

AUSTRALIA – SALMON¹

(DS18)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	SPS Arts. 5.1, 5.5 and 5.6	Establishment of Panel	10 April 1997
			Circulation of Panel Report	12 June 1998
Respondent	Australia		Circulation of AB Report	20 October 1998
			Adoption	6 November 1998

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Australia's import prohibition of certain salmon from Canada.
- Product at issue: Fresh, chilled or frozen ocean-caught Canadian salmon and certain other Canadian salmon.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- SPS Art. 5.1: The Appellate Body, although reversing the Panel's finding because the Panel had examined the wrong measures (i.e. heat-treatment requirement), still found that the correct measure at issue – i.e. Australia's import prohibition – violated Art. 5.1 (and, by implication, Art. 2.2) because it was not based on a "risk assessment" requirement under Art. 5.1.
- SPS Art. 5.5: The Appellate Body upheld the Panel's finding that the import prohibition violated Art. 5.5 (and, by implication Art. 2.3) since "arbitrary or unjustifiable" levels of protection were applied to several different yet comparable situations so as to result in "discrimination or a disguised restriction" (i.e. more strict restriction) on imports of salmon, compared to imports of other fish and fish products such as herring and finfish.
- SPS Art. 5.6: The Appellate Body reversed the Panel's finding that the heat-treatment violated Art. 5.6 by being "more trade-restrictive than necessary", because heat treatment was the wrong measure. The Appellate Body, however, could not complete the Panel's analysis of this issue under Art. 5.6 due to insufficient facts on the record. (In this regard, the Appellate Body said that it would complete the Panel's analysis in a situation like this "to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record".)

3. OTHER ISSUES²

- False judicial economy: The Appellate Body found that the Panel in this case exercised "false judicial economy" by not making findings for all the products at issue, in particular, findings in respect of Art. 5.5 and 5.6 for other Canadian salmon. The Appellate Body clarified that, in applying the principle of judicial economy, panels must address those claims on which a finding is necessary to secure a positive solution to the dispute. Providing only a partial resolution of the matter at issue would be "false judicial economy".

¹ *Australia – Measures Affecting Importation of Salmon*

² Other issues addressed in this case: SPS Arts. 5.5 and 5.6 as applied to "certain other Canadian salmon" than certain ocean-caught Canadian salmon (in connection with the Appellate Body's finding on the Panel's exercise of false judicial economy); relationship between SPS Arts. 5.5 and 2.3; panel's terms of reference; scope of appellate review (in relation to burden of proof); DSU Art. 11; panel's admission and consideration of evidence; scope of interim review (DSU Art. 15.2); evidentiary issues; claims and arguments; applicability and relationship between the GATT and the SPS Agreement; order of the claims to be addressed.

AUSTRALIA – SALMON (ARTICLE 21.5)¹

(DS18)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	SPS Arts. 2.2, 2.3, 5.1, 5.5 and 5.6	Referred to the Original Panel	28 July 1999
			Circulation of Panel Report	18 February 2000
Respondent	Australia	DSU Art 10.3	Circulation of AB Report	NA
			Adoption	20 March 2000

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Australia published the "1999 Import Risk Analysis" which included additional analyses that considered the health risks associated with the importation into Australia of fresh, chilled and frozen salmon. Australia also modified its legislation on the quarantine of imports by allowing, pursuant to permits, non-heated salmon to be imported and released from Australian quarantine facilities in cases where the salmon was in a "consumer-ready" form. Similar regulations were adopted, around the same time, regarding imports of herring and finfish.

2. SUMMARY OF KEY PANEL FINDINGS

- SPS Art. 5.1 (risk assessment): The Panel found that Australia was in violation of Art. 5.1 and by implication, therefore, of the general obligations of Art. 2.2. Reiterating the three requirements laid down previously by the Appellate Body that are essential to constitute a "risk assessment", the Panel noted that for a measure to be "based on" a risk assessment there needs to be a "rational relationship" between the measure and the risk assessment, and that none of the experts consulted by the Panel could find any justification in Australia's risk assessment measure for the requirement that salmon be "consumer-ready". Based on the same rationale, the Panel found that the ban on the imports of salmon enacted by the Tasmanian Government was also in violation of Arts. 5.1 and 2.2.
- SPS Art. 5.5 ("avoid arbitrary or unjustifiable distinctions"): The Panel concluded that Australia was not in violation of Art. 5.5, as it found that although Australia was employing different levels of protection to different, but sufficiently comparable, situations, the different treatment was scientifically justified, and not arbitrary or unjustifiable and the different treatment was thus not a disguised restriction on international trade.
- SPS Art 5.6 ("not more trade-restrictive than required"): Upon examining the Australian measure in light of the three elements needed to demonstrate an inconsistency with Art. 5.6, the Panel found that Australia had acted inconsistently with Art. 5.6. The Panel found that, taking into account the technical and economic feasibility of alternative measures (first element), there were other less-trade restrictive measures available to Australia that would provide the appropriate level of protection (second element), and these alternative measures (i.e. requirement for "special packaging" as an alternative to the current "consumer-ready" requirement) would lead to significantly more imported salmon in the Australian market (third element).

3. OTHER ISSUES²

- Terms of reference (DSU Art. 21.5 panels): The Panel refused to grant Australia's request to impose jurisdictional limits on Art. 21.5 compliance panels and stated that there is no suggestion in the text of Art. 21.5 that only certain issues of consistency of measures may be considered, but that a compliance Panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in light of any provision of any of the covered agreements.

¹ *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*

² Other issues addressed: protection of confidential information; *amicus curiae* submission; third party rights; SPS Art. 8 and Annex C, para. 1(c).