CASE NOTES

CASE CONCERNING MEASURES AFFECTING IMPORTATION OF SALMON[1]

(Australia/Canada)

INTRODUCTION

This case concerned a dispute between Australia and Canada on Australia's quarantine restrictions and the measures used to prevent the importation of Canadian salmon into Australia. The Parties submitted their dispute to the dispute settlement mechanism established by the World Trade Organisation (WTO), the Dispute Settlement Body (DSB). The DSB is an authority established under Article IV of the 1993 Agreement Establishing the WTO and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSB is responsible for enforcing the DSU.

A Panel dealt with this case at first instance under the DSU,[2] but its decision was appealed to the Appellate Body by both Parties. During the appeal, the European Communities, India, Norway and the United States appeared as Third Participants.

CANADA'S COMPLAINT

In this case, Canada had complained to the WTO against Australia's quarantine restrictions and the measures used to prevent the commercial importation into Australia of fresh, chilled or frozen Canadian salmon under Quarantine Proclamation 86A of 19 February 1975 and its amendments or modifications (QP86A).[3] Before the promulgation of QP86A on 30 June 1975, Australia did not impose any restrictions on the importation of uncooked, wild, adult, ocean-caught Pacific salmonid product (ocean-caught Pacific salmon).

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[1] This case note is partially extracted from the Report of the Appellate Body, WTO, Australia – Measures Affecting Importation of Salmon, 20 October 1998, WT/DS18/AB/R (98-000), which is located at <www.wto.org/english/tratop_e/dispu_e/ds18abr.doc> (visited August 2000).

[2] WT/DS18/R, 12 June 1998.

[3] Quarantine Proclamation No 86A, Australian Government Gazette, No S33, 21 February 1975.

Under QP86A, certain products cannot be imported into this country unless they have been subject to treatment. QP86A reads as follows:

> 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 infections or contagious disease, or disease or pest affecting persons, animals or plants.

Accordingly, pursuant to delegated authority and subject to conditions, the Director of Quarantine may allow the commercial importation into Australia of heat-treated salmon products for human consumption as well as non-commercial quantities of other salmon, primarily for scientific purposes. However, fresh, chilled or frozen salmon (uncooked salmon) cannot be imported.

Canada requested access to the Australian market for uncooked salmon. As a result, Australia conducted an import risk analysis for ocean-caught Pacific salmon. The outcome of the risk analysis was first set forth in a 1995 Draft Report[4], revised in May 1996[5] and finalised in December 1996 (the 1996 Final Report).[6] The 1996 Final Report recommended that the present quarantine policies for uncooked salmon products should stay.[7] On 13 December 1996, the Director of Quarantine adopted this recommendation after considering Australia's quarantine policy and international obligations.

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[4] Australian Quarantine and Inspection Service, 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.

[5] Australian Quarantine and Inspection Service, 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.

[6] 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.

[7] Ibid 70.

However, Canada claimed that this category of salmon, which was the basis for the risk analysis, should be distinguished from the other categories of salmon that Canada had sought to export to Australia (other Canadian salmon). As an exporter, Canada complained that Australia's action contravened the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). More specifically, Canada claimed that the Proclamation breached Articles 5.1, 5.5 and 5.6 of the Agreement, and Articles 2.2 and 2.3 were breached by implication.

THE PANEL PROCEEDINGS[8]

A DSU Panel was established to consider Canada's complaint. After consultation with scientific experts,[9] the Panel concluded as follows:[10]

(i) By maintaining a sanitary measure that was not based on risk assessment, Australia had acted contrary to Article 5.1 of the SPS Agreement. As such, Australia's action was inconsistent with Article 2.2 as well.

(ii) By distinguishing uncooked salmon from whole, frozen herring for use as bait and live ornamental finfish, Australia had adopted arbitrary and unjustifiable distinctions in the levels of sanitary protection in different situations. This resulted in discrimination or a disguised restriction on international trade.

(iii) Since Australia's sanitary measure regarding uncooked salmon was more trade-restrictive than was required to achieve an appropriate level of sanitary protection, it was inconsistent with Article 5.6. As such, Australia's action was inconsistent with Article 2.3 as well.

As a result, 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", the Panel found that Australia had nullified or impaired Canada's benefits accruing under the Agreement

[8] See generally WTO, Australia – Measures Affecting Importation of Salmon, 20 October 1998, WT/DS18/AB/R (98-000), ibid paras 1-3.
[9] Ibid Annex 2.
[10] Ibid para 9.1.

by acting inconsistently with the SPS Agreement. Also, Australia's actions were not only inconsistent with Articles 5.1, 5.5 and 5.6 of the Agreement, but had breached Articles 2.3 and 2.3 by implication too. Paragraph 9.2 of the Panel Report therefore recommended as follows:

> 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.

On 12 June 1998, the Panel Report was circulated to WTO Members.

THE APPELLATE BODY PROCEEDINGS

Both Parties appealed against the finding of the Panel Report to a three-member DSU Appellate Body[11] according to Article 16 of the DSU and the Rules of the Working Procedures.[12] Oral hearings were held on 21-22 August 1998. The European Communities, India, Norway and the United States appeared as Third Participants and made a number of submissions.[13] Under Article 17.6 of the DSU, the Appellate Body's jurisdiction and mandate were "limited to issues of law covered in the panel report and legal interpretations developed by the panel." As a consequence, the Parties requested the Appellate Body to consider only issues of law and legal interpretation found in the Panel Report.

Australia as Appellant/Appellee[14]

Australia asked the Appellate Body to consider the following issues:

(a) Did the Panel interpret its terms of reference wrongly regarding the measure and the product at issue?

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[11] The Members were Claus-Dieter Ehlermann (presiding), Christopher Beeby and Said El-Naggar.

[12] On 22 July 1998, Australia appealed against parts of the Panel Report and filed an appellant's submission on 3 August 1998. Canada did likewise, filing its appellant's submission on 6 August 1998. On 14 August 1998, both Parties filed appellees' submissions.

[13] For the submissions of the Third participants, see WT/DS18/AB/R (98-000) paras 61-71 (European Communities); paras 72-72 (India); paras 75-80 (Norway); and paras 81-87 (United States).

[14] See generally ibid paras 6-50.

(b) Did the Panel exceed its terms of reference by extending its examination of Article 5 to Article 6 of the SPS Agreement?
(c) Did the Panel err in law in finding that the measure at issue, as it applied to ocean-caught Pacific salmon, was not based on a risk assessment, and that Australia had therefore acted inconsistently with Article 5.1, and by implication, Article 2.2 of the SPS Agreement?
(d) Did the Panel err in law in finding that Australia had acted inconsistently with Article 5.5, and by implication, Article 2.3 of the SPS Agreement?
(e) Did the Panel err in law in finding that Australia had acted inconsistently with Article 5.6 of the SPS Agreement?
(f) On the evidence, did the Panel:
    - allocate and apply correctly the burden of proof?
    - conduct an objective assessment of the matter?
    - err in admitting or considering certain evidence?
    - fail to accord Australia due process by denying its request to submit a third written submission?

Canada as Appellant/Appellee[15]

Canada raised the following issues before the Appellate Body:

(a) Did the Panel err in law when applying the "principle of judicial economy"[16] and in failing to extend its assessment of Canada's claims under Articles 5.5 and 5.6 of the SPS Agreement to other Canadian salmon?
(b) Did the Panel err in law by not finding that Australia had violated Article 2.3, but yet finding that Australia had acted inconsistently with Article 5 of the SPS Agreement?

Canada asserted that the Panel had failed to make findings under Articles 5.5 and 5.6 for salmon products other than ocean-caught Pacific salmon. In support, Canada argued that the Panel had misapplied the "principle of judicial economy" as set out by the Appellate Body in *United States – Measure Affecting Imports of Woven*

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[15] See generally ibid paras 51-60.
[16] See below.

Wool Shirts and Blouses.[17] The Appellate Body in this earlier case had stated that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[18] However, Canada claimed that the Panel's approach was too restrictive and hence its conclusion in the present case was contrary to the intent of Article 3.7 of the DSU.

The Appellate Body's Report[19]

As stated above, the Appellate Body's jurisdiction and mandate were limited to issues of law under Article 17.6 of the DSU. Article 17.13 provides that the "Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." In certain appeals, when a Panel's finding on a legal issue is reversed, the Appellate Body may examine and decide an issue that was not specifically addressed by the Panel in order to complete the legal analysis and resolve the dispute between the Parties. Precedents for this proposition include the appeals in *United States – Gasoline;*[20] *Canada – Certain Measures Concerning Periodicals;*[21] *European Communities – Measures Affecting the Importation of Certain Poultry Products;*[22] and *United States – Import Prohibition of Certain Shrimp and Shrimp Products.*[23]

On 7 October 1998, the Appellate Body published the outcome of its deliberations in the present case in *Report on Australia – Measures Affecting Importation of Salmon (AB-1998-5).* The Report made the following findings and conclusions:

(a) The Appellate Body reversed the Panel's findings that the 1988 Conditions and the 1996 Requirements were within the Panel's terms of reference. The Appellate Body concluded that the SPS measure at issue in this dispute was the import prohibition on fresh, chilled or frozen salmon set forth in QP86A, as

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[17] Adopted on 23 May 1997, WT/DS33/AB/R. For more discussion see WT/DS18/AB/R (98-000) para 219-226.
[18] Adopted 23 May 1997, WT/DS33/AB/R at 19.
[19] WT/DS18/AB/R (98-000) para 280.
[20] Adopted 20 May 1996, WT/DS2/AB/R at 19 et seq.
[21] Adopted 30 July 1997, WT/DS31/AB/R at 23 et seq.
[22] Adopted 23 July 1998, WT/DS69/AB/R paras 154 et seq.
[23] WT/DS58/AB/R, dated 12 October 1998 paras 123 et seq.

confirmed by the 1996 Decision, rather than the heat-treatment requirement set forth in the 1988 Conditions.

(b) The Appellate Body considered that the Panel's reference to Article 6.1 of the SPS Agreement was not "a legal finding or conclusion". The Appellate Body found that the Panel did not, therefore, exceed its terms of reference.

(c) The Appellate Body reversed the Panel's finding that the measure at issue in this dispute, as it applied to ocean-caught Pacific salmon, was not based on a risk assessment in accordance with Article 5.1. The Appellate Body found that the Panel's finding was based on the wrong premise that the heat-treatment requirement, rather than the import prohibition, was the SPS measure at issue. As such, Australia had acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the SPS Agreement.

(d) The Appellate Body found that on the basis of the Panel's factual findings, the 1996 Final Report was not *risk* assessment within the meaning of Article 5.1 or within the meaning of the first definition in Paragraph 4 of Annex A of the SPS Agreement. By maintaining an import prohibition on fresh, chilled or frozen ocean-caught Pacific salmon without a proper risk assessment, Australia had acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the SPS Agreement.

(e) The Appellate Body upheld the Panel's finding that, by maintaining the measure at issue as it applied to ocean-caught Pacific salmon, Australia had acted inconsistently with its obligations under Article 5.5 and, by implication, Article 2.3 of the SPS Agreement.

(f) The Appellate Body reversed the Panel's finding that the measure at issue, as it applied to ocean-caught Pacific salmon, was "more trade-restrictive than required" to achieve Australia's appropriate level of protection. It also reversed the Panel's finding that Australia had acted inconsistently with Article 5.6 of the SPS Agreement. The reason was that the Panel had made this finding on the wrong premise that the heat-treatment requirement, rather than the import prohibition, was the SPS measure at issue in this dispute.

(g) The Appellate Body could not conclude whether or not the SPS measure at issue, namely, the import prohibition as it applied to ocean-caught Pacific salmon, was consistent with Article 5.6 of

the SPS Agreement as a result of insufficient factual findings and undisputed facts in the Panel record.

(h) The Appellate Body found that the Panel had erred in its application of the principle of judicial economy by limiting its findings under Articles 5.5 and 5.6 to ocean-caught Pacific salmon. The Panel had also erred by deeming it unnecessary to address Articles 5.5 and 5.6 of the SPS Agreement with respect to other Canadian salmon.

(i) The Appellate Body found that by maintaining the SPS measure at issue with regard to other Canadian salmon, Australia had acted inconsistently with Article 5.5 of the SPS Agreement.

(j) The Appellate Body could not conclude whether or not the SPS measure at issue, namely, the import prohibition, as it applied to other Canadian salmon, was consistent with Article 5.6 of the SPS Agreement as a result of insufficient factual findings and undisputed facts in the Panel record.

(k) The Appellate Body concluded that a finding of inconsistency with the first sentence of Article 2.3 could be reached independently of a finding of inconsistency with Article 5.5. However, because of insufficient factual findings and undisputed facts in the Panel record, the Appellate Body could not determine whether the measure at issue constituted arbitrary or unjustifiable discrimination within the meaning of the first sentence of Article 2.3 of the SPS Agreement.

(l) The Appellate Body concluded that the Panel's consideration and weighing of the evidence in support of Canada's claims related to the Panel's assessment of the facts and, therefore, fell outside the scope of appellate review.

(m) The Appellate Body concluded that the Panel did not abuse its discretion contrary to its obligations under Article 11 of the DSU.

(n) The Appellate Body concluded that the Panel's admission and consideration of certain evidence submitted, or referred to, by Canada did not raise due process concerns contrary to the DSU.

(o) The Appellate Body concluded that since the Panel granted Australia extra time to respond to the oral statement made by Canada at the second meeting of the Panel, the Panel did not fail to accord due process to Australia contrary to the DSU.

Accordingly, the Appellate Body recommended as follows:[24]

> [T]hat the DSB request that Australia bring its measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

CONCLUSION

Following the release of the Appellate Body Report, Australia informed the DSB on 25 November 1998 that pursuant to Article 21.3 of the DSU it would implement the recommendations and rulings of the DSB in this dispute. In doing so, Australia stated that although it would be "mindful" of Article 3.5 of the DSU, it would require a reasonable period to complete the implementation process.

Although Australia was disappointed with the findings and conclusions of the Appellate Body Report, its reaction above was in accordance with the tenor and spirit of the establishment of the DSB and the DSU. The DSB provides in general terms the procedures for the settlement of disputes between the Member States of the WTO. The procedures rely on consultations, good offices, conciliation, mediation, and Panel and Appellate Body proceedings. These procedures, unlike arbitration, do not result in binding decisions and the Panel and Appellate Body may only make recommendations. In other words, the success of these mechanisms depends on the good faith of the disputing Parties. However, in the WTO, the Panel and Appellate Body Reports become binding once the DSB accepts them.[25]

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[24] WT/DS18/AB/R (98-000) para 281.

[25] Mo J, International Commercial Law (2000, 2nd edition, Butterworths, Sydney) 582-583.