⁴ Lichtenbaum, *supra* note 29, at 1247.

⁷⁵ *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc. WT/DS33/AB/R (report of the Appellate Body), available in WTO Dispute Settlement, Panel and Appellate Body Reports (Apr. 25 1997) <<http://www.wto.org/wto/dispute/wlshirab.wp5>> [hereinafter *Wool Shirts*].

⁷⁶ Lichtenbaum, *supra* note 29, at 1247.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1248.

⁷⁹ See, e.g., Appellate Body Report, *supra* note 16; Initial Panel Report, *supra* note 12.

III. PROCEDURAL HISTORY OF THE AUSTRALIA-CANADA SALMON DISPUTE

Canada is particularly sensitive to import restrictions because over forty percent of all goods produced in Canada are exported.⁸⁰ Revenues from the export of fish products totaled 2.2 billion Canadian dollars (approximately 1.5 billion United States dollars) from January to October 1999.⁸¹ Canadian salmon is exported to nearly fifty countries around the world.⁸² Thus, it is not surprising that since 1975, when Australia prohibited salmon imports, Canada has made numerous attempts to eliminate the prohibition.⁸³ In 1995, after two decades of efforts to resolve its dispute with Australia, Canada requested consultations with Australia under Article 4 of the DSU.⁸⁴ During the consultations, Australia agreed to conduct an Import Risk Analysis of wild Pacific salmon imports.⁸⁵ In May 1995, Australia issued a draft IRA ("1995 Draft IRA") concluding that headless, eviscerated Pacific salmon from Canada and the United States were safe enough to be imported and that the import ban should be lifted.⁸⁶ However, this recommendation encountered strong domestic opposition in Australia, especially from Tasmanian salmon cultivators and sport fishing groups.⁸⁷ These groups argued that the salmon imports presented too great a risk of disease to Australian fisheries and that the Australian government might be liable for hundreds of millions of dollars in compensation if diseases were introduced by the imports.⁸⁸ As a result of this domestic pressure, Australia reversed course and released a "final" IRA in December 1996 ("1996 Final

⁸⁰ Department of Foreign Affairs and International Trade ("DFAIT"), *Trade Negotiations and Agreements: Why Trade Matters?* (visited Jan. 29, 2000) <<http://www.dfait-maeci.gc.ca/tna-nac/text-e.asp>>.

⁸¹ See Industry Canada, *Trade Data Online* (visited Jan. 29, 2000) <<http://strategis.ic.gc.ca/cgi-bin/tdst-bin/wow/wow.codeContrySelectionPage>>.

⁸² *Government Seeks Input on Possible Retaliation Against Australia*, available in DFAIT News Release (May 28, 1999) <http://198.103.104.118/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/100355.htm> [hereinafter News Release].

⁸³ *Id.*

⁸⁴ *Australia—Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/2 (request for the establishment of a panel by Canada), available in WTO Document Dissemination Facility (Mar. 10, 1997) <<http://www.wto.org/wto/ddf/ep/public.html>>.

⁸⁵ See generally News Release, *supra* note 82.

⁸⁶ *1995 Draft IRA*, *supra* note 2, executive summary.

⁸⁷ News Release, *supra* note 82.

⁸⁸ *Australian Fishing Groups Vow to Fight on Against Salmon Decision*, AAP NEWS, Aug. 4, 1999, available in 1999 WL 21586751.

IRA").⁸⁹ The 1996 Final IRA concluded that the import ban should be maintained.⁹⁰

In March 1997, Canada called for the establishment of a WTO dispute settlement panel to review Australia's import ban.⁹¹ Canada argued that the import ban violated the SPS Agreement.⁹² The panel issued its report in June 1998, in which it ruled against Australia on three grounds.⁹³ First, the panel concluded that Australia, by maintaining an import ban that was not based on a risk assessment, had acted inconsistently with Articles 5.1 and 2.2⁹⁴ of the SPS Agreement.⁹⁵ Second, it concluded that Australia had violated Articles 5.5 and 2.3⁹⁶ of the SPS Agreement because the import ban on salmon was arbitrary or unjustifiable when considered in light of the treatment of other imported fish products.⁹⁷ As an example, the panel noted that while wild, ocean-caught Pacific salmon products were banned, whole frozen herring and live ornamental finfish⁹⁸ were not banned.⁹⁹ Finally, the panel concluded that Australia had violated Article 5.6¹⁰⁰ of the SPS Agreement by maintaining an import ban that was more trade restrictive than necessary to achieve an appropriate level of sanitary protection.¹⁰¹ In July 1998, Australia appealed the panel's decision to the Appellate Body.¹⁰²

In its review of the dispute settlement panel's decision, the Appellate Body agreed that the import ban violated Articles 5.1 and 2.2 of the SPS

⁸⁹ News Release, *supra* note 82; *see also* Australian Quarantine & Inspection Service, *Salmon Import Risk Analysis*, executive summary (Dec. 13, 1996) <<http://www.aqis.gov.au/docs/anpolicy/salmon.htm>> [hereinafter 1996 Final IRA].

⁹⁰ *Id.*

⁹¹ *Chronology of Events*, *supra* note 8.

⁹² Overview, *supra* note 9.

⁹³ Initial Panel Report, *supra* note 12, para. 9.1.

⁹⁴ Articles 5.1 and 2.2 of the SPS Agreement require sanitary or phytosanitary measures to be based on an appropriate assessment of potential risks and on sufficient scientific evidence. SPS Agreement, *supra* note 9, arts. 5.1, 2.2; *see infra* Part V.A.

⁹⁵ Initial Panel Report, *supra* note 12, para. 9.1.

⁹⁶ Articles 5.5 and 2.3 of the SPS Agreement prohibit WTO members from adopting sanitary measures that arbitrarily or unjustifiably discriminate between import products or member countries such that the sanitary measure amounts to a disguised restriction on international trade. SPS Agreement, *supra* note 9, arts. 5.5, 2.3; *see infra* Part V.B.

⁹⁷ Initial Panel Report, *supra* note 12, para. 9.1.

⁹⁸ Live ornamental finfish are decorative or aquarium fish and are not for human consumption. *See* Australian Quarantine & Inspection Service, *Import Risk Analysis on Live Ornamental Finfish 2* (visited Jan. 15, 2000) <<http://www.aqis.gov.au/docs/qdu/finalornamental.pdf>> [hereinafter 1999 Ornamental IRA].

⁹⁹ Initial Panel Report, *supra* note 12, para. 9.1.

¹⁰⁰ Article 5.6 of the SPS Agreement requires WTO members to ensure that their sanitary or phytosanitary measures are not more trade restrictive than necessary to achieve their appropriate level of sanitary protection. SPS Agreement, *supra* note 9, art. 5.6; *see infra* Part III.C.

¹⁰¹ Initial Panel Report, *supra* note 12, para. 9.1.

¹⁰² *Chronology of Events*, *supra* note 8.

Agreement because it was not based on a proper risk assessment.¹⁰³ The Appellate Body also agreed that the import ban violated Articles 5.5 and 2.3 of the SPS Agreement because it arbitrarily imposed different levels of sanitary protection for different import products and was a disguised restriction on international trade.¹⁰⁴ However, the Appellate Body reversed the dispute settlement panel's conclusion that the import ban was more trade restrictive than necessary under Article 5.6 of the SPS Agreement.¹⁰⁵

Australia performed a new IRA to address the Appellate Body's conclusion that its previous risk analysis violated the SPS Agreement.¹⁰⁶ In July of 1999, Australia released a memorandum that detailed the results of the new IRA and announced new import guidelines.¹⁰⁷ Under the new guidelines, salmon products may be imported into Australia, provided that they meet several quarantine conditions.¹⁰⁸ The new import guidelines also impose stricter conditions on the importation of other kinds of fish.¹⁰⁹ Despite the relaxation of Australia's restrictions on the import of salmon, Canada asked the WTO to find that the new guidelines violate the SPS Agreement and do not comply with the Appellate Body report.¹¹⁰ The dispute settlement panel concluded that Australia's new import guidelines, with the exception of only one provision, are consistent with the SPS Agreement.¹¹¹ Australia's revised import guidelines are detailed in Part IV of this comment. The decision of the dispute settlement panel is discussed in Part V.

IV. AUSTRALIA'S REVISED IMPORT GUIDELINES

Following the Appellate Body decision in October of 1998, a WTO arbitrator¹¹² gave Australia until July of 1999 to modify its import

¹⁰³ Appellate Body Report, *supra* note 16, at 80.

¹⁰⁴ *Id.* at 93.

¹⁰⁵ *Id.* at 97.

¹⁰⁶ AQPM 1999/51, *supra* note 19.

¹⁰⁷ *Id.*

¹⁰⁸ Australian Quarantine & Inspection Service, *Revised Fish Import Guidelines Announced*, attachment A, *The AQIS Import Risk Analyses Policies* (media release) (July 19, 1999) <<http://www.aqis.gov.au/docs/pr/salmonattacha.htm>> [hereinafter *Revised Fish Import Guidelines*]; see *infra* Part IV.

¹⁰⁹ *Revised Fish Import Guidelines*, *supra* note 108.

¹¹⁰ Request by Canada, *supra* note 21.

¹¹¹ Panel Report, *supra* note 23, para. 8.1.

¹¹² When the Dispute Settlement Body adopts a panel or Appellate Body report, the losing party must comply with the report within "a reasonable period of time." DSU, *supra* note 54, art. 21(3). This "reasonable period of time" can be determined by an arbitrator. *Id.* art. 21(3)(c).

restrictions to make them consistent with the SPS Agreement.¹¹³ In early 1999, Australia conducted a new Import Risk Analysis for salmonids, non-salmonid marine finfish, and live ornamental finfish ("1999 IRA").¹¹⁴ Based on this IRA, Australia announced new import guidelines in a July 19, 1999 memorandum.¹¹⁵ Canada challenged the new guidelines in the WTO, arguing that they do not comply with the Appellate Body report and that they still violate the SPS Agreement.¹¹⁶

A. *The Revised Import Guidelines for Salmonids*

The new guidelines end the ban on imports of salmonid products into Australia.¹¹⁷ Australia now allows the import of salmonid products that are accompanied by both an import permit and an official certificate issued by a competent authority¹¹⁸ of the exporting country.¹¹⁹ Each application for an import permit must identify (1) the salmonid species, (2) the country of export, (3) the country of origin of the salmonid fish (if not exported directly from the country of origin), and (4) the product's form.¹²⁰ The official certificate must indicate that the imported salmonid product meets nine criteria.¹²¹ Among these criteria, the fish must be processed, inspected, and graded by a competent authority, and the fish products must be free of lesions.¹²² Salmonid product accompanied by both an import permit and an

¹¹³ See *Australia—Measures Affecting Importation of Salmon—Award of the Arbitrator*, WTO Doc. WT/DS18/9 (Feb. 23, 1999), available in WTO Dispute Settlement, Panel and Appellate Body Reports <<http://www.wto.org/wto/dispute/18-9.pdf>>.

¹¹⁴ See *1999 Ornamental IRA*, *supra* note 98, at 2.

¹¹⁵ AQPM 1999/51, *supra* note 19.

¹¹⁶ Request by Canada, *supra* note 21.

¹¹⁷ See AQPM 1999/51, *supra* note 19.

¹¹⁸ A competent authority is an agency within the exporting country that oversees or regulates the export of animal products. For example, the United States Food and Drug Administration and the National Marine Fisheries Service are competent authorities. See generally *1999 IRA*, *supra* note 1, app. 2.

¹¹⁹ Australian Quarantine & Inspection Service, Animal Quarantine Policy Memorandum 1999/69, *Importation of Uncanned Salmonid Product* (Oct. 20, 1999) <<http://www.aqis.gov.au/docs/anpolicy/1999-69.doc>> [hereinafter AQPM 1999/69].

¹²⁰ *Id.* attachment 1, § 2.2.

¹²¹ The nine criteria are: (1) the fish were derived from a population for which there is a documented system of health surveillance and monitoring administered by a competent authority; (2) the fish were not derived from a population slaughtered as an official disease control measure; (3) the fish have been eviscerated; (4) the head and gills have been removed and internal and external surfaces thoroughly washed; (5) the fish are not juvenile salmonids or sexually mature adults/spawners; (6) the fish were processed in premises under the control of a competent authority; (7) the fish were subjected to an inspection and grading system supervised by a competent authority; (8) for Atlantic salmon, the fish for export to Australia did not come from a farm known or officially suspected of being affected by an outbreak of infectious salmon anemia; and (9) the product is free from visible lesions associated with infectious disease and is fit for human consumption. *Id.* attachment 1, § 2.4.

¹²² *Id.*

official certificate will be released from quarantine if it is in consumer-ready¹²³ form.¹²⁴

B. The Revised Import Guidelines for Non-Salmonid Marine Finfish

Australia's new guidelines also change the requirements for the import of non-salmonid marine finfish. Under the guidelines, four categories of non-salmonid marine finfish may be imported. These include (1) consumer-ready product, (2) all fish product from New Zealand, (3) headless, eviscerated fish that are not consumer-ready, and (4) product that does not fit in the first three categories including whole, round (uneviscerated) fish and head-on eviscerated product.¹²⁵

Under the first category, Australia does not require either an official health certificate or an import permit for non-salmonid fish product that has been processed to a consumer-ready state.¹²⁶ For non-salmonid product, the requirements for "consumer readiness" are the same as those for salmonid product.¹²⁷

The second category of fish imports that Australia will allow is non-salmonid finfish product from New Zealand.¹²⁸ Non-salmonid finfish product may be imported and released from quarantine when accompanied by a certificate of origin from the New Zealand Ministry of Agriculture and Forestry.¹²⁹ The certificate of origin must indicate that the fish were caught in New Zealand's exclusive economic zone or in adjacent international waters.¹³⁰

Under the third category, Australia will permit headless, eviscerated non-salmonid finfish to be imported and released from quarantine if an official health certificate from a competent authority of the exporting country accompanies them.¹³¹ An import permit is not required for headless,

¹²³ Consumer-ready product is product that is ready to be cooked or consumed, including (1) cutlets of less than 450 grams, (2) skinless fillets of any weight, (3) skin-on fillets of less than 450 grams, (4) eviscerated, headless "pan-size" fish of less than 450 grams, and (5) product that is processed further than the stages described above. *Id.* attachment 1, § 1.4.

¹²⁴ *Id.*

¹²⁵ Australian Quarantine & Inspection Service, Animal Quarantine Policy Memorandum 1999/79, *Implementation of New Quarantine Guidelines for the Importation of Non-viable, Non-salmonid Marine and Freshwater Finfish and Their Products* app. 1 (Nov. 16, 1999) <<http://www.aqis.gov.au/docs/anpolicy/1999-79.doc>> [hereinafter AQPM 1999/79].

¹²⁶ *Id.* app. 1, pt. A, § 2.

¹²⁷ *Compare id.* app. 1, pt. A, § 1.3 with APQM 1999/69, *supra* note 119, attachment 1, § 1.4.

¹²⁸ AQPM 1999/79, *supra* note 125, app. 1, pt. B.

¹²⁹ *Id.* app. 1, pt. B, § 1.3.

¹³⁰ *Id.* app. 1, pt. B, § 2.2.

¹³¹ *Id.* app. 1, pt. C, § 1.3.

eviscerated non-salmonid finfish.¹³² The official health certificate must attest that (1) the fish were processed at a facility approved by and under the control of a competent authority, (2) the fish were eviscerated, (3) the fish were subjected to an inspection system supervised by a competent authority, (4) the head and gills were removed and internal and external surfaces thoroughly washed, and (5) the product is free from visible lesions associated with infectious disease.¹³³

The fourth category of non-salmonid fish imports that Australia will allow is non-salmonid product that does not fit in one of the categories described above.¹³⁴ Generally, Australia will allow the import of non-salmonid product, including whole, round (uneviscerated) fish and head-on eviscerated product, if both an import permit and an official health certificate accompany the product.¹³⁵ Each application for an import permit must include the following details: (1) the country of export, (2) the source of fish and confirmation that the fish, or fish from which the product is derived, were caught in the wild, (3) identification of fish species (scientific name and common name), (4) whether fish of other species will be present in consignments and, if so, the species, (5) the arrangements for inspection of product and for provision of a health certificate that meets Australia's requirements, (6) product presentation/form, and (7) intended end-use of the product.¹³⁶ The official certificate must indicate that the imported non-salmonid product meets six criteria.¹³⁷ Among these the fish must be processed, inspected, and graded by a competent authority, and the fish products must be free of lesions.¹³⁸ If the product to be imported contains fish named on Australia's "specified finfish species" list,¹³⁹ Australia generally will not permit importation unless the product is head-off and

¹³² *Id.* app. 1, pt. C, § 2.1.

¹³³ *Id.* app. 1, pt. C, § 2.2.

¹³⁴ *Id.* app. 1, pt. D, § 1.1.

¹³⁵ *Id.* app. 1, pt. D, §§ 2.2, 2.4.

¹³⁶ *Id.* app. 1, pt. D, § 2.2.

¹³⁷ The official certificate must (1) attest to the source of the fish and confirm that the fish or fish from which the product is derived were caught in the wild, (2) identify the fish species (scientific name and common name) in the consignment, (3) confirm that the consignment does not contain other fish species, (4) confirm that the fish were processed in premises approved by and under the control of a competent authority, (5) confirm that the fish were inspected under the supervision of a competent authority, and (6) confirm that the product is free from visible lesions associated with infectious disease. *Id.* app. 1, pt. D, § 2.4.

¹³⁸ *Id.*

¹³⁹ The fish on the "specified finfish species" list are susceptible species that have a higher risk of disease and thus are subject to sanitary measures. See, e.g., 1999 IRA, *supra* note 1, at 208. The list as of November 1999 can be found in AQPM 1999/79, *supra* note 125, app. 1, pt. D, § 1.10.

eviscerated, is further processed,¹⁴⁰ or is intended for further processing at designated premises in Australia.¹⁴¹

C. *The Revised Import Guidelines for Live Ornamental Finfish*

Australia's revised guidelines continue to permit the import of live ornamental finfish into Australia, provided that they are accompanied by (1) an animal health certificate from a competent authority attesting to the health of the fish in the consignment and the health status of the premises of export, (2) certification from a competent authority that the premises of export are currently approved for export to Australia, and (3) certification from a competent authority that the fish had not shared water with food-fish aquaculture premises.¹⁴² Each import is subject to post-arrival quarantine detention in approved private facilities under quality assurance arrangements approved by the Australian Quarantine and Inspection Service.¹⁴³ In addition to the certification requirements, eight risk management measures may be applied to address specific disease concerns¹⁴⁴ including health certification, testing of source populations for disease, pre-export inspection of the fish, testing of imports for disease, and treatment of diseased fish.¹⁴⁵

In summary, Australia's revised guidelines end the ban on the import of salmonid products.¹⁴⁶ They also set forth more stringent criteria for the import of non-salmonid finfish products and live ornamental finfish.¹⁴⁷ Thus the revised guidelines narrow the difference that previously existed between the import criteria for non-salmonid products and salmonid products.

¹⁴⁰ For example, thorough cooking such as canning, hot smoking, and pasteurization constitutes further processing that substantially inactivates pathogens. 1999 IRA, *supra* note 1, at 22.

¹⁴¹ AQPM 1999/79, *supra* note 125, app. 1, pt. D, § 1.3.

¹⁴² AQPM 1999/51, *supra* note 19, attachment 3.

¹⁴³ *Id.*

¹⁴⁴ The eight risk management measures are as follows: (1) health certification from the competent authority that the source of the fish was free of specified disease agents; (2) testing of the source population of the fish for specified disease agents; (3) pre-export visual inspection; (4) visual inspection at the border to identify overtly diseased consignments and to ensure that the fish are a permitted species; (5) quarantine security over procedures in quarantine premises, including the disposal of sick and dead fish, transport water, packaging materials, and other waste; (6) testing of imported fish, on a random or routine basis, to address the likelihood that unwanted disease agents may be present in a consignment, and/or to provide additional data to improve targeting of risk management measures generally; (7) if the presence of specific disease agents is suspected or confirmed by diagnostic testing, appropriate treatment of imported fish; and (8) increased post-arrival quarantine over the minimum indicated period. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* attachment 1.

¹⁴⁷ *See* AQPM 1999/79, *supra* note 125; AQPM 1999/51, *supra* note 19, attachment 3; Panel Report, *supra* note 23, para. 7.91.

D. *Canada Challenges Australia's Revised Import Guidelines*

Even though the new guidelines eliminated the twenty-five year old ban on the import of salmonids into Australia, Canada challenged the measures by filing a request that asked the original dispute resolution panel to determine whether Australia's new measures were consistent with the Appellate Body report and the SPS Agreement.¹⁴⁸ Canada argued that the new measures were not based on a risk assessment, were not based on scientific principles, were applied to a greater extent than is necessary to protect animal life or health, and were maintained without sufficient scientific evidence contrary to Articles 5.1 and 2.2.¹⁴⁹ Canada also argued that the measures arbitrarily and unjustifiably discriminated between New Zealand and Canada and between Australia and Canada, and were applied in a manner that constituted a disguised restriction on international trade, contrary to the first provision of Article 2.3.¹⁵⁰ In addition, Canada contended that when considered against the measures for non-salmonid marine finfish products and live ornamental finfish, the measures for salmonids reflected arbitrary or unjustifiable distinctions in Australia's appropriate level of protection, resulting in a disguised restriction on international trade that violates Article 5.5.¹⁵¹ Further, Canada claimed that the new guidelines for salmonids entailed more informational requirements and were more trade restrictive than required to achieve Australia's appropriate level of sanitary protection, contrary to Articles 5.6 and 8 and Annex C.1(c).¹⁵² The dispute settlement panel issued its decision in February 2000.¹⁵³

V. THE WTO DISPUTE SETTLEMENT PANEL REPORT

In its report, the WTO dispute settlement panel upheld most of Australia's new import guidelines. The panel concluded that Australia's 1999 IRA was a proper risk assessment.¹⁵⁴ In addition, the panel determined that the guidelines for salmon, when compared to those for other fish, do not result in disguised restrictions on trade, and that the new guidelines do not

¹⁴⁸ Request by Canada, *supra* note 21.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Panel Report, *supra* note 23.

¹⁵⁴ *Id.* para. 7.71.

impose unnecessary informational requirements.¹⁵⁵ Even so, the dispute settlement panel found that the new guidelines violated several articles of the SPS Agreement.¹⁵⁶ However, these violations were based solely on the consumer-ready provision of the salmon import guidelines.¹⁵⁷ The panel did not find that other provisions violated the SPS Agreement.¹⁵⁸

A. Articles 5.1 and 2.2 of the SPS Agreement

Canada argued that Australia's new import guidelines violated Article 5.1¹⁵⁹ of the SPS Agreement.¹⁶⁰ Article 5.1 requires that any sanitary measure that constitutes a trade restriction be based on a proper assessment of the risk posed by the product.¹⁶¹ The dispute settlement panel first addressed whether Australia's 1999 IRA constituted a proper risk assessment within the meaning of Article 5.1.¹⁶² A risk assessment is an "evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences."¹⁶³ A risk assessment within the meaning of Article 5.1 must:

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

¹⁵⁵ *Id.* paras. 7.102-03, 7.107, 7.154-57.

¹⁵⁶ *Id.* para. 8.1.

¹⁵⁷ *Id.*; see also *infra* Part V.A, C.

¹⁵⁸ Panel Report, *supra* note 23, para 8.1.

¹⁵⁹ Article 5.1 provides that "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." SPS Agreement, *supra* note 9, art. 5.1.

¹⁶⁰ Request by Canada, *supra* note 21.

¹⁶¹ SPS Agreement, *supra* note 9, art. 5.1.

¹⁶² Appellate Body Report, *supra* note 16, at 70.

¹⁶³ *Id.* at 72 (citing SPS Agreement, *supra* note 9, Annex A, para. 4).

- (3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied*.¹⁶⁴

The dispute settlement panel applied this test to Australia's 1999 IRA.¹⁶⁵ The panel concluded that all three requirements were met and that the 1999 IRA therefore constituted a proper risk assessment within the meaning of Article 5.1.

In its decision, the dispute settlement panel noted that Canada did not contest the first requirement; only the second and third requirements were at issue.¹⁶⁶ The panel determined that the 1999 IRA met the second requirement because it objectively evaluated the likelihood of entry, establishment, or spread of the identified diseases, and it did so based on sufficient scientific evidence.¹⁶⁷ The panel contrasted the 1999 IRA with the 1996 Final IRA, the study on which Australia's original salmon import ban was based.¹⁶⁸ The panel observed that whereas the 1996 Final IRA evaluated only the "*possibility—instead of likelihood or probability of disease entry, establishment, or spread,*"¹⁶⁹ the 1999 IRA qualitatively determined "the probability of the disease entering and becoming established in Australia through imports of eviscerated salmonids."¹⁷⁰ The panel also noted that for each disease, the 1999 IRA qualitatively determined the expected impact of disease establishment.¹⁷¹ The panel further observed that the 1999 IRA determined for each disease whether the risk of disease establishment and impact was acceptable in light of Australia's appropriate level of protection against disease.¹⁷²

The dispute settlement panel also determined that the 1999 IRA met the third requirement of an appropriate risk assessment under Article 5.1 because the IRA substantively evaluated how the sanitary measures that might be applied would affect the likelihood of entry, establishment, or spread of disease.¹⁷³ Again, the panel contrasted the 1999 IRA with the 1996 Final IRA. The panel noted that whereas the 1996 Final IRA did not evaluate the effectiveness of the import ban in reducing overall disease

¹⁶⁴ Appellate Body Report, *supra* note 16, at 73 (emphasis in original).

¹⁶⁵ Panel Report, *supra* note 23, para. 7.41.

¹⁶⁶ *Id.* para. 7.42.

¹⁶⁷ *Id.* paras. 7.52-55.

¹⁶⁸ *Id.* para. 7.45 n.167.

¹⁶⁹ *Id.* para. 7.45 (emphasis in original).

¹⁷⁰ *Id.* para. 7.54.

¹⁷¹ *Id.*

¹⁷² *Id.* para. 7.55.

¹⁷³ *Id.* para. 7.71.

risk,¹⁷⁴ the 1999 IRA substantively examined potential sanitary measures.¹⁷⁵ Specifically, the 1999 IRA identified several available sanitary measures for each disease and discussed the effect that each measure would have on disease establishment and the consequences that would flow from such disease establishment.¹⁷⁶ In short, the panel found that the 1999 IRA met all three requirements of a proper risk assessment.

The dispute settlement body next considered whether Australia's new import guidelines were based on the 1999 IRA.¹⁷⁷ A sanitary measure is "based on" a risk assessment when there is "a rational relationship between the measure and the risk assessment."¹⁷⁸ Canada alleged that there was no rational relationship between the 1999 IRA and the requirement that salmonid imports must be consumer-ready before they are released from quarantine.¹⁷⁹ The dispute settlement panel agreed with Canada, observing that the new guidelines provided no explanation of why the "consumer-ready" requirement was necessary.¹⁸⁰ In light of the 1999 IRA's conclusion that head and gill removal and thorough washing significantly reduces disease risk, the panel could find no rational relationship between the 1999 IRA and the additional requirement.¹⁸¹ Thus the panel concluded that Australia's new import guidelines, to the extent that they required salmonid imports to be consumer-ready, violated Article 5.1 of the SPS Agreement.¹⁸²

Based on the violation of Article 5.1, the dispute settlement panel concluded that the consumer-ready requirement violated Article 2.2¹⁸³ of the SPS Agreement.¹⁸⁴ The Appellate Body in the original dispute explained the relationship between Articles 5.1 and 2.2 of the SPS Agreement:

¹⁷⁴ *Id.* para. 7.60 (citing Appellate Body Report, *supra* note 16, at 76).

¹⁷⁵ Panel Report, *supra* note 23, para. 7.66.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* paras. 7.72-74.

¹⁷⁸ *Id.* (citing *European Community—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R para. 193 (report of the Appellate Body), available in WTO Dispute Settlement, Panel and Appellate Body Reports (Feb. 13, 1998) <<http://www.wto.org/wto/dispute/hormab.pdf>> [hereinafter *Hormones*]).

¹⁷⁹ Panel Report, *supra* note 23, para. 7.78.

¹⁸⁰ *Id.* paras. 7.82-83.

¹⁸¹ *Id.* paras. 7.80, 7.83.

¹⁸² *Id.* para. 7.84.

¹⁸³ Article 2 describes Basic Rights and Obligations under the SPS Agreement. Article 2.2 of the SPS Agreement provides, "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5." SPS Agreement, *supra* note 9, art. 2.2.

¹⁸⁴ Panel Report, *supra* note 23, para. 7.85.

Articles 5.1 and 5.2 . . . “may be seen to be marking out and elaborating a particular route leading to the same destination set out in” Article 2.2. Indeed, in the event a sanitary measure is not based on a risk assessment as required in Articles 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. We conclude, therefore, that if we find a violation of the more specific Article 5.1 or 5.2 such finding can be presumed to imply a violation of the more general provisions of Article 2.2.¹⁸⁵

In summary, the dispute settlement panel concluded that the 1999 IRA met the three requirements of a risk assessment under Article 5.1 of the SPS Agreement because it evaluated the probability of disease entry, establishment, or spread, as well as how the potential sanitary measures would affect those probabilities.¹⁸⁶ Even so, the dispute settlement panel concluded that the new guidelines violated Articles 5.1 and 2.2 of the SPS Agreement, but only to the extent that the consumer-ready provision was not based on the 1999 IRA.¹⁸⁷

B. Articles 5.5 and 2.3 of the SPS Agreement

The dispute settlement panel next addressed whether Australia’s enactment of the new import guidelines violated Article 5.5¹⁸⁸ of the SPS Agreement. Article 5.5 prohibits WTO members from adopting sanitary measures that arbitrarily or unjustifiably discriminate between import products or member countries such that the sanitary measures amount to

¹⁸⁵ Appellate Body Report, *supra* note 16, at 80 (citing Initial Panel Report, *supra* note 12, para. 8.52).

¹⁸⁶ Panel Report, *supra* note 23, paras. 7.63-66, 7.84.

¹⁸⁷ *Id.* para. 7.84.

¹⁸⁸ Article 5.5 provides:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

SPS Agreement, *supra* note 9, art. 5.5.

disguised restrictions on international trade.¹⁸⁹ To determine whether Australia violated Article 5.5, the dispute settlement panel applied the test set forth by the Appellate Body in *European Community—Measures Concerning Meat and Meat Products (Hormones)*.¹⁹⁰ Under *Hormones*, three elements are required in order for a member to act inconsistently with Article 5.5 of the SPS Agreement: (1) distinctions must exist in appropriate levels of protection in different situations; (2) the distinctions in levels of protection must be arbitrary or unjustifiable; and (3) the arbitrary distinctions in levels of protection must result in discrimination or a disguised restriction on international trade.¹⁹¹ Applying this test, the dispute settlement panel found that none of the three elements were present, and that therefore Australia's revised import guidelines were consistent with Article 5.5 of the SPS Agreement.¹⁹²

1. First Element—Article 5.5

The dispute settlement panel found that Canada failed to establish the first element of an Article 5.5 violation because under the new import guidelines, the appropriate level of protection¹⁹³ for the import of salmonids did not substantially differ from that of other, similar fish products.¹⁹⁴ The first element of an Article 5.5 violation is the existence of distinctions in appropriate levels of protection in different situations.¹⁹⁵ Different situations cannot be compared unless they present some common element that makes them comparable.¹⁹⁶ For example, different situations are comparable where they both involve a risk of entry, establishment, or spread of the same or a similar disease, or where they both involve similar associated biological and economic consequences.¹⁹⁷ In this case, the dispute settlement panel determined, and Australia did not contest, that the import guidelines for

¹⁸⁹ *Id.*

¹⁹⁰ Panel Report, *supra* note 23, para. 7.86; see *Hormones*, *supra* note 178.

¹⁹¹ *Hormones*, *supra* note 178, para. 214.

¹⁹² Panel Report, *supra* note 23, paras. 7.89, 7.108.

¹⁹³ In the 1999 IRA, Australia determined the appropriate level of protection for each species of fish based upon two criteria: (1) the probability of a disease becoming established in the Australian fish population; and (2) the consequences of disease establishment on the health of the fish population. Where the probability of establishment is low and the consequences of establishment are not too dire, Australia's appropriate level of protection is justified and risk management measures do not have to be implemented. See 1999 IRA, *supra* note 1, at 12-13, 14 fig. 1.1; see also 1999 Ornamental IRA, *supra* note 98, at 11-13 & fig. 1.1.

¹⁹⁴ See generally Panel Report, *supra* note 23, para. 7.92.

¹⁹⁵ Appellate Body Report, *supra* note 16, at 81 (citing *Hormones*, *supra* note 178, para. 214).

¹⁹⁶ *Id.* at 81.

¹⁹⁷ Initial Panel Report, *supra* note 12, para. 8.115.

salmon and those for other fish constituted “different situations” which could be compared¹⁹⁸ under Article 5.5 of the SPS Agreement.¹⁹⁹

With respect to “distinctions in appropriate levels of protection,”²⁰⁰ the panel noted that two of its experts believed Australia’s treatment of salmonid and non-salmonid imports reflected the same or similar levels of protection.²⁰¹ The panel also observed that when compared to Australia’s previous import guidelines, the revised import guidelines imposed a less trade restrictive regime for salmon imports while tightening the import restrictions for non-salmonids.²⁰² According to the panel, any differences in levels of protection under the new import guidelines were unlike the substantial differences in levels of protection under the import ban at issue in the original dispute.²⁰³ Thus, the dispute settlement panel concluded that the first element of an Article 5.5 violation did not exist.

2. *Second Element—Article 5.5*

The second element of an Article 5.5 violation is established when the distinctions in levels of protection are arbitrary or unjustifiable.²⁰⁴ Although the dispute settlement panel found no substantial difference between the levels of protection for salmonid and non-salmonid imports, the panel concluded that any slight distinctions that did exist were not arbitrary or unjustifiable.²⁰⁵ The panel began by noting that Canada identified with specificity only one apparent distinction in levels of protection: the difference between the sanitary measures required for salmonids and those required for pilchards, a “category four”²⁰⁶ non-salmonid.²⁰⁷ The panel observed that the guidelines for the import of pilchards appear less strict than those required for the import of salmonids because the “category four”

¹⁹⁸ The situations are comparable because disease agents that are the same as or similar to the salmon disease agents of concern to Australia have been detected in non-salmonids. *See id.* para. 8.121.

¹⁹⁹ Panel Report, *supra* note 23, para. 7.89.

²⁰⁰ The first element of an Article 5.5 violation has two prongs: “distinctions in appropriate levels of protection” and “in different situations.” The dispute settlement panel chose to address the “distinctions in appropriate levels of protection” prong of the first element at the same time it addressed the second element. *Id.* para. 7.89. For simplicity, this Comment discusses the “distinctions” prong in this section.

²⁰¹ *Id.* para. 7.92.

²⁰² *Id.* para. 7.91.

²⁰³ *Id.* para. 7.90.

²⁰⁴ Appellate Body Report, *supra* note 16, at 85.

²⁰⁵ Panel Report, *supra* note 23, para. 7.101.

²⁰⁶ Category four refers to non-salmonid imports that do not fit into categories one, two, or three, such as whole, unviscerated non-salmonid imports. *See* AQPM 1999/79, *supra* note 125, app. 1, pt. D; *see also supra* Part IV.B.

²⁰⁷ Panel Report, *supra* note 23, para. 7.95.

guidelines do not require measures such as evisceration.²⁰⁸ However, according to the panel, this distinction was not arbitrary or unjustifiable.²⁰⁹ The panel contrasted the new import guidelines with the import ban, noting that the import ban imposed substantial differences in levels of protection without justification,²¹⁰ whereas any differences under the new guidelines were properly based on the 1999 IRA.²¹¹ Specifically, the panel pointed out that only one of the major salmon diseases identified in the 1999 IRA was associated with pilchards and that there was no evidence of transmission of that disease from pilchards to salmonids.²¹² In addition, the panel observed that the consequences of disease establishment were not significant.²¹³ In short, the panel concluded that Canada failed to establish the second element of an Article 5.5 violation because any differences in levels of protection that resulted from the new guidelines were not arbitrary or unjustifiable.²¹⁴

3. *Third Element—Article 5.5*

The dispute settlement panel concluded that Canada failed to establish the third element of an Article 5.5 violation because Australia's new guidelines did not discriminate against Canadian imports.²¹⁵ The third element of an Article 5.5 violation is established when arbitrary or unjustifiable distinctions in levels of protection result in discrimination or a disguised restriction on international trade.²¹⁶ In the original dispute, the Appellate Body concluded that a disguised trade restriction resulted from the salmon import ban.²¹⁷ In making its determination, the Appellate Body relied on three "warning signals" and two "additional factors" considered cumulatively: (1) the arbitrary or unjustifiable character of the differences in levels of protection;²¹⁸ (2) the "*rather substantial difference* in levels of protection" between salmonids, and non-salmonid marine and ornamental finfish;²¹⁹ (3) the inconsistency of the import ban with Articles 5.1 and 2.2 of

²⁰⁸ *Id.* para. 7.97 & n.209.

²⁰⁹ *Id.* para. 7.101.

²¹⁰ *Id.* para. 7.90.

²¹¹ *Id.* para. 7.101.

²¹² *Id.* para. 7.99.

²¹³ *Id.*

²¹⁴ *Id.* para. 7.101.

²¹⁵ *Id.* paras. 7.102, 7.107.

²¹⁶ Appellate Body Report, *supra* note 16, at 86.

²¹⁷ *Id.* at 86-87.

²¹⁸ *Id.* at 87.

²¹⁹ *Id.* at 89 (emphasis in original).

the SPS Agreement;²²⁰ (4) the “substantial, but unexplained change” from the conclusion of the 1995 Draft IRA to the conclusion of the 1996 Final IRA;²²¹ and (5) the absence of controls on the internal movement of salmon products within Australia.²²²

In contrast, the dispute settlement panel found that Australia’s new import guidelines did not constitute a disguised restriction on international trade.²²³ The panel observed that only one of the five warning signals was present,²²⁴ and further noted that any differences in levels of sanitary protection between salmonids and non-salmonids were neither “substantial” nor “arbitrary or unjustifiable.”²²⁵ In addition, the panel found no mysterious policy shift under the new guidelines, as was the case with Australia’s shift from allowing imports under the 1995 Draft IRA to banning imports under the 1996 Final IRA.²²⁶ The panel did find that the consumer-ready requirement violated Articles 5.1 and 2.2 of the SPS Agreement.²²⁷ However, it determined that these violations, by themselves, did not establish the third element of an Article 5.5 violation.²²⁸ In summary, the dispute settlement panel found that Canada did not establish any of the three elements of an Article 5.5 violation and concluded that Australia’s new import guidelines were consistent with Article 5.5 of the SPS Agreement.²²⁹

4. *Article 2.3 of the SPS Agreement*

The dispute settlement panel concluded that Australia’s new import guidelines did not violate the first provision of Article 2.3²³⁰ of the SPS Agreement.²³¹ The panel determined that three elements are required to

²²⁰ *Id.*

²²¹ *Id.* at 91.

²²² *Id.* at 92.

²²³ Panel Report, *supra* note 23, paras. 7.102, 7.107.

²²⁴ *Id.* para. 7.103.

²²⁵ *Id.*; *see supra* Part V.B.1-2.

²²⁶ *Id.* para. 7.104.

²²⁷ *Id.* para. 7.105.

²²⁸ *Id.*

²²⁹ *Id.* para. 7.107.

²³⁰ Article 2 describes Basic Rights and Obligations under the SPS Agreement. Article 2.3 provides:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

SPS Agreement, *supra* note 9, art. 2.3; *see Appellate Body Report, supra* note 16, at 93.

²³¹ Panel Report, *supra* note 23, para. 7.114.

establish a violation of the first provision of Article 2.3: (1) the measure discriminates between WTO members, (2) the discrimination is arbitrary or unjustifiable, and (3) identical or similar conditions prevail in the territory of members being compared.²³² In light of the conclusion that the new import guidelines were consistent with Article 5.5, the panel found that any discrimination between salmonid and non-salmonid imports was not “arbitrary or unjustifiable.”²³³ The panel, relying on “the substantial difference in [fish] disease status,” also found that “identical or similar conditions” did not prevail between Australia and Canada.²³⁴ On this basis, the dispute settlement panel concluded that Australia’s new import guidelines were consistent with the first provision of Article 2.3 of the SPS Agreement.²³⁵

C. *Article 5.6 of the SPS Agreement*

Article 5.6²³⁶ of the SPS Agreement requires WTO members to ensure that their sanitary measures are not more trade restrictive than necessary to achieve their appropriate level of sanitary protection.²³⁷ A measure is more trade restrictive than necessary if there is another sanitary measure that (1) achieves the member’s appropriate level of protection, (2) is reasonably available taking into account technical and economic feasibility, and (3) is significantly less restrictive to trade than the SPS measure contested.²³⁸ These three elements are cumulative.²³⁹ Applying this test, the dispute settlement panel found that Australia’s new import guidelines, to the extent

²³² *Id.* para. 7.111.

²³³ *Id.* para. 7.113.

²³⁴ *Id.*

²³⁵ *Id.* para. 7.114.

²³⁶ Article 5.6 provides:

Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

SPS Agreement, *supra* note 9, art. 5.6.

²³⁷ *Id.*

²³⁸ *Japan—Measures Affecting Agricultural Products*, para. 95, WTO Doc. WT/DS76/AB/R (report of the Appellate Body), available in WTO Dispute Settlement, Panel and Appellate Body Reports (Feb. 22, 1999) <<http://www.wto.org/wto/ditpute/S42d.pdf>> [hereinafter *Agricultural Products*].

²³⁹ *Id.*

they required salmon imports to be consumer-ready,²⁴⁰ violated Article 5.6 of the SPS Agreement.²⁴¹

1. *First Element—Article 5.6*

The dispute settlement panel concluded that Canada established the first element of an Article 5.6 violation because there are measures other than the consumer-ready provision that could achieve Australia's appropriate level of protection.²⁴² The first element of an Article 5.6 violation is established when there is an alternative sanitary measure that achieves the WTO member's appropriate level of protection.²⁴³ The dispute settlement panel considered two alternatives to Australia's import guidelines: (1) the import guidelines with without consumer-ready requirements, and (2) the import guidelines without the 450 gram weight maximum.²⁴⁴

The dispute settlement panel first determined whether Australia's new salmon import guidelines, without any consumer-ready requirements, would achieve Australia's appropriate level of sanitary protection.²⁴⁵ According to Australia, the primary reason for imposing the consumer-ready requirements was to reduce the risk of disease from the waste products of commercially processed salmon imports.²⁴⁶ The panel rejected this argument, noting that Australia's 1999 IRA states that evisceration, removal of the head and gills, and thorough cleaning and washing significantly reduces disease risk.²⁴⁷ The panel also recalled that their experts²⁴⁸ were unable to find any justification in the 1999 IRA for the consumer-ready requirements.²⁴⁹ Moreover, the panel observed that even if Australia did need to prevent further commercial processing of salmon imports to achieve their appropriate level of protection against disease, the 450 gram weight maximum was unnecessary.²⁵⁰ The panel stated, "instead of imposing weight limitations, Australia could restrict release from quarantine to salmon

²⁴⁰ See *supra* note 123 for the definition of "consumer-ready."

²⁴¹ Panel Report, *supra* note 23, paras. 7.125, 7.153.

²⁴² *Id.* paras. 7.144-45.

²⁴³ *Agricultural Products*, *supra* note 238.

²⁴⁴ See Panel Report, *supra* note 23, paras. 7.132, 7.141-42.

²⁴⁵ *Id.* para. 7.132.

²⁴⁶ *Id.* para. 7.133.

²⁴⁷ *Id.* para. 7.134.

²⁴⁸ The dispute settlement panel consulted with three experts to help resolve scientific and technical issues. *Id.* paras. 6.1-6.3.

²⁴⁹ *Id.* para. 7.135.

²⁵⁰ *Id.* paras. 7.141-42.

product that has been individually and commercially packaged in a way that makes it unattractive for commercial processors to further process the product.”²⁵¹ On this basis, the panel concluded that both alternatives would achieve Australia’s appropriate level of protection, and that therefore the first element of an Article 5.6 violation was established.²⁵²

2. *Second Element—Article 5.6*

The dispute settlement panel concluded that Canada established the second element of an Article 5.6 violation because the measures identified above were reasonably available taking into account technical and economic feasibility.²⁵³ The panel agreed with Canada, reasoning that “since one can assume that current Australian requirements are ‘reasonably available taking into account technical and economic feasibility,’ also a regime *without* the consumer-ready requirements . . . would be [reasonably available].”²⁵⁴ The panel also concluded that instead of the 450 gram weight maximum, a requirement for individual and commercial packaging of salmon imports would be an alternative sanitary measure that was reasonably available to Australia.²⁵⁵ In support of its conclusion, the panel cited similar requirements imposed by New Zealand.²⁵⁶ On this basis, the dispute settlement panel concluded that the second element of an Article 5.6 violation was established.²⁵⁷

3. *Third Element—Article 5.6*

The dispute settlement panel also concluded that the third element of an Article 5.6 violation was established because the measures identified above are significantly less restrictive to trade than the consumer-ready requirements of Australia’s new salmonid import guidelines.²⁵⁸ The panel noted that eliminating either the 450 gram weight maximum or the consumer-ready requirements in their entirety “would result in significantly more salmon product being allowed for direct release from quarantine.”²⁵⁹

²⁵¹ *Id.* para. 7.142.

²⁵² *Id.* paras. 7.144-45.

²⁵³ *Id.* para. 7.146.

²⁵⁴ *Id.* (emphasis in original).

²⁵⁵ *Id.* para. 7.147.

²⁵⁶ *Id.*

²⁵⁷ *Id.* para. 7.149.

²⁵⁸ *Id.* paras. 7.150-52.

²⁵⁹ *Id.* para. 7.150.

In addition, the panel observed that hotels, restaurants, and large families generate considerable Australian demand for salmon that does not meet the consumer-ready requirements.²⁶⁰ From this the panel concluded, "The increased market access that would result under the alternatives outlined above would be significant and, in our view, warrants the search for other measures by Australia."²⁶¹ In summary, the dispute settlement panel found that Canada established all three elements of an Article 5.6 violation, however its conclusion was based solely on the consumer-ready provision of Australia's new import guidelines.²⁶²

D. Article 8 and Annex C of the SPS Agreement

Canada alleged that Australia's new import guidelines mandated unnecessarily strict information requirements in violation of Article 8 of the SPS Agreement.²⁶³ Article 8 requires WTO members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures."²⁶⁴ Paragraph 1(c) of Annex C provides:

(1) Members shall ensure, with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures, that: . . .

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs²⁶⁵

Canada argued that Australia's new import guidelines unnecessarily forced an exporting country to prove that (1) imported fish are derived from a population for which there is a documented system of health monitoring and surveillance, (2) imported fish are not juveniles or sexually mature adults, and (3) imported fish are not derived from a population slaughtered as an official disease control measure.²⁶⁶ The dispute settlement panel disagreed

²⁶⁰ *Id.*

²⁶¹ *Id.* para. 7.51.

²⁶² *Id.* paras. 7.125, 7.153.

²⁶³ Request by Canada, *supra* note 21.

²⁶⁴ SPS Agreement, *supra* note 9, art. 8.

²⁶⁵ *Id.* Annex C, para. 1(c).

²⁶⁶ Panel Report, *supra* note 23, para. 7.155.

with Canada's argument, stating that "all three Australian requirements . . . are substantive sanitary measures in their own right, . . . not procedures or information requirements . . . that are subject to paragraph 1(c) of Annex C."²⁶⁷ Thus, the panel concluded that the new import guidelines were consistent with Article 8 and Annex C of the SPS Agreement.²⁶⁸

In summary, the dispute settlement panel concluded that Australia's 1999 IRA was a proper risk assessment under Articles 5.1 and 2.2 of the SPS Agreement.²⁶⁹ The dispute settlement panel also concluded that the new guidelines were consistent with Articles 5.5 and 2.3 of the SPS Agreement, finding that they did not impose arbitrary or unjustifiable distinctions between the appropriate levels of protection for salmonids and other fish and that they did not constitute a disguised restriction on international trade.²⁷⁰ In addition, the panel concluded that the new import guidelines were consistent with Article 8 and Annex C of the SPS Agreement.²⁷¹ Even so, the panel found that Australia's new salmonid import guidelines violated Articles 5.1, 2.2, and 5.6.²⁷² However these violations were based solely on the consumer-ready provision of the new salmonid import guidelines.²⁷³ In short, the panel upheld most of Australia's new import guidelines.

VI. THE WTO DECISIONS INVOLVING THE SPS AGREEMENT: PROTECTION OF THE HUMAN HEALTH AND ENVIRONMENTAL INTERESTS OF WTO MEMBERS

The Australia – Canada salmon dispute is one of only three SPS-related trade conflicts settled by the WTO.²⁷⁴ The other two decisions that deal with the SPS Agreement are the *European Community – Measures Concerning Meat and Meat Products (Hormones)* and *Japan – Measures Affecting Agricultural Products*²⁷⁵ cases.²⁷⁶ In *Hormones*, the Appellate Body concluded that the European Union ("EU") prohibition on the import of meat derived from cattle treated with growth hormones was inconsistent

²⁶⁷ *Id.* para. 7.156.

²⁶⁸ *Id.* para. 7.157.

²⁶⁹ *Id.* para. 7.84.

²⁷⁰ *Id.* paras. 7.108, 7.114.

²⁷¹ *Id.* para. 7.157.

²⁷² *Id.* paras. 7.84-85, 7.153.

²⁷³ See *supra* Part V.A, C.

²⁷⁴ Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and the International Trade of Dairy Products*, 54 FOOD & DRUG L.J. 55, 64 (1999).

²⁷⁵ See *Agricultural Products*, *supra* note 238.

²⁷⁶ See Stewart & Johanson, *supra* note 274, at 65-67.

with Articles 3.3²⁷⁷ and 5.1 of the SPS Agreement.²⁷⁸ In *Agricultural Products*, the Appellate Body concluded that Japan's "varietal testing" requirement²⁷⁹ for the import of certain agricultural products violated Articles 2.2 and 5.1 of the SPS Agreement.²⁸⁰ Although the Appellate Body found violations of the SPS Agreement in both decisions, it rejected several of the violations found by the dispute settlement panels.²⁸¹ In these cases, the Appellate Body focused primarily on the fact that the sanitary measures at issue were not properly based on scientific evidence or a risk assessment.²⁸² Critics of the WTO have cited cases such as these in arguing that the burden of demonstrating scientific validity under the SPS Agreement is insurmountable.²⁸³ The dispute settlement panel in the Australia-Canada salmon dispute demonstrated otherwise by substantially upholding Australia's new import guidelines. When read in conjunction with these two cases, the dispute settlement panel decision on Australia's new salmon import guidelines provides strong evidence that the SPS Agreement can effectively function to protect the human health interests of WTO members.

A. *The Hormones Decision*

In 1989, the EU banned the import of meat from cattle treated with growth hormones.²⁸⁴ The United States and Canada each filed WTO challenges to the import ban, arguing that the use of hormones for growth promotion posed no threat to human health.²⁸⁵ In 1997, the dispute

²⁷⁷ Under Article 3.3, a WTO member may implement a sanitary measure that results in a level of protection different from an international standard as long as the sanitary measure complies with Article 5. See SPS Agreement, *supra* note 9, art. 3.3; see also *Hormones*, *supra* note 178, paras. 172-73.

²⁷⁸ *Hormones*, *supra* note 178, paras. 208-09.

²⁷⁹ Japan required exporting countries to test and confirm the efficacy of anti-moth quarantine treatments for each variety of certain agricultural imports, including apples, cherries, peaches, walnuts, apricots, pears, plums, and quince. *Agricultural Products*, *supra* note 238, paras. 1-2. This testing for each variety meant that even when Japan had already approved, for example, the importation of red delicious apples from the United States, the United States would be unable to export other varieties, such as Fujis, until the efficacy of treatments was demonstrated specifically on the Fujis. Stewart & Johanson, *supra* note 274, at 67.

²⁸⁰ *Agricultural Products*, *supra* note 238, paras. 85, 114.

²⁸¹ See, e.g., *Hormones*, *supra* note 178, para. 253(m); *Agricultural Products*, *supra* note 238, para. 131.

²⁸² See *Hormones*, *supra* note 178, paras. 208-09; see also *Agricultural Products*, *supra* note 238, paras. 85, 113-14.

²⁸³ See Steve Charnovitz, *New York Law School Center for International Law Symposium on World Trade and the Environment*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 163, 168 (1999).

²⁸⁴ Stewart & Johanson, *supra* note 274, at 65.

²⁸⁵ Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant*

settlement panel²⁸⁶ ruled that the EU import ban violated several articles of the SPS Agreement.²⁸⁷ The EU appealed the conclusions of the panel, and the Appellate Body released its report in January 1998.²⁸⁸ The Appellate Body reversed several of the dispute settlement panel's findings.²⁸⁹ For example, the Appellate Body reversed the finding that the import ban was not "based on" international standards, and therefore violated Article 3.1²⁹⁰ of the SPS Agreement.²⁹¹ The Appellate Body reasoned that the panel had inappropriately construed "based on" to mean "conform with," and thus had created a substantive requirement that all SPS measures must conform with international standards.²⁹² In addition, the Appellate Body reversed the panel's finding that the import ban violated Article 5.5 of the SPS Agreement.²⁹³ The Appellate Body concluded that the ban on most of the hormones was not arbitrary or unjustifiable, and that the ban was not a disguised restriction on international trade.²⁹⁴

Nevertheless, the Appellate Body found that the EU import ban violated the SPS Agreement.²⁹⁵ Specifically, it concluded that the import ban violated Articles 5.1 and 3.3 because the ban was not rationally based on a risk assessment.²⁹⁶ The Appellate Body reasoned that all six of the scientific reports relied upon by the EU to support the ban actually concluded that the use of hormones for growth promotion was "safe."²⁹⁷ On this basis, the Appellate Body recommended that the EU bring its meat import policy into compliance with the SPS Agreement.²⁹⁸ Those who point to this case as evidence that the WTO will not uphold trade restrictive measures designed to protect human health appear to disregard the facts of the case. Specifically, the facts relied upon by the Appellate Body reveal

Protection Convention, and the International Office of Epizootics, 26 SYRACUSE J. INT'L L. & COM. 27, 35-36 (1998).

²⁸⁶ The dispute settlement panel that heard the United States claims also heard Canada's claims. *Hormones*, *supra* note 178, para. 1 n.2.

²⁸⁷ Stewart & Johanson, *supra* note 274, at 65.

²⁸⁸ *Id.* at 66.

²⁸⁹ See *Hormones*, *supra* note 178, para. 253.

²⁹⁰ Article 3.1 provides, "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular paragraph 3." SPS Agreement, *supra* note 9, art. 3.1.

²⁹¹ *Hormones*, *supra* note 178, paras. 157-58.

²⁹² *Id.* paras. 162-63.

²⁹³ *Id.* para. 253(m).

²⁹⁴ *Id.* paras. 225, 246.

²⁹⁵ *Id.* para. 253(l).

²⁹⁶ *Id.* paras. 208-09.

²⁹⁷ *Id.* para. 206.

²⁹⁸ *Id.* para. 255.

that the EU's import ban on meat from hormone-treated cattle was not based on a scientific analysis. The EU suggested that meat from hormone-treated cattle was dangerous to human health. However, the studies offered by the EU in support of this proposition reached the opposite conclusion.²⁹⁹ In short, the *Hormones* decision demonstrates only that a sanitary measure that has no rational basis in science violates the SPS Agreement.

B. *The Agricultural Products Decision*

Another WTO decision that addressed the obligations of WTO members under the SPS Agreement was the *Agricultural Products* case.³⁰⁰ In 1996, the United States requested that a WTO dispute settlement panel review Japan's approval process for the importation of agricultural products.³⁰¹ The panel concluded that Japan's "varietal testing" requirements³⁰² violated several articles of the SPS Agreement.³⁰³ Japan appealed the panel decision and the Appellate Body released its report in February 1999.³⁰⁴ The Appellate Body reversed the panel's finding that the varietal testing requirements were more trade restrictive than necessary and thus violated Article 5.6 of the SPS Agreement.³⁰⁵ The Appellate Body reasoned that the panel inappropriately based its conclusion solely on expert testimony because the United States had not even argued the specific issue.³⁰⁶ Therefore, according to the Appellate Body, the dispute settlement panel had relieved the United States of its burden of proof.³⁰⁷

Even so, the Appellate Body found that Japan's varietal testing requirements violated the SPS Agreement.³⁰⁸ Specifically, the Appellate Body concluded that the requirements were maintained without sufficient scientific evidence in violation of Article 2.2,³⁰⁹ and that the requirements were not rationally based on a risk assessment in violation of Article 5.1 of the SPS Agreement.³¹⁰ The Appellate Body noted that the risk assessment relied upon by Japan "does not discuss or even refer to the varietal testing

²⁹⁹ *Id.* para. 206.

³⁰⁰ See Stewart & Johanson, *supra* note 274, at 65-67.

³⁰¹ *Id.* at 67.

³⁰² See *supra* note 279.

³⁰³ See *Agricultural Products*, *supra* note 238, para. 3.

³⁰⁴ *Id.*

³⁰⁵ *Id.* paras. 3, 131.

³⁰⁶ *Id.* para. 130.

³⁰⁷ *Id.* para. 131.

³⁰⁸ *Id.* paras. 85, 114.

³⁰⁹ *Id.* para. 85.

³¹⁰ *Id.* paras. 113-14.

requirement.³¹¹ On this basis the Appellate Body recommended that Japan bring its agricultural products import guidelines into compliance with the SPS Agreement.³¹² Those who argue that the *Agricultural Products* case demonstrates that sanitary measures can never survive a challenge in the WTO dispute settlement system again appear to be according insufficient weight to the facts of the case. Japan's varietal testing requirement clearly was not based on scientific analysis; it was never mentioned in Japan's risk assessment.³¹³ Similar to the *Hormones* decision, the *Agricultural Products* decision demonstrates only that a sanitary measure that has no rational basis in science violates the SPS Agreement.

C. *The SPS Agreement: An Effective Tool for Human Health Protection*

Environmentalists often vilify the WTO because they believe that the WTO system is indifferent or even hostile to human health concerns.³¹⁴ The conventional wisdom among some in the environmental community is that all of the decisions that come out of the WTO dispute settlement system inhibit the ability of countries to protect their health and environmental standards.³¹⁵ This view of WTO decisions, at least those decisions that involve the SPS Agreement, is shortsighted and does not take the facts of each individual case into consideration. At first blush, the *Hormones* and *Agricultural Products* decisions appear to undermine human health interests; they both declare sanitary measures that were purportedly enacted to protect human health, inconsistent with the SPS Agreement. However, a close consideration of the facts reveals that the decisions do not truly undermine human health interests. In *Hormones*, the Appellate Body found that the scientific studies relied upon by the EU did not support the prohibition on the import of meat from growth hormone-treated cattle.³¹⁶ In *Agricultural Products*, the Appellate Body noted that the risk assessment relied upon by Japan made no mention of Japan's varietal testing import requirements.³¹⁷ Simply put, these decisions stand mostly for the proposition that environmental or sanitary measures must be based on scientific evidence and risk analyses.

³¹¹ *Id.* para. 113.

³¹² *Id.* para. 144.

³¹³ See *supra* note 311 and accompanying text.

³¹⁴ Kevin C. Kennedy, *The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 375, 501-02 (1998).

³¹⁵ See Charnovitz, *supra* note 283, at 168.

³¹⁶ *Hormones*, *supra* note 178, para. 206.

³¹⁷ *Agricultural Products*, *supra* note 238, para. 113.

It is likely that those who are critical of the WTO dispute resolution process took a cynical view of the *Hormones and Agricultural Products* cases and argued that the burden of demonstrating the scientific validity of a sanitary or environmental measure was insurmountable. However, the dispute settlement panel decision upholding most of Australia's new salmon import guidelines has proven otherwise. The panel upheld several import restrictions, including a requirement for proof that the salmonid product was derived from eviscerated, headed, non-diseased salmon that were processed at approved premises.³¹⁸ The requirement that salmonid product be in "consumer-ready" form to be released from quarantine was the only part of Australia's new import guidelines that was found to violate the SPS Agreement.³¹⁹ In short, the panel concluded that most of Australia's new import guidelines were appropriately grounded in science and were consistent with the SPS Agreement. The panel decision represents the first case in which a sanitary measure was substantially upheld by the WTO and demonstrates that WTO members can effectively protect their environmental and health interests within the current WTO framework.

VII. CONCLUSION

One of the stated purposes of the SPS Agreement is to ensure that no WTO member is "prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health."³²⁰ This objective of the SPS Agreement is subject to the caveat that the measures must not be applied arbitrarily, unjustly, or in a manner that constitutes a disguised restriction on international trade.³²¹ In this case, Australia has removed an import prohibition, allowing the import of salmonids that meet several sanitary criteria required by Australia. The dispute settlement panel upheld most of Australia's new guidelines, reasoning that they are appropriately based on comprehensive, detailed scientific analyses of the risk of disease establishment in Australian fish populations and the consequences of such establishment. The panel's decision is the first case in which a sanitary measure was substantially upheld by the WTO, and it provides strong evidence that the SPS Agreement is an effective tool available to WTO members that wish to protect their human health interests.

³¹⁸ See *supra* note 121 and accompanying text.

³¹⁹ See *supra* Parts V.A, C.

³²⁰ SPS Agreement, *supra* note 9, preamble, para. 1.

³²¹ *Id.*