WORLD TRADE ORGANIZATION

WT/DS18/AB/R
20 October 1998
(98-4035)

Original: English

AUSTRALIA – MEASURES AFFECTING IMPORTATION OF SALMON

AB-1998-5

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Australia - Measures Affecting Importation of Salmon

Australia, *Appellant/Appellee*
Canada, *Appellant/Appellee*

European Communities, India, Norway and the United States, *Third Participants*

AB-1998-5

Present:

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

I. Introduction

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

2. Before the promulgation of QP86A on 30 June 1975, Australia imposed no restrictions on the importation of salmonid products. QP86A "prohibit[s] the importation into Australia of dead fish of the sub-order Salmonidae, or any parts (other than semen or ova) of fish of that sub-order, in any form unless: [...] prior to importation into Australia the fish or parts of fish have been subject to such treatment as in the opinion of the Director of Quarantine is likely to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals or plants". Pursuant to QP86A and in accordance with the authority delegated therein, the Director of Quarantine has permitted the entry of commercial imports of heat-treated salmon products for human consumption as well as non-commercial quantities of other salmon (primarily for scientific purposes) subject to

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

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

prescribed conditions.[3] Canada requested access to the Australian market for fresh, chilled or frozen, i.e., uncooked, salmon. Australia conducted an import risk analysis for uncooked, wild, adult, ocean-caught Pacific salmonid product ("ocean-caught Pacific salmon"). This category of salmon is to be distinguished from the other categories of salmon for which Canada seeks access to the Australian market ("other Canadian salmon").[4] The risk analysis on ocean-caught Pacific salmon was first set forth in the 1995 Draft Report[5], revised in May 1996[6] and finalized in December of 1996 (the "1996 Final Report").[7] The 1996 Final Report concluded that:

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

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

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

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

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

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

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

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

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

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

[8]1996 Final Report, page 70.

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

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

> (i) Australia, by maintaining a sanitary measure which is not based on a risk assessment, has acted (both in so far as the measure applies to salmon products at issue from adult, wild, ocean-caught Pacific salmon and the other categories of salmon products in dispute), inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground, has also acted inconsistently with the requirements contained in Article 2.2 of that Agreement;
>
> (ii) Australia, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations (on the one hand, the salmon products at issue from adult, wild, ocean-caught Pacific salmon and, on the other hand, whole, frozen herring for use as bait and live ornamental finfish), which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground, has also acted inconsistently with the requirements contained in Article 2.3 of that Agreement;
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> (iii) Australia, by maintaining a sanitary measure (with respect to those salmon products at issue from adult, wild, ocean-caught Pacific salmon) which is more trade-restrictive than required to achieve its appropriate level of sanitary protection, has acted inconsistently with the requirements contained in Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
>
> Since Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", we conclude that to the extent Australia has acted inconsistently with the SPS Agreement it has nullified or impaired the benefits accruing to Canada under the SPS Agreement.

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

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

4. On 22 July 1998, Australia notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a notice of appeal[10] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 3 August 1998, Australia filed an appellant's submission.[11] On 6 August 1998, Canada also filed an appellant's submission.[12] On 14 August 1998, both Australia[13] and Canada[14] filed appellee's submissions. On the same day, the European Communities, India, Norway and the United States filed separate third participant's submissions.[15]

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

II. Arguments of the Participants and Third Participants

A. *Australia - Appellant*

1. Terms of Reference

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

[10]WT/DS18/5, 22 July 1998.

[11]Pursuant to Rule 21(1) of the *Working Procedures*.

[12]Pursuant to Rule 23(1) of the *Working Procedures*.

[13]Pursuant to Rule 22 of the *Working Procedures*.

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

[15]Pursuant to Rule 24 of the *Working Procedures*.

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

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

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

2. Burden of Proof

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

11. Australia argues that the Panel did not require directly relevant scientific data to support Canadian assertions, and thereby created an imbalance in the evidentiary standards demanded of the complainant and respondent. According to Australia, while the Panel "superficially" adopted the interpretative approach of the Appellate Body in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities - Hormones*")[16], it failed to follow the interpretative guidance provided by the Panel Reports in the same case.[17] It maintained a conceptual approach to the *SPS Agreement* modelled on Article III and Article XX of the GATT 1994 in regard to its interpretations of the provisions of Articles 5.1, 5.5 and 5.6 and by association, Articles 2.2 and 2.3, even in the manner of allocating the burden of proof.

3. Objective Assessment of the Matter

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

[16]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R.

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

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

4. Other Procedural Matters

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

15. Australia asserts that at the second substantive meeting, the Panel denied Australia the right to submit a formal written rebuttal submission to Canada's oral statement which raised many "new matters". Its grant of one week for a written comment limited to specific matters was not sufficient to fully address the substantive issues raised in the statement, in accordance with the time periods provided by the Working Procedures of Appendix 3 of the DSU.

5. Article 5.1 of the *SPS Agreement*

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

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

18. Australia claims that the Panel also failed to interpret the obligations of Article 5.1 in their proper context, including Articles 5.2 and 2.2 of the *SPS Agreement*. Article 5.2 provides that: "In the assessment of risks, Members shall take into account ... relevant processes and production methods ...". Clearly, a process method is only "relevant" if it is actually used in producing the

product to be imported in fresh, chilled or frozen form. Thus, if a process method embodied in a "measure" is not a relevant process method for fresh, chilled or frozen salmon, there is no obligation on WTO Members to assess that process method. According to Australia, there is no basis in the *SPS Agreement* for concluding that for a measure to be based on a risk assessment, it is required that the risk be assessed on a process method which does not have application to the product at issue. To suggest that a risk assessment on heat treatment could provide the basis for an import prohibition on fresh, chilled or frozen product is not only a logical absurdity but would nullify the meaning of the term based on as used in Article 5.1 of the *SPS Agreement*.

6. Article 5.5 of the *SPS Agreement*

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

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

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

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

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

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

25. Australia asserts that an adverse finding under Article 5.1 does not provide any evidence of a "disguised restriction on trade" resulting from arbitrary or unjustifiable distinctions in the levels of protection under Article 5.5, nor should it presume or pre-empt a finding under Article 5.5. Any such interpretation would negate any burden of proof on the complainant to establish a presumption in regard to the three elements of Article 5.5 and would not provide any scope for rebuttal by the respondent. Furthermore, such an interpretation would fail to give effect to all the terms of the treaty, and would vitiate the role of Article 5.5 as an additional obligation to that imposed by Article 5.1.

26. Australia claims that the first of the "other factors" cited by the Panel, referring to "two substantially different implementing measures" which involve "discrimination" between products, is based on an inappropriate analogy to Article III of the GATT 1994 and is a manifest factual inaccuracy. Furthermore, according to Australia, the Panel erred if it is applying an interpretation of discrimination based on Article III of the GATT 1994, rather than applying an interpretation in the

sense of Article 2.3 of the *SPS Agreement*, i.e., discrimination between different WTO Members or between Australia and Canada "where identical or similar conditions prevail".

27. According to Australia, the Panel mischaracterized the difference between the recommendation of the 1995 Draft Report and the recommendation of the 1996 Final Report as a "change" and a "rather substantial change in conclusions". It incorrectly accorded a draft recommendation the status of an SPS measure and erroneously adhered to a view that the only way to justify a difference between draft recommendations and final recommendations under the *SPS Agreement* is by new scientific evidence. In this context, the Panel refused to consider relevant evidence submitted by Australia on re-evaluation of data and the role of draft reports and recommendations as part of the transparency of the practices and processes of government. Australia asserts that there is no SPS provision that requires a WTO Member to implement draft recommendations absent new scientific evidence.

28. Australia contends that the Panel is in legal error in implying that, with regard to one disease, *epizootic haematopoietic necrosis* ("EHN"), which is endemic in certain regions of Australia, but exotic to others, consistency with Article 5.5 requires either restrictions on the internal movement of salmon products within Australia, or alternatively, that Australia apply import zoning to grant access to Canada. The Panel did not identify any legal requirements in Article 5.5 in this regard, or in any other part of the *SPS Agreement*, although it noted the provisions of Article 6 in a footnote. The Panel did not claim that Australia's internal controls are in violation of Article 5.5 or any other provision of the *SPS Agreement*, but used this claim as somehow constituting factual evidence of the existence of a disguised restriction on trade without providing any relevant argument to support this claim.

7. Article 5.6 of the *SPS Agreement*

29. Australia claims that the Panel has erred in law in the way it has applied the three-pronged test to establish inconsistency with Article 5.6. According to Australia, no evidence was presented to indicate that the 1996 Final Report considered four alternative quarantine policy options as "reasonably available taking into account technical and economic feasibility". The 1996 Final Report did not address this issue, as it concluded that the options would not achieve Australia's appropriate level of protection.

30. Furthermore, Australia argues that the Panel "has incorrectly characterized the measure which currently achieves Australia's appropriate level of protection in determining that this level can be met by certain heat treatment conditions." Heat treatment does not constitute the level of protection for

fresh, chilled or frozen salmon. Australia also contends that it never claimed that the difference between the alternative quarantine policy options was "only a minimal, if any, difference".

B. *Canada - Appellee*

1. Terms of Reference

31. Canada posits that the Panel's inquiry could not be confined to the 1996 Decision of the Director of Quarantine because it is too narrow in scope as it applies only to ocean-caught Pacific salmon, as it takes effect only from 13 December 1996 and as it is only one element of the measure at issue. The 1988 Conditions fell, by Australia's own admission, within the terms of reference since these Conditions were implemented pursuant to QP86A, the instrument Australia describes as "the legal framework for the authority to determine the 1988 Conditions". If the 1996 Decision is the only measure at issue, then the Panel would have had to find Australia in violation of Article XI of the GATT 1994.

32. Canada claims that Australia was at all times well aware of the case against it, including the measure that was being challenged and the claims of violation that Canada was making in respect of that measure. Canada and Australia had been engaged since 1975 in discussions about Australia's denial of access to Canadian fresh, chilled or frozen salmon. The request for a panel leaves no room for doubt. It referred to Australia's measures prohibiting the importation of fresh, chilled or frozen salmon and specified that those measures included QP86A and any modifications or amendments thereto. The request for consultations is also clear on its face. It states that Australia prohibits the importation of untreated fresh, chilled or frozen salmon from Canada under QP86A, dated 19 February 1975. Finally, contrary to Australia's assertion that Canada provided no further clarification as to the measure at issue in its first submission, Canada identified the measure at issue on the very first page of its submission.

33. Canada asserts that Australia's contention is simply a game of semantics. It is abundantly clear from the Panel Report that the Panel examined whether Canadian fresh, chilled or frozen salmon had access to the Australian market. It was not requested nor did it concern itself with Canadian access to the Australian market for heat-treated salmon. The reason for this is obvious: heat-treated salmon is permitted entry into Australia and there is no dispute between the parties as to that product. What is also abundantly clear is that fresh, chilled or frozen salmon is not permitted entry into Australia because it is not heat-treated in accordance with the prescribed temperatures and heat duration periods.

34. Australia alleges that the Panel exceeded its terms of reference by examining the consistency of Australia's measure with Article 6 of the *SPS Agreement*. According to Canada, the Panel did no such thing. It merely cited Article 6 in a footnote and did not "examine the consistency of the measure" with Article 6.

2. Burden of Proof

35. Canada asserts that Australia's claims that Canada did not establish a *prima facie* case of violation by Australia of Articles 5.1, 5.5 and 5.6 of the *SPS Agreement* are unsubstantiated and without merit. Its allegations of Panel error are in fact allegations that the Panel has not made an objective assessment of the matter before it, including an objective assessment of the facts. This is an extremely serious allegation. It demands that Australia provide full and convincing evidence. Australia comes nowhere near to meeting this standard.

36. Canada claims that Australia misconceives the meaning of the evidentiary standard of *prima facie* by considering that a *prima facie* case exists when "subject to rebuttal, a panel could find that it is more probable than not that each element of the claim can be satisfied according to each of the Articles under which the claim has been brought". According to Canada, the Panel correctly articulated and applied the evidentiary standard, by relying on the Appellate Body Report in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses* ("*United States – Shirts and Blouses*").[18]

3. Objective Assessment of the Matter

37. According to Canada, nowhere does Australia's submission identify an egregious error that calls into question the good faith of the Panel. Australia's allegations of "error" are merely attempts to reargue its case and to have the Appellate Body substitute its judgment for that of the Panel as the trier of facts.

4. Other Procedural Matters

38. Canada asserts that, as Australia itself acknowledges, the Panel did allow it to make a third written submission regarding its allegations that Canada had made new "claims" at the second substantive meeting. Australia appears to be arguing that it has nevertheless been denied due process. All of the so-called new claims are new arguments, as the Panel correctly pointed out. Throughout

[18]Adopted 23 May 1997, WT/DS33/AB/R.

this dispute, the Panel extended deadlines and made accommodations to meet Australia's objections that it did not have adequate time to prepare.

39. Due to Australia's objections, the Panel held that the Vose Report was "not crucial to our report" and that "we shall not further consider it in our examination". According to Canada, however, the Vose Report went specifically to the issue of whether Australia omitted significant information from the 1996 Final Report that was in the 1995 Draft Report, which information was critical to the transparent estimation of risk. Thus, if there has been any denial of "due process", it is Canada that has suffered it. The Panel's failure to consider the Vose Report deprived Canada of a relevant piece of evidence.

40. Canada argues that Australia's claims of prejudice due to the reference by Canada of certain studies showing the ineffectiveness of heat treatment against particular disease agents, which studies were not submitted in evidence, but were relied upon by the Panel, "is the most outrageous" of Australia's due process assertions. According to Canada, Australia claims that it could not locate these studies to verify or substantiate them due to Canada's typographic error in a footnote listing the publication dates as 1933 rather than 1993. Canada asserts that "what Australia has neglected to tell the Appellate Body is that the studies referred to by Canada were all referenced in the 1996 Final Report, which is where Canada found them. Both parties submitted the December 1996 Final Report into evidence. Canada submits that Australia was, therefore, well aware of these studies, or that it should have been aware of them."

5. Article 5.1 of the *SPS Agreement*

41. In Canada's view, the Panel correctly applied the legal standard and correctly considered the evidence to determine whether the results of the risk assessment provided a rational scientific basis to support the heat-treatment requirement. The Panel was compelled to conclude that the results of Australia's risk assessment did not "reasonably support" the heat-treatment requirement.

6. Article 5.5 of the *SPS Agreement*

42. According to Canada, the issue facing the Panel under Article 5.5 was not whether the risks posed by different products were the same, but whether the appropriate levels of protection maintained by Australia to address those risks were different, and, if they were, whether those differences were arbitrary or unjustifiable and resulted in discrimination or a disguised restriction on international trade.

43. The key point before the Panel, in Canada's view, was that despite the absence of evidence that dead, eviscerated, fresh, chilled or frozen salmon for human consumption has ever introduced disease anywhere, and that the risk of such introduction was extremely low, Australia closes its market. By contrast, when faced with the knowledge that many of the same disease agents are entering Australia, through fish products other than salmon, Australia allows the fish products in, because it claims not to know the likelihood that those disease agents would infect the Australian salmonid population or the consequences if they did. In other words, Australia adopts two diametrically opposed levels of protection.

44. Canada claims that contrary to Australia's assertions, the Panel did consider "potential biological and economic consequences." Australia had argued that for different situations to be comparable, both disease and consequences needed to be the same. However, the Panel found as a fact, based on the experts' testimony, that for a given disease, the biological and economic consequences of a disease introduction would be the same or similar, regardless of the product introducing the disease.

45. In response to Australia's claim that the Panel denied it the right to adopt a cautious approach, and to determine its own level of protection, Canada points out that what the Panel did was to compare the measures imposed by Australia in respect of salmon and non-salmonids. Australia contended throughout the case that its appropriate level of protection for disease agents that could affect its salmonids is very conservative. According to Canada, it was so conservative in fact, that at times Australia appeared to be insisting that no matter how remote the probability or likelihood of the risk, the mere possibility that such disease agents might be introduced was sufficient for it to ban salmonids that might host the agents in question. When confronted with the fact that many of the same disease agents not only might occur, but are known to occur in non-salmonid products, Australia takes a very different approach: it lets the products in. It is, therefore, difficult to understand what Australia hopes to gain by faulting the Panel for comparing only disease agents known to occur in salmon with those known to occur in non-salmonids. According to Canada, had the Panel expanded its analysis to contrast Australia's "cautious" position on potential disease agents in salmonids with its "open market" for non-salmonids in which such disease agents have been confirmed, Australia's discrepancies in levels of protection would have appeared that much greater.

46. According to Canada, the Panel might well have found that the distinctions in levels of protection in all of the different situations identified by Canada were arbitrary or unjustifiable. However, it did not. Instead, it focused on the two comparative products - whole frozen herring used as bait and live ornamental finfish - for which Australia's differing measures seemed the most egregious. This was because, as the Panel's experts noted, the importation of live ornamental fish and

bait fish are generally considered to pose higher risks of introducing exotic disease agents than does the importation of dead fish for human consumption. Moreover, as the experts noted, there has never been a recorded case of dead, eviscerated fish, such as the salmon that Australia prohibits, resulting in an exotic disease introduction. By contrast, there are many such documented introductions in the case of live fish, even in Australia.

47. Canada states that when it comes to the risks of disease introduction that non-salmonid imports (particularly live fish, bait fish, and other fish for human consumption) pose to Australia's salmonids, Australia demands that Canada provide not just evidence, but proof of risk. However, in the case of salmonid imports, despite the strong evidence that the risk is negligible, Australia imposes an import ban "just in case".

48. Canada submits that the evidence regarding all three elements of Australia's Article 5.5 violation is as compelling as one is ever likely to find, not only insofar as the measure applies to ocean-caught Pacific salmon, but to all fresh, chilled or frozen salmon products covered by the measure. If the evidence in this case is insufficient to support a finding that Australia violated Article 5.5, it is difficult to conceive of circumstances in which a Member could prove an Article 5.5 violation.

7. Article 5.6 of the *SPS Agreement*

49. Canada asserts that although Australia contends that the 1996 Final Report concluded that the other quarantine policy options it identified (Options 2-5) would not meet Australia's appropriate level of protection, there is nothing in the 1996 Final Report to sustain this assertion. A review of the Panel Report, and the 1996 Final Report, reveals that this conclusion applies, if at all, only to the two options rejected *ab initio* - removal of all quarantine restrictions or a ban on all salmon imports - which the 1996 Final Report found could not "reasonably be considered as appropriate, having regard to associated quarantine risks".

50. According to Canada, Australia implies illogically that the only measure in place that actually achieves the prohibition on fresh, chilled or frozen salmon - heat treatment - does not achieve Australia's appropriate level of protection, while the prohibition itself does. Also, by stating that its appropriate level of protection is "explicit" in the prohibition itself, Australia appears to be suggesting that the appropriate level of protection is the prohibition. The language of Article 5.6 makes perfectly clear that a measure is not the appropriate level of protection.

C. *Canada - Appellant*

1. Product Coverage

51. Canada asserts that the Panel's failure to make findings under Articles 5.5 and 5.6 for salmon products other than ocean-caught Pacific salmon was based on a misapplication of the "principle of judicial economy" as set out by the Appellate Body in *United States – Shirts and Blouses*[19] and led to a result contrary to Article 3.7 of the DSU. Moreover, the Panel's approach had the perverse result of subjecting a Member's measure to less scrutiny the more overt its violation of its SPS obligations. In the alternative, Canada submits that the Panel's limited consideration of Articles 5.5 and 5.6 was based on justifications at odds with the ample evidence before the Panel, thereby constituting a violation of Article 11 of the DSU.

52. According to Canada, if making a ruling on one claim will sufficiently determine the course of implementation so as to secure a positive solution to the dispute, it would be redundant for a panel to proceed further. However, a panel that addresses certain claims but declines to address others that would better frame the course of implementation will not necessarily have resolved the matter in dispute. An implementing Member may be able to implement in such a way as to bring its measure into conformity in respect of the claims addressed by the panel, but not in respect of the other claims that the panel did not address. The matter would not be resolved in respect of those other claims and the complaining Member would be forced to bring another case to address them. Hence, the "judicial economy" sought by the panel would be a false economy.

53. Canada claims that the Panel's decision in the present case to limit its findings to ocean-caught Pacific salmon was not a decision to address certain claims. Rather, it was a decision to address only one of the product categories, namely ocean-caught Pacific salmon, in respect of which Canada had claimed a violation of the two articles in question. Given that neither Australia's measure nor the scope of the dispute was limited to ocean-caught Pacific salmon but, rather, extended to all fresh, chilled or frozen salmon, and having found that in order to resolve this dispute it was appropriate and necessary to consider Canada's Articles 5.5 and 5.6 claims for ocean-caught Pacific salmon, it logically follows that it was appropriate and necessary to do so in respect of all the salmon products covered by the measure. By omitting to do so, the Panel failed to resolve the matter at issue in the dispute. Canada argued that the findings of the Panel under Articles 5.5 and 5.6 with regard to ocean-caught Pacific salmon could be extended to other Canadian salmon.

[19]Adopted 23 May 1997, WT/DS33/AB/R.

2. Article 2.3 of the *SPS Agreement*

54. Canada asserts that it presented evidence to support its independent Article 2.3 claim - that although Australia bans the importation of uncooked salmon from Canada ostensibly to prevent the entry and establishment of exotic diseases, it does not control the movement of salmon within Australia from states with, to states without, certain diseases. However, the Panel decided that it was "more appropriate in the circumstances of this dispute to first deal with Canada's claims under Article 5" and when it considered Article 5.5, it did so only in respect of ocean-caught Pacific salmon. It was on the ground of having found a violation of Article 5.5 that the Panel found Australia also inconsistent with the requirements of Article 2.3. The Panel's finding on Article 2.3, therefore, was limited to ocean-caught Pacific salmon as the Panel declined to "further examine Canada's other claims under Article 2".

55. According to Canada, the Panel erred in applying the first sentence of Article 2.3 as an afterthought to its analysis of Article 5.5. It erred in interpreting the first sentence of Article 2.3 only as preambular language and examining it solely through Article 5.5, and not as an independent obligation. It compounded this error by inappropriately confining its analysis and finding to ocean-caught Pacific salmon rather than considering all categories of salmon at issue. In doing so the Panel disregarded its terms of reference and the evidence placed before it.

56. Canada claims that the Panel's interpretation has the effect of emasculating Article 2.3, first sentence. It violates customary rules of interpretation of public international law and offends the principle articulated by the Appellate Body Report in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*")[20] that the interpreter must give effect to all the terms of a treaty. It also runs afoul of the admonition in Article 3.2 of the DSU that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". It fails to secure a positive solution to the dispute.

D. *Australia - Appellee*

1. Product Coverage

57. Australia asserts that the lighter scrutiny by the Panel of farmed salmon *vis-à-vis* ocean-caught Pacific salmon was not a matter of legal error, but was caused by the failure of Canada to present legal claims and arguments relevant to all of the salmon categories, which effectively invited the Panel to engage in "product splitting" in its examination of claims. According to Australia,

[20]Adopted 20 May 1996, WT/DS2/AB/R.

Canada is wrong in asserting that the Panel can find inconsistency on the basis of a limited category of products in respect of some of the elements forming part of the obligations of Articles 5.5 and 5.6 and can thereby extend those findings to another category of products, thus avoiding the need to establish a *prima facie* case in respect of all elements of the obligations with respect to the latter products.

58. In Australia's view, there was, contrary to what Canada contends, no "ample evidence" before the Panel in respect of other categories of salmon, since most of the studies referred to by Canada are of a general nature or are based on late or unsubmitted evidence.

2. Article 2.3 of the *SPS Agreement*

59. According to Australia, Canada's appeal in respect of Article 2.3, first sentence, is based on a mischaracterization of the Panel's findings of violation under Article 5.5. The Panel did not find a violation of Articles 5.5 and 2.3 because Australia applies different measures on domestic salmonid product and imported salmon. Hence, all of Canada's arguments relating to internal and external controls are irrelevant to the matters under appeal.

60. Australia argues that the notion of Article 2.3 as an independent obligation would conflict with the ordinary meaning of the terms in their context. Canada has not explained why its claims of error should not have equal application to the obligations expressed in the second sentence of Article 2.3, or for that matter in regard to the provisions of Articles 2.2 and 5.1.

E. *Arguments by the Third Participants*

1. European Communities

61. The European Communities states that the Panel's limitation of the products examined to ocean-caught Pacific salmon is not justified by the principle of judicial economy. However, it is not clear that the Panel was in a position to examine claims in respect of the other categories of salmon. Therefore, it did not make a finding not because such was not necessary but because it did not have the necessary evidence to make a finding.

62. The European Communities observes that the Panel appears to have made a very peculiar application of the principles governing the allocation of the burden of proof. The claim that "disguised restriction of trade" is evidenced by the absence of similar restrictions on the internal movement of salmon was raised by, and therefore had to be substantiated by, Canada. If, despite the evidence submitted by Canada, the Panel still had "doubts" on the factual accuracy or relevance of this claim to the third element of Article 5.5, it should have dismissed the claim.

63. The European Communities also states that the frequent resort by the Panel, in its examination of Article 5, to the use of assumptions rather than making definitive findings is an extreme and undesirable use of judicial economy. This approach is not conducive to the resolution of disputes.

64. The European Communities argues that the normal meaning of "potential" and "likelihood" is different - "likelihood" implies a higher degree of probability than "potential". However, the object, purpose and context of the *SPS Agreement* indicate that no greater level of probability could have been intended for the first type of risk assessment than for the second type as defined by paragraph 4 of Annex A of the Agreement. There is no reason why SPS measures against pests and diseases will be more stringently examined than those against health risks from additives, contaminants, etc.

65. The European Communities also states its concern that the panel might be misconstrued to have stated that a "zero risk" level of protection is not a choice open to Members under the *SPS Agreement*. This is not at all what the Appellate Body meant in *European Communities - Hormones*[21] when it referred to the "theoretical uncertainty" which always remains.

66. The European Communities argues that there is no relevant difference between the "trade perspective" and the "sanitary perspective" of the measure at issue. In the case of fresh, chilled or frozen salmon the measure at issue from both perspectives is an import ban. The conclusion of the Panel that heat treatment does not sufficiently reduce risk and hence there is no rational relationship between the risk assessment and the measure of heat treatment does not follow from its previous reasoning for two reasons: first, the treatment has no application to fresh, chilled or frozen salmon, and, second, if heat treatment is not effective, it strengthens the conclusion that imports of fresh, chilled or frozen salmon should be prohibited.

67. The European Communities also asserts that the Panel was correct in proceeding with an examination of Articles 5.5 and 5.6 because the consequences on implementation arising from a finding of a violation of Article 5.1 are not the same as those from a finding of a violation of Articles 5.5 or 5.6. However, it was wrong to justify its decision to conduct further examination by the use of the "alternative" approach, i.e., had the Panel been judged incorrect on its findings on Article 5.1 then, it would have been required to examine Articles 5.5. and 5.6. That approach is a negation of the principle of judicial economy since its logic would always require all claims to be examined.

[21]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R.

68. The European Communities contends that the Panel's consideration of the "difference in the degree of risk" in the context of the second element of Article 5.5 is wrong because such is not a means to evaluate the arbitrariness or unjustifiability of distinctions in levels of protection. It is an element of the definition of the level of protection.

69. Because of this error, according to the European Communities, the analysis was confined to determine whether the differences between the measures applied to different types of fish could be justified by corresponding differences in the degree of risk. The only logical conclusion that the Panel could have drawn from that type of analysis was whether or not there were differences in levels of protection. That type of analysis was not sufficient to establish whether the differences in levels of protection were "arbitrary" or "unjustified". For that, the Panel should have evaluated the "character" of these differences.

70. According to the European Communities, the Panel also made four serious legal errors in applying the third element of Article 5.5: i) it gave excessive weight to the existence of differences in levels of protection as indirect evidence of the third element of Article 5.5, thereby blurring the distinction between the second and the third elements of Article 5.5; ii) it erroneously interpreted "disguised restriction on international trade" to include "discrimination between products"; iii) it inferred the motive of Australia in reversing the recommendation of the 1995 Draft Report through pure speculation; and iv) it made an irrelevant argument derived from the absence of internal controls on the movement of salmon.

71. The European Communities asserts that the Panel's analysis of the measure at issue under Article 5.6 suffers from the same defects as the analysis under Article 5.1, since it is based on the erroneous notion that the measure at issue is heat treatment. The Panel also erred in its approach to the burden of proof in connection with Article 5.6. While it stated that it was not making a finding on whether any alternative option would actually achieve Australia's appropriate level of protection, it nevertheless concluded that Canada raised a presumption on the availability of other measures which would achieve Australia's appropriate level of protection. This demonstrates that the Panel is making a "presumption" in the sense of an indication or a suspicion that a fact is true.

2. India

72. India asserts that in matters such as these, the burden of proof was on Australia. Article 3.3 of the *SPS Agreement* specifically states that Members may introduce measures which result in a higher level of protection than measures based on relevant international standards, provided that there is scientific justification and that it is not more trade restrictive than required to achieve the appropriate level of protection. Article 5.8 states that in case any other Member feels that such a

measure is constraining or has the potential to constrain its exports and that the measure is not based on relevant international standards, it can ask for an explanation. This clearly shows, according to India, that in all such cases the burden of proof is on the Member who has introduced the measure.

73. India argues that Article 5.5, both in letter and in spirit, stresses consistency in the application of SPS measures. Its intention and objective is very clear - Members shall avoid distinctions in the levels of protection they consider appropriate in different situations, if these result in discrimination or disguised restriction on international trade.

74. India claims that since Australia's own risk assessment concedes that the levels of risk presented by the five quarantine policy options cannot be distinguished, each of these options could therefore achieve Australia's appropriate level of protection. Australia should have adopted the least trade-restrictive of these options.

3. Norway

75. Norway contends that the Panel's approach to the substantive requirements of a risk assessment is correct, especially with respect to the requirement that an evaluation be made of the effectiveness of various risk reduction options. According to Norway, the Panel should, however, have concluded separately on the substantive requirements of a risk assessment before moving on to the requirement that the measure is based on a risk assessment. All the necessary elements of fact for such conclusions seem to be present. The consequences of the Panel's approach become evident if the Appellate Body were to accept Australia's claims regarding the measure. In such a case there would be no finding, based on the facts of the case, that relates to the risk assessment as such - or the requirements regarding scientific evidence and scientific principles in Article 2.2.

76. Norway argues that proper interpretation of based on is that the effectiveness of a measure in reducing the risk must be established by the risk assessment, and that the chosen measure must be among those that were evaluated and found to have a certain effectiveness. The concrete choice of the appropriate measure to achieve a Member's level of protection, should thereafter be addressed under the "necessity requirement" in Article 2.2 as elaborated in Article 5.6. If the necessity of the chosen measure is implicit in Article 5.1, Article 5.6 would be deprived of its meaning.

77. Norway forwards that this requires a three step approach: i) a finding regarding the substantive requirements of the risk assessment itself; ii) a finding regarding whether the measure is among those that were evaluated and found effective in the risk assessment; and iii) a finding regarding whether the applied measure is necessary to achieve the importing Member's level of protection.

78. Norway contests Australia's claims that the Panel is creating a new legal obligation, by determining that diseases not detected cannot be validly taken into account for the purpose of a Member's appropriate level of protection. In Norway's view, if Australia's contention is correct, a Member would be permitted to adopt an SPS measure without having to identify a risk. Norway thinks that it is clear from the definition of Annex A, paragraph 1, of the *SPS Agreement* that SPS measures relate to protection from risks; therefore, if no risk has been identified with respect to a specific import, no SPS measure can be applied.

79. Norway argues that if one were to accept Australia's claim that the measure is an import ban, then the question becomes one of determining whether any of the identified alternative measures, reasonably available, is sufficient to reduce risk to the "very low levels" demanded by Australia. The 1996 Final Report does not make a clear evaluation and determination in this regard, and this lack of evaluation may in itself be a violation of the substantive requirements of a risk assessment under Article 5.1.

80. Norway asserts that the Panel should take the obligations in Article 2 as its point of departure, since they encompass the "Basic Rights and Obligations." This is because the crux of the matter is whether the Australian measure is "necessary" to achieve its level of protection, whether it is based on scientific principles and sufficient scientific evidence, and/or whether the measure amounts to an unjustifiable restriction on international trade.

4. United States

81. The United States asserts that Australia’s argument ignores the fact that heat treatment was evaluated in Australia’s 1996 Final Report, as well as in the 1995 Draft Report, alongside other measures with relation to fresh, chilled or frozen salmon.

82. Ironically, according to the United States, Australia cites comments by the experts noting that Australia’s heat-treatment requirement effectively changes - i.e., destroys - the product, as support for its claim that heat treatment is not applicable to fresh, chilled or frozen salmon. This is like asserting that a requirement that concrete blocks be pulverized to dust before importation is a measure that pertains only to the importation of dust. Again, the Panel was not required to disregard Australia’s requirement for heat treatment simply because Australia’s measure requires that the character of fresh, chilled or frozen salmon be destroyed so that the resulting product is no longer "fresh, chilled or frozen".

83. The United States argues that if the Panel limited its analysis to ocean-caught Pacific salmon based on the interest of judicial economy, that principle was misapplied as it resulted in a failure of the Panel to resolve completely the matter at issue in the dispute. This is not a situation where a Panel properly elected not to consider all of the arguments or claims presented by a party. Instead, the Panel in this proceeding failed to extend the analysis to all fresh, chilled or frozen salmon which is the subject of Canada's panel request.

84. The United States asserts that Australia implemented a ban to address the possibility that eviscerated salmon, imported for human consumption, might serve as a host to introduce diseases, only some of which are exotic to Australia, into its salmon fisheries and that it was just such hypothetical risks that the Appellate Body in *European Communities - Hormones* concluded were not the "kind of risk which, under Article 5.1, is to be assessed".

85. The United States argues that Australia, by insisting that the Panel's comparison of the levels of protection only be made between different types of fish that are host to a like number of diseases would require that the comparison be made only where identical risks prevail. Such a limitation simply is not warranted by the text of Article 2.3, which the Appellate Body has said is an important element of the context of Article 5.5. In addition, Australia's argument regarding the appropriateness of the Panel's comparison ignores the scientific evidence before the Panel that it is very unlikely that imported salmon bears many, if any, of the approximately 20 diseases to which Australia refers.

86. The United States further argues that the Appellate Body in *European Communities - Hormones* implicitly approved comparisons of levels of protection in circumstances where the risks and conditions were not identical.

87. The United States asserts that Australia's arguments on Article 5.6 ignore two basic considerations. First, the Panel had before it scientific evidence which called into question the effectiveness of heat treatment. Thus, if heat treatment was achieving Australia's level of protection, there were alternatives available, including evisceration, that would also achieve the same level of protection. Second, the Panel noted the scientific conclusions that the risk associated with the importation of salmon for human consumption was small. Also, the 1996 Final Report found that "[t]he difference in level of risk between each option is incremental and cannot be quantified". Canada had therefore established an unrebutted *prima facie* case that less trade-restrictive alternative measures, capable of achieving Australia's level of protection, were available.

III. Issues Raised in this Appeal

88. The appellant, Australia, raises the following issues in this appeal:

(a) whether the Panel failed to interpret correctly its terms of reference with respect to the measure and the product at issue;

(b) whether the Panel exceeded its terms of reference by extending the scope of its examination of Article 5 to include Article 6 of the *SPS Agreement*;

(c) whether the Panel erred in law in finding that the measure at issue, as it applies to ocean-caught Pacific salmon, is not based on a risk assessment, and that Australia has therefore acted inconsistently with Article 5.1, and, by implication, Article 2.2 of the *SPS Agreement*;

(d) whether the Panel erred in law in finding that Australia has acted inconsistently with Article 5.5, and, by implication, Article 2.3 of the *SPS Agreement*;

(e) whether the Panel erred in law in finding that Australia has acted inconsistently with Article 5.6 of the *SPS Agreement*; and

(f) whether the Panel correctly allocated and applied the burden of proof, conducted an objective assessment of the matter, erred in admitting or considering certain evidence, and failed to accord Australia due process in denying Australia's request to submit a third written submission.

89. The appellant, Canada, raises the following issues in this appeal:

(a) whether the Panel erred in law in its application of the principle of judicial economy 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; and

(b) whether the Panel erred in law in not finding a violation of Article 2.3, first sentence, independently from its finding that Australia has acted inconsistently with Article 5.5 of the *SPS Agreement*.

IV. Terms of Reference

A. *The Measure and Product at Issue*

90. The first question we address is whether the Panel failed to interpret correctly its terms of reference with respect to the measure and the product at issue in this dispute. In its request for the establishment of a panel, Canada identified the measure and the product at issue as follows:

> The Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon (the "Australian measures" or the "measures") include Quarantine Proclamation 86A, dated 19 February 1975, and any amendments or modifications to it. The measures adversely affect the importation of Canadian salmon.[22]

91. With regard to the measure at issue, the Panel concluded in paragraph 8.19 of its Report that:

> … according to our terms of reference, the measure we need to examine in this dispute is QP86A as implemented or confirmed by the 1988 Conditions, the 1996 Requirements and the 1996 Decision and this in so far as it prohibits the importation into Australia of fresh, chilled or frozen salmon.

92. In coming to that conclusion, the Panel considered in paragraph 8.18 of its Report that the 1988 Conditions:[23]

> … in effect deny the importation of commercial quantities of salmon product not heat-treated as prescribed. The 1988 Conditions can, in that sense, also be said to constitute a measure "prohibiting the importation of fresh, chilled or frozen salmon" as referred to in the Panel request. For the above reasons, we consider that also the 1988 Conditions fall within our terms of reference.

With regard to the 1996 Requirements[24], the Panel subsequently considered:

> ... the same reasoning as that developed above for the 1988 Conditions applies. We thus consider that the 1996 Requirements fall within our terms of reference.[25]

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[22]WT/DS18/2, 10 March 1997.

[23]*Supra*., footnote 3.

[24]*Ibid*.

[25]Panel Report, para. 8.18.

93. Later in the Panel Report, in examining whether the SPS measure at issue was based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, the Panel found that:

> ... From a trade perspective (focusing on what product cannot enter the Australian market) the measure at issue in effect constitutes an import prohibition on, *inter alia*, fresh, chilled and frozen salmon. However, if we approach the measure at issue to determine its sanitary aspects (focusing on what is required for the product to be *allowed* for importation) - an approach we need to conduct in the context of the SPS Agreement - we find that it, in effect, imposes heat treatment as a sanitary solution to the risk posed by the importation of salmon. These two perspectives are two sides of a single coin: a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported, is that imports of fresh, chilled and frozen salmon are prohibited ...[26]

In a footnote to this paragraph, the Panel further clarified that:

> What Canada is challenging before this Panel is Australia's justification for the measures that prohibit access for fresh, chilled or frozen salmon – or, in other words, which permit access for salmon only if it has been heat-treated in accordance with the 1988 Conditions or commercially canned.[27]

94. With regard to the product at issue, the Panel stated that the product coverage of this dispute is limited, in accordance with the request for the establishment of a panel, to "fresh, chilled or frozen salmon". The Panel explicitly held that the product coverage "does exclude heat-treated product"[28] and that "heat-treated product falls outside the product coverage of this dispute".[29]

95. According to Australia, the Panel exceeded its terms of reference in respect of "both the product covered and the applicable quarantine measures for consideration".[30] With regard to product coverage, Australia contends that the Panel erred in law by extending the product coverage to heat-treated salmonid products.[31] Australia concedes that the Panel expressly stated that heat-treated products fall outside the product coverage of this dispute, but it argues that "[b]y the time of its examination of consistency of 'the measure' with the provisions of Article 5.1, the Panel seemingly decided that its terms of reference cover all forms of salmon product processed from the 'initial'

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[26]Panel Report, para. 8.95.

[27]Panel Report, footnote 302.

[28]Panel Report, para. 8.24.

[29]*Ibid.*

[30]Australia's appellant's submission, para. 50. See also Notice of Appeal, point 2.

[31]Australia's appellant's submission, para. 54.

product, i.e., fresh salmon."[32] Australia contends that the Panel extended its terms of reference beyond the SPS measure at issue, i.e., the import prohibition on fresh, chilled or frozen salmon[33], by including the heat-treatment requirement which applies only to smoked salmon and salmon roe.[34] Australia argues that the Panel, by characterizing a quarantine measure for smoked salmon as a sanitary aspect of a trade measure for fresh, chilled or frozen salmon (the "other side" of a single coin)[35], demonstrated "sharply flawed logic".[36] According to Australia, it is not a consequence of the requirement that smoked salmon be heat-treated that imports of fresh, chilled or frozen salmon are prohibited. Australia stresses that smoked salmon and fresh, chilled or frozen salmon are different products and that the quarantine measures for each are not "two sides of the same coin".[37]

96. With regard to the product at issue in this dispute, we note that the Panel explicitly stated that heat-treated products fall outside the product coverage of this dispute.[38] Furthermore, it is clear from the Panel Report that the Panel only considered "fresh, chilled or frozen salmon". We, therefore, conclude that Australia's claim that the Panel exceeded its terms of reference by considering products outside its terms of reference and, in particular, heat-treated products, is without merit.

97. With regard to the measure at issue, we note that QP86A provides, in relevant part:

> NOW THEREFORE I, …, the Governor-General of Australia, …, hereby, …
>
> (d) *prohibit 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*
>
> (i) 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*; and

[32]Australia's appellant's submission, para. 62.

[33]Australia's appellant's submission, para. 65.

[34]Australia's appellant's submission, para. 23. Further, in para. 24 of its appellant's submission, Australia argues that the Panel erred by construing the measure at issue as a measure "in effect", rather than a measure "as applied", implying that the measure at issue was some sort of disguised import prohibition – in the form of a measure that applied to products outside its terms of reference (i.e., the heat-treatment requirement applied to smoked salmon and salmon roe).

[35]Panel Report, para. 8.95.

[36]Australia's appellant's submission, para. 78.

[37]*Ibid.*

[38]Panel Report, para. 8.24.

> (ii) the Director of Quarantine or a person authorized by him has, by instrument in writing, consented to the importation and the instrument is produced to a Collector … or to a quarantine officer. (emphasis added)

It is clear from the wording of QP86A that it establishes an *import prohibition* on salmon. This is not disputed; both parties agree that fresh, chilled or frozen salmon has not been allowed to enter Australia since QP86A came into force.[39]

98. Although QP86A imposes an import prohibition, it delegates authority to the Director of Quarantine to allow imports which have been subject to such treatment as is likely, in his opinion, to prevent the introduction of any disease. On the basis of this delegated authority, the Director of Quarantine issued the currently applicable 1988 Conditions.[40] The 1988 Conditions were construed by the Panel to apply not only to smoked salmon, but also to other categories of salmon, including fresh, chilled or frozen salmon. In the view of the Panel, this interpretation is justified by the title and the first paragraph of the 1988 Conditions. The title reads:

> Conditions for the Importation of Salmonid Meat and Roe into Australia.

Paragraph 1 reads:

> All uncanned salmon and trout meat and salmon roe will require a quarantine permit to enter Australia.

99. As the Panel saw it, neither the title nor paragraph 1 specifies that the 1988 Conditions deal only with smoked salmon. However, upon closer scrutiny, it appears that this interpretation misreads the actual scope of the 1988 Conditions. They provide that:

(a) the importation of all salmonids other than canned salmon requires a quarantine permit[41];

(b) the application for such permit must state the temperature and duration at which the salmon-trout is smoked, or the roe is heated[42];

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[39]With the exception of the importation of small quantities of fresh, chilled or frozen salmon allowed for scientific or taxidermy purposes. Panel Report, para. 8.95.

[40]*Supra.*, footnote 3. These 1988 Conditions replaced the 1983 Guidelines for the Importation of Smoked Salmon and Trout into Australia.

[41]1988 Conditions, para. 1.

[42]1988 Conditions, paras. 2 and 8. In para. 3 of the 1988 Conditions, a table of an approved temperature-time relationship is set out.

(c) for salmon which is not treated as above-provided, the AQIS will consider variations to these requirements which could take into account the effect of any auxiliary processing such as "flash-baking", "par-boiling", "gamma irradiation", "brining" or "freezing" where the effectiveness of this process in inactivating organisms can be demonstrated[43];

(d) for the importation of consignments of smoked salmon meat under 5 kilograms in weight, there is no need for a quarantine permit, but the prescribed processing is still required.[44]

100. The 1996 Requirements confirm subparagraph (d) above, but modify the labelling requirement for consignments of smoked salmon under 5 kilograms in weight, as prescribed in the 1988 Conditions.[45]

101. We agree with Australia that the heat-treatment requirement mentioned in the 1988 Conditions applies only to smoked salmon, and that these Conditions exempt heat-treated smoked salmon and salmon roe from the import prohibition laid down in QP86A. Fresh, chilled or frozen salmon falls under the import prohibition of QP86A, as confirmed by the 1996 Decision of the Director of Quarantine. Fresh, chilled or frozen salmon is not, and cannot be, subjected to heat treatment. As a matter of fact, heat treatment would destroy fresh, chilled or frozen salmon. As the Panel itself explicitly stated: "heat treatment actually changes the nature of the product and limits its use. Heat-treated salmon can obviously no longer be consumed as fresh salmon."[46] Moreover, both participants agree that fresh, chilled or frozen salmon is an entirely different product from heat-treated (commercially marketed as "smoked") salmon.[47]

102. We recall that the Panel stated that the measure at issue in this dispute "is QP86A as implemented or confirmed by the 1988 Conditions, the 1996 Requirements and the 1996 Decision, and this in so far as it prohibits the importation into Australia of fresh, chilled or frozen salmon".[48] As indicated above, the Panel interpreted its terms of reference to include the 1988 Conditions, by considering them to constitute a measure "prohibiting the importation of fresh, chilled or frozen

[43]1988 Conditions, para. 5.

[44]1988 Conditions, para. 9.

[45]*Supra.*, footnote 3.

[46]Panel Report, para. 8.182.

[47]Responses by Australia and Canada to questions at the oral hearing.

[48]Panel Report, para. 8.19.

salmon" unless heat-treated as prescribed.[49] We recall that in the context of its examination of whether Australia's measure was consistent with Article 5.1, the Panel treated the import prohibition and the heat-treatment requirement as "two sides of a single coin". It said that a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported is that imports of fresh, chilled or frozen salmon are prohibited.[50]

103. We do not share the Panel's position. In our view, the SPS measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon.

104. We also do not share the Panel's view that the import prohibition and the heat-treatment requirement are "two sides of the same coin". Smoked salmon and fresh, chilled or frozen salmon are different products and the SPS measures applied to each are not "two sides of the same coin". We agree with Australia that it is not a consequence of the requirement that *smoked* salmon be heat-treated that imports of *fresh, chilled or frozen* salmon are prohibited. Imports of fresh, chilled or frozen salmon are prohibited as a direct consequence of the application of QP86A, and this prohibition has not been revoked, but has, in fact, been continuously maintained since 1975. We likewise do not share the Panel's view that the 1996 Requirements apply to fresh, chilled or frozen salmon. These requirements clearly apply only to imports of small amounts of smoked salmon.

105. For the reasons set out above, we reverse the Panel's findings in paragraph 8.18 and 8.19 of the Panel Report that the 1988 Conditions and the 1996 Requirements fall within the Panel's terms of reference. We conclude that the SPS measure at issue in this dispute is the *import prohibition* on fresh, chilled or frozen salmon set forth in QP86A, as confirmed by the 1996 Decision, rather than the heat-treatment requirement set forth in the 1988 Conditions.

[49]Panel Report, para. 8.18.

[50]Panel Report, para. 8.95.

B. *Article 6 of the SPS Agreement*

106. The next issue we address is whether the Panel exceeded its terms of reference by extending the scope of its examination of Article 5 to include Article 6 of the *SPS Agreement*.

107. In the request for the establishment of a panel, Canada requested that the Panel consider and find that:

> (a) The Australian measures are inconsistent with:
>
> (i) the Agreement on the Application of Sanitary and Phytosanitary Measures, and in particular Articles 2, 3 and 5 thereof;
>
> (ii) the General Agreement on Tariffs and Trade 1994, and in particular Articles XI and XIII thereof;
>
> (b) the application of the Australian measures nullifies or impairs the benefits accruing to Canada pursuant to the Agreement Establishing the World Trade Organization.[51]

108. In the context of examining the third element of Article 5.5, i.e., the existence of discrimination or a disguised restriction on international trade resulting from the arbitrary or unjustifiable distinction in the levels of sanitary protection in different situations, the Panel took into account three "warning signals" and three "additional factors".[52] The third of these "additional factors" concerns the Panel's doubts on whether Australia applies "similarly strict" sanitary standards to the internal movement of salmon within Australia as it does on imports of salmon.[53] In the context of its brief and inconclusive discussion on Australia's internal controls on the movement of salmon, the Panel noted:

> ... that the other reasons provided by Australia to justify the absence of any internal restrictions on the movement of salmon products, in particular from Victoria to other parts of Australia ... would seem to be equally valid in support of allowing *imports* of salmon products into specific parts of Australia.[54]

[51]WT/DS18/2, 10 March 1997.

[52]Panel Report, para. 8.19.

[53]Panel Report, para. 8.155.

[54]Panel Report, para. 8.156.

109. In a footnote to this paragraph, the Panel referred to Article 6.1 of the *SPS Agreement* and stated:

> We note that in this respect Article 6 of the SPS Agreement provides: "Members shall ensure that their sanitary ... measures are *adapted to the sanitary ... characteristics of the area - whether all of a country, part of a country*, or all or parts of several countries - ... to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the *level of prevalence of specific diseases* or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations".[55]

110. Canada's request for the establishment of a panel did not include a claim of violation of Article 6 of the *SPS Agreement*. The Panel's terms of reference are determined by Canada's request for the establishment of a panel. We, therefore, agree with Australia that Article 6 of the *SPS Agreement* is not within the terms of reference of the Panel. However, we disagree with Australia that the Panel exceeded its terms of reference in quoting Article 6.1 in a footnote, attached to a paragraph in which the Panel examined a violation of Article 5.5. More precisely, we reject Australia's contention that the Panel, by merely referring to Article 6.1 in a footnote, made an implied finding of inconsistency with Article 6. In our view, the statement of the Panel with regard to Article 6, in footnote 430 of its Report, is similar in character to the statement of the panel in *United States – Shirts and Blouses*, with regard to the powers of the Textile Monitoring Body ("TMB"). India appealed from this statement, but we found it to be "purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions".[56] We did not consider that statement to be "a legal finding or conclusion" which the Appellate Body "may uphold, modify or reverse". Likewise, we consider that in this case, the Panel's statement in footnote 430 of its Report regarding Article 6.1 of the *SPS Agreement* is a purely gratuitous comment and not "a legal finding or conclusion". By making such a comment, the Panel did not exceed its terms of reference.

[55]Panel Report., footnote 430.

[56]Adopted 23 May 1997, WT/DS33/AB/R, p. 17.

V. The *SPS Agreement*

A. *Preliminary Observation*

111. The Panel made separate analyses and findings on ocean-caught Pacific salmon and on other Canadian salmon. With respect to other Canadian salmon, the Panel found that Australia, by maintaining the measure at issue, without even purporting to conduct or rely on a risk assessment, has acted inconsistently with Articles 5.1 and 2.2 of the *SPS Agreement*.[57] This finding is not appealed. The Panel limited its further examination and findings of violations of Articles 5.1, 5.5, 5.6, and the consequential violations of Articles 2.2 and 2.3 of the *SPS Agreement*, to ocean-caught Pacific salmon.[58] The following three sections (B, C and D) of our Report, which examine Australia's appeal against these findings, are therefore also confined to ocean-caught Pacific salmon. Canada's appeal from the Panel's lack of findings relating to its claims under Articles 5.5 and 5.6 with respect to other Canadian salmon is examined in Section E. Canada's appeal from the Panel's lack of a finding on its independent claim under the first sentence of Article 2.3, for both categories of salmon, is examined in Section F.

B. *Article 5.1 of the SPS Agreement*

112. We first address the question of whether the Panel erred in finding that the measure at issue, as it applies to ocean-caught Pacific salmon, is not based on a risk assessment and that Australia, therefore, has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the *SPS Agreement*.

113. The Panel first addressed the issue of whether the 1996 Final Report is a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*. It did not make a *finding* on this issue but *assumed*, for the purpose of its further examination, that the 1996 Final Report meets the requirements of a risk assessment. It subsequently examined whether the SPS measure at issue, which, in its view, is the heat-treatment requirement, is based on the 1996 Final Report, "the only risk assessment forwarded by Australia".[59] In paragraph 8.99 of its Report, the Panel came to the conclusion that "the measure at issue - in so far as it applies to ocean-caught Pacific salmon - is not 'based on' a risk

[57]Panel Report, para. 8.59.

[58]Panel Report, para. 8.60.

[59]Panel Report, para. 8.96.

assessment," and that, therefore, Australia has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the *SPS Agreement*.[60]

114. Australia appeals from the Panel's finding that the measure in dispute was not based on a risk assessment. In the view of Australia, this finding is vitiated by the Panel's conclusion that the SPS measure in dispute is the heat-treatment requirement rather than the import prohibition.

115. We recall that we have found that the SPS measure at issue is the import prohibition on fresh, chilled or frozen salmon, not the heat-treatment requirement.[61] The import prohibition is, therefore, the measure which must be examined under the *SPS Agreement*. More particularly, under Article 5.1, the Panel should have determined whether the import prohibition on fresh, chilled or frozen salmon was based on a risk assessment, instead of examining whether the heat-treatment requirement was based on a risk assessment. We believe this to be an error of law and we therefore reverse the Panel's finding in paragraph 8.99 that the SPS measure, as it applies to ocean-caught Pacific salmon, is not based on a risk assessment, and that Australia has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the *SPS Agreement*.

116. The Panel did not examine whether the import prohibition on fresh, chilled or frozen salmon, the proper SPS measure at issue in this dispute, is based on a risk assessment, and there is no finding on this question in the Panel Report.

117. We are cognizant of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. Article 17.6 of the DSU provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Article 17.13 of the DSU states: "The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." In certain appeals, when we reverse a panel's finding on a legal issue, we 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. This occurred, for example, in the appeals in *United States – Gasoline*[62], *Canada – Certain Measures Concerning Periodicals*[63], *European Communities –*

[60]It appears that the Panel did not find it necessary to make a definitive finding on whether the 1996 Final Report constituted a "risk assessment", after having come to its conclusion that the measure at issue was not based on a risk assessment.

[61]*Supra.*, para. 105.

[62]Adopted 20 May 1996, WT/DS2/AB/R, pages 19 ff.

[63]Adopted 30 July 1997, WT/DS31/AB/R, pages 23 ff.

Measures Affecting the Importation of Certain Poultry Products ("European Communities – Poultry")[64], and *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.[65]

118. As we have reversed the Panel's finding that the SPS measure at issue, erroneously identified as the heat-treatment requirement, is not based on a risk assessment, we believe that -- to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record -- we should complete the legal analysis and determine whether the actual SPS measure at issue, i.e., Australia's *import prohibition* on fresh, chilled or frozen ocean-caught Pacific salmon, is based on a risk assessment.

119. In examining whether Australia's import prohibition is consistent with Article 5.1, we first have to address whether the 1996 Final Report is, indeed, as Australia contends, a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*. After a detailed analysis of the requirements of the *SPS Agreement* relating to risk assessments, and a detailed analysis on whether the 1996 Final Report fulfils these requirements, the Panel *assumed* -- without making a finding on this issue -- "that the 1996 Final Report meets the requirements of a risk assessment set out in Articles 5.1 and 5.2".[66] We do not believe it appropriate to base our examination of Article 5.1 on this *assumption* made by the Panel that the 1996 Final Report is a proper risk assessment. We must, therefore, address this question ourselves. This is possible, because the Panel made all the factual findings necessary to enable us to examine whether the 1996 Final Report meets the requirements of a risk assessment under Article 5.1 of the *SPS Agreement*.

120. Paragraph 4 of Annex A of the *SPS Agreement* defines two types of "risk assessment". We agree with the Panel that the type of risk assessment which is required in this case is the type defined in the first part of paragraph 4 of Annex A[67], which reads as follows:

> *Risk Assessment* - The 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;

[64]Adopted 23 July 1998, WT/DS69/AB/R, paras. 154 ff.

[65]WT/DS58/AB/R, dated 12 October 1998, paras. 123 ff.

[66]Panel Report, paras. 8.91 and 8.92.

[67]The SPS measure in dispute is a measure to protect animal life or health from risks arising from the entry, establishment or spread of diseases, rather than from risks arising from additives, contaminants, toxins or disease-causing organisms in foodstuffs. Therefore, the type of risk assessment required is the type defined in the first part, rather than the second part, of paragraph 4 of Annex A of the *SPS Agreement.*

121. On the basis of this definition, we consider that, in this case, 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

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

122. We note that the Panel identified the same three requirements for a risk assessment, within the meaning of Article 5.1 and the first part of paragraph 4 of Annex A of the *SPS Agreement*.[68]

123. Before taking up the question of whether the 1996 Final Report satisfies these requirements, we note that the first definition in paragraph 4 of Annex A speaks about the evaluation of "likelihood."[69] In our report in *European Communities – Hormones*, we referred to the dictionary meaning of "probability" as "degrees of likelihood" and "a thing that is judged likely to be true", for the purpose of distinguishing the terms "potential" and "probability".[70] For the present purpose, we refer in the same manner to the ordinary meaning of "likelihood", and we consider that it has the same meaning as "probability".[71] On this basis, as well as on the basis of the definition of "risk" and "risk

[68]However, the test developed by the Panel seems to suggest that the Member imposing the SPS measure would itself have to conduct the risk assessment (Panel Report, para. 8.72). In that respect the Panel is mistaken. We recall that in paragraph 190 of our report in *European Communities – Hormones*, we stated that "Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment. It only requires that the SPS measures be 'based on an assessment, as appropriate for the circumstances …'. The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization."

[69]We note that the first type of risk assessment in paragraph 4 of Annex A is substantially different from the second type of risk assessment contained in the same paragraph. While the second requires only the evaluation of the *potential* for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the *likelihood* of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences. In view of the very different language used in paragraph 4 of Annex A for the two types of risk assessment, we do not believe that it is correct to diminish the substantial differences between these two types of risk assessments, as the European Communities seems to suggest when it argues that "the object, purpose and context of the *SPS Agreement* indicate that no greater level of probability can have been intended for the first type of risk assessment than for the second type, [as b]oth types can apply both to human life or health and to animal or plant life or health". (Third participant's submission of the European Communities, para. 7).

[70]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 184.

[71]"Likelihood: probability", *The Concise Oxford Dictionary of Current English* (9th ed., Clarendon Press).

assessment" developed by the Office international des épizooties ("OIE")[72] and the OIE *Guidelines for Risk Assessment*[73], we maintain that for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the "likelihood", i.e., the "probability", of entry, establishment or spread of diseases and associated biological and economic consequences as well as the "likelihood", i.e., "probability", of entry, establishment or spread of diseases *according to the SPS measures which might be applied*.

124. We note that, although the Panel stated that the definition of a risk assessment for this type of measure requires an "evaluation of the likelihood", for the purpose of satisfying the second and third requirements[74], it subsequently was hesitant in applying these requirements, by stating or suggesting in paragraphs 8.80, 8.83, 8.89 and 8.91, that *some* evaluation of the likelihood or probability would suffice. We consider this hesitation unfortunate. We do not agree with the Panel that a risk assessment of this type needs only *some* evaluation of the likelihood or probability. The definition of this type of risk assessment in paragraph 4 of Annex A refers to "the evaluation of the likelihood" and not to *some* evaluation of the likelihood. We agree, however, with the Panel's statements in paragraph 8.80 that the *SPS Agreement* does not require that the evaluation of the likelihood needs to be done quantitatively. The likelihood may be expressed either quantitatively or qualitatively. Furthermore, we recall, as does the Panel[75], that we stated in *European Communities – Hormones* that there is no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk.[76]

125. The Panel adds to these considerations, the following statement:

> ... [W]e consider that a risk assessment, on which to base an import prohibition in accordance with Article 5.1, cannot be premised on the concept of "zero risk". Otherwise, all import prohibitions would be based on a risk assessment since there is a risk (i.e., a *possibility* of an adverse event occurring), however remote, associated with most (if not all) imports.[77]

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[72]OIE Code, Section 1.1, Definitions, p. 13. We note that Article 5.1 provides that risk assessments should take "into account risk assessment techniques developed by the relevant international organizations". In the context of this case, the relevant international organization is the OIE.

[73]OIE Code, Chapter 1.4.2, p. 33 and 34.

[74]Panel Report, para. 8.72.

[75]Panel Report, para. 8.80.

[76]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 186.

[77]Panel Report, para. 8.81.

In its third participant's submission, the European Communities states that it finds this statement perplexing. The European Communities is concerned that what the Panel affirmed might be misconstrued to mean that "zero risk" as an appropriate level of protection is not a choice open to Members under the *SPS Agreement*. The statement by the Panel quoted above is not appealed, and we merely note that it is important to distinguish -- perhaps more carefully than the Panel did -- between the evaluation of "risk" in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in *European Communities – Hormones*, the "risk" evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed."[78] This does not mean, however, that a Member cannot determine its own appropriate level of protection to be "zero risk".

126. Applying our three-pronged test set out in paragraph 128 above, to the 1996 Final Report in order to determine whether that Report meets the requirements of a risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, we note that the Panel found that the 1996 Final Report identifies the diseases whose entry, establishment or spread Australia wants to prevent as well as the potential biological and economic consequences associated with the entry, establishment or spread of such diseases. The Panel, therefore, concluded that "the 1996 Final Report meets the first requirement of a risk assessment".[79] We agree with the Panel.

127. With regard to the second requirement for a risk assessment of the type applicable in this case, namely, the *evaluation of the likelihood* of entry, establishment or spread of the diseases of concern *and* of the associated potential biological and economic consequences, we note that the Panel stated in paragraph 8.82 of its Report:

> … the 1996 Final Report uses the words probability, possibility and likelihood on different occasions and evaluates elements of probability for *some* of the diseases of concern.[277] (emphasis added)
>
> [277] At the meeting with experts advising the Panel Australia stated that "we contend we have conducted a probability risk assessment" and implied that assessing risk as low or small is a statement of probability (Transcript, para. 155).

After citing some passages from the 1996 Final Report which evaluate elements of probability[80], the Panel concluded:

[78]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 186.

[79]Panel Report, para. 8.73.

[80]The Panel cited only a passage in the Executive Summary, two passages with respect to two diseases (*Aeromonas salmonicida* and *Parvicapsula sp.*), and a passage from the disease agent conclusions. See Panel Report, para. 8.82.

> Considering the evidence before us, we note that the 1996 Final Report addresses *some* elements of both probability and possibility. We shall, therefore, assume - without making a finding on this issue - that it meets the requirement set out above.[81] (emphasis added)

128. We believe, however, that on the basis of the facts found by the Panel, it could, and should, have come to the conclusion that the 1996 Final Report does not contain the "evaluation of the likelihood of entry, establishment or spread" of the diseases of concern "and of the associated potential biological and economic consequences" as required by paragraph 4 of Annex A of the *SPS Agreement*. As we have already emphasized, *some* evaluation of the likelihood is not enough.[82]

129. In arriving at our conclusion that the 1996 Final Report does *not* meet the second requirement of a risk assessment of the type applicable in this case, we rely, in particular, on the Panel's factual findings in paragraph 8.83 of its Report:

> … that the 1996 Final Report (as stated by several of the experts advising the Panel[284]) lends more weight to the unknown and uncertain elements of the assessment than the 1995 Draft Report (on which the 1996 Final Report is based). This, on occasions, results in general and vague statements of mere possibility of adverse effects occurring; statements which constitute neither a quantitative nor a qualitative assessment of probability.[285]
>
> [284] Wooldridge answers, p.6, quoted in para. 8. and Rodgers answers, p.1 ("As such, the 1995 report is a more useful document, in the sense of an internal risk assessment exercise, since it 'evaluates' the data to conclude that a negligible risk exists, while at the same time recognising that the overall risk of disease introduction cannot be quantified. The final report seems to lend more weight to the unknown elements of the assessment and as such is more cautious, which results in an outcome closer to the 'unacceptable' rather than the 'negligible but acceptable' end of the scale").
>
> [285] This led the experts advising the Panel on this issue to the conclusion that the 1996 Final Report does *not* appropriately assess probability as is required in their view. See Burmaster's answer to Panel Question 1, Burmaster answers, p.1; Rodgers, Transcript, para. 26 ("[The 1996 Final Report] assesses risks on a disease-by-disease basis but in a textural form and does not assign any probabilities that would be needed to reach a conclusion. In this respect, therefore, I think, it possibly does fall short of determining any probability based on the information available") and Wooldridge, Transcript, para. 55 ("... since [the 1996 Final Report] looks only at the possibility of the unwanted outcomes of infection and disease importation, rather than the probability, in my opinion, it does not in any event fulfil the essential requirements of a risk assessment").

[81] Panel Report, para. 8.83.

[82] *Supra.*, para. 124.

130. We might add that the existence of unknown and uncertain elements does not justify a departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph 4 of Annex A, for a risk assessment. We recall that Article 5.2 requires that "in the assessment of risk, Members shall take into account available scientific evidence". We further recall that Article 2, entitled "Basic Rights and Obligations", requires in paragraph 2 that "Members shall ensure that any sanitary … measure … is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5." As we stated in *European Communities – Hormones*, "Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[83]

131. We, therefore, come to the conclusion that the 1996 Final Report does *not* meet the second requirement of the type of risk assessment applicable in this case, i.e., the evaluation of the likelihood of entry, establishment or spread of the diseases of concern and of the potential associated biological and economic consequences.

132. We turn now to the third requirement of a risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A of the *SPS Agreement*, namely, the evaluation of the likelihood of entry, establishment or spread of a disease *according to the SPS measures which might be applied*. We agree with the Panel that the measures which might be applied are those which reduce the risks of concern, and are referred to in the 1996 Final Report as risk reduction factors. We note that the Panel observed that the 1996 Final Report examines a large number of different risk reduction factors for each of the 24 diseases of concern[84], and we note that the Panel came to the following factual finding:

> For most of these risk reduction factors, the 1996 Final Report provides *some* evaluation of the extent to which these factors could reduce risk.[85] (emphasis added)

[83]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 180.

[84]Panel Report, para. 8.89. These risk reduction factors are: "restricting zone of origin, species of origin, life cycle stage; pre and post shipping quarantine; product testing with tests having high sensitivity; processing, maturation and storage for specified time and temperature; treatments, (e.g., heating, disinfection); restricting the destination; vaccination; and certification."

[85]Panel Report, para. 8.89.

133. With regard to the quarantine policy options considered to reduce the *total* risk associated with all diseases of concern, the Panel, arrived at these factual findings:

> … that the 1996 Final Report does not substantively *evaluate* the relative risks associated with these different options. Even though the definition of risk assessment requires an "evaluation ... according to the sanitary ... measures which might be applied", *the 1996 Final Report identifies such measures but does not, in any substantial way, evaluate or assess their relative effectiveness in reducing the overall disease risk.*[86] (emphasis added)

Thereafter, the Panel stated:

> Considering the evidence before us, we recall that the 1996 Final Report addresses and *to some extent evaluates* a series of risk reduction factors, in particular, on a disease-by-disease basis. We shall, therefore, assume - without making a finding on this issue - that the 1996 Final Report … does make such evaluation according to and taking into account the sanitary measures or options - considered to reduce the alleged risk - which might be applied.[87] (emphasis added)

134. We believe that the above assumption is not justified by the Panel's factual findings in paragraphs 8.89 and 8.90 of its Report. On the basis of its factual findings, the Panel should have come to the conclusion that the 1996 Final Report does not fulfil the third requirement for the type of risk assessment applicable in this case, i.e., it does not contain the required evaluation of the likelihood of entry, establishment or spread of the diseases of concern according to the SPS measures which might be applied. We recall that, contrary to the Panel, we consider that *some* evaluation of the likelihood is not enough.[88]

135. We conclude, on the basis of the factual findings made by the Panel and the requirements for a risk assessment as set forth above, that the 1996 Final Report meets neither the second nor the third requirement for the type of risk assessment applicable in this case, and, therefore, that the 1996 Final Report is *not* a proper risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A.

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[86]Panel Report, para. 8.90.

[87]Panel Report, para. 8.91.

[88]*Supra.*, para 124.

136. Inasmuch as we have found that the 1996 Final Report is not a proper risk assessment, and since it was the only risk assessment put forward by Australia, we conclude that the measure at issue, i.e., the import prohibition on fresh, chilled or frozen salmon, is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and, therefore, that Australia has acted inconsistently with Article 5.1 of the *SPS Agreement*.

137. We note that the Panel, after reiterating our statement on the relationship between Articles 2.3 and 5.5 in *European Communities – Hormones*, went on to say:

> … 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. We do recognize, at the same time, that given the more general character of Article 2.2 not all violations of Article 2.2 are covered by Articles 5.1 and 5.2.[89]

138. We agree with the Panel, and, therefore, conclude that, by maintaining an import prohibition on fresh, chilled or frozen ocean-caught Pacific salmon, in violation of Article 5.1, Australia has, by implication, also acted inconsistently with Article 2.2 of the *SPS Agreement*.

C. *Article 5.5 of the SPS Agreement*

139. The next issue we address is whether the Panel erred in law in finding that Australia has acted inconsistently with Article 5.5 of the *SPS Agreement*.

140. Following our Report in *European Communities – Hormones*[90], the Panel considered:

> ... that three elements are required in order for a Member to act inconsistently with Article 5.5:
>
> - the Member concerned adopts different appropriate levels of sanitary protection in several "different situations";
> - those levels of protection exhibit differences which are "arbitrary or unjustifiable"; and
> - the measure embodying those differences results in "discrimination or a disguised restriction on international trade".[91]

[89]Panel Report, para. 8.52.

[90]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 214.

141. The Panel found that all three conditions are fulfilled and therefore concluded that:

> Since all three elements of Article 5.5 are present in this case, we find that Australia, by maintaining the measure at issue, acts inconsistently with its obligations under Article 5.5. Given our earlier finding - that a violation of the more specific Article 5.5 can be presumed to imply a violation of the more general Article 2.3 - we find that Australia, to that extent, also acts inconsistently with Article 2.3.[92]

142. Australia appeals from this finding of inconsistency with Article 5.5 and, by implication, Article 2.3 of the *SPS Agreement*. Without challenging the Panel's three-step legal test for inconsistency with Article 5.5 as such, Australia contends that the Panel has made a series of errors of law in the interpretation and application of the test.[93] Australia argues that the Panel, in its application of Article 5.5, exceeded its terms of reference, erred in the allocation and application of the burden of proof, failed to make an objective assessment of the matter as required by Article 11 of the DSU and made a number of substantive errors in its interpretation and application of Article 5.5. The first of these claims has already been dealt with in Part IV of our Report; the second and third claims are dealt with in Sections A and B of Part VI. In this section we focus exclusively on the substantive errors of law Australia claims the Panel made in its interpretation and application of each of the three elements of Article 5.5 of the *SPS Agreement*.

1. First element of Article 5.5

143. With regard to the first element of Article 5.5, namely, the existence of distinctions in appropriate levels of protection in different situations, the Panel cited our Report in *European Communities – Hormones*, where we stated that "situations … cannot, of course, be compared, unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable".[94] The Panel found that:

> ... in the circumstances of this dispute, we can compare situations under Article 5.5 if these situations involve either a risk of "entry, establishment or spread" of the same or a similar disease *or* of the same or similar "associated biological and economic consequences" and this irrespective of whether they arise from the same product or other products.[95] (emphasis added)

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[91]Panel Report, para. 8.108.

[92]Panel Report, para. 8.160.

[93]Australia's appellant's submission, paras. 146 ff.

[94]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R para. 217.

[95]Panel Report, para. 8.117.

144. On this basis, the Panel determined that the import prohibition on fresh, chilled or frozen salmon for human consumption *and* the admission of imports of (i) uncooked Pacific herring, cod, haddock, Japanese eel and plaice for human consumption; (ii) uncooked Pacific herring, Atlantic and Pacific cod, haddock, European and Japanese eel and Dover sole for human consumption; (iii) herring in whole, frozen form used as bait ("herring used as bait"); and (iv) live ornamental finfish, are "different" situations which can be compared under Article 5.5 of the *SPS Agreement*.[96]

145. Australia argues that the Panel erred by considering that situations are "different", i.e., "comparable", if these situations involve *either* a risk of entry, establishment or spread of the same or a similar disease, *or* a risk of the same or similar "associated potential biological and economic consequences".[97] Australia contends that the Panel has imputed a meaning to the term "risk" which conflicts with the ordinary meaning of the term as used in its context and in the light of the object and purpose of the *SPS Agreement*. According to Australia, the "risk" to be examined is the risk evaluated in the risk assessment, namely, the risk of entry, establishment or spread of several different diseases *and* of the associated potential biological and economic consequences.[98]

146. Situations which involve a risk of entry, establishment or spread of the same or a similar disease have some common elements sufficient to render them comparable under Article 5.5. Likewise, situations with a risk of the same or similar associated potential biological and economic consequences also have some common elements sufficient to render them comparable under Article 5.5. We, therefore, consider that for "different" situations to be comparable under Article 5.5, there is no need for both the disease *and* the biological and economic consequences to be the same or similar. We recognize that, as pointed out by Australia, the risk which needs to be examined in a risk assessment, pursuant to Article 5.1 and the first definition of risk assessment of paragraph 4 of Annex A, is the risk of *both* the entry, establishment or spread of a disease *and* the associated potential biological and economic consequences. However, we fail to see how this can be of relevance to the question of comparability of different situations under Article 5.5 which is the issue addressed by the Panel. We, therefore, conclude that the Panel was correct in stating that situations can be compared under Article 5.5 if these situations involve *either* a risk of entry, establishment or spread of the same or a similar disease, *or* a risk of the same or similar "associated potential biological and economic consequences".

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[96]Panel Report, para. 8.121. Hereafter, we refer to these groups of imports as "other fish and fish products".

[97]Australia's appellant's submission, paras. 155 ff, referring to the Panel Report, para. 8.117.

[98]Australia's appellant's submission, paras. 159 ff.

147. Moreover, we note that the Panel examined and concluded, with respect to each of the four comparisons, that there is a risk of entry, establishment or spread of the same or similar diseases *and* that the risk of associated potential biological and economic consequences is the same or similar.[99]

148. Australia also argues that the Panel erred by examining the biological and economic consequences of the "introduction" of diseases rather than the biological and economic consequences of the "entry, establishment or spread" of diseases.[100] According to Australia, the Panel's interpretation of "entry, establishment or spread" as "introduction" is contrary to the SPS provisions on risk assessment, i.e., Articles 5.1 to 5.3 and Annex A.[101] We note that it is clear from the context of the relevant Panel discussion, that the Panel merely used the word "introduction" as a *short hand expression* for "entry, establishment or spread". It explicitly defined the consequences of disease introduction as "the consequences of a disease once established in a country".[102]

149. Furthermore, even if there were to be a difference between the consequences of "disease introduction" and the consequences of the "entry, establishment and spread of a disease", we note that for the comparability of situations under Article 5.5, nothing requires us to look at the latter and not at the former. We recognize that the definition of a risk assessment requires a risk assessment to evaluate the consequences of the "entry, establishment and spread of a disease" but we fail to see how this can be of relevance to the question of the comparability of different situations under Article 5.5.

150. Australia finally contends that the Panel erred in determining that its examination on the comparability of different situations must be limited solely to those disease agents positively detected. According to Australia, the Panel diminished Australia's right to a cautious approach to determine its own appropriate level of protection. Australia argues that the Panel failed to interpret the provisions of Article 5.5 in their context and in the light of the object and purpose of the *SPS Agreement*. According to Australia, the terms "likelihood" and "potential" in regard to the definition of "risk assessment" contained in paragraph 4 of Annex A, and the terms "scientific principles" and "sufficient scientific evidence" contained in Article 2.2, make it clear that the basic SPS right set out in Article 2.1 to take SPS measures necessary for the protection of animal life or health, is not contingent on positive scientific evidence of disease detection.[103]

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[99]Panel Report, para. 8.121.

[100]Australia's appellant's submission, para. 168, referring to the Panel Report, para. 8.121. We recall that Australia's claims relating to the burden of proof and Article 11 of the DSU are dealt with in Part VI of this Report.

[101]Australia's appellant's submission, para. 168.

[102]Panel Report, para. 8.121.

[103]Australia's appellant's submission, para. 181.

151. We note that, contrary to what Australia argues, the Panel did not limit its examination under Article 5.5 to diseases positively detected in fresh, chilled or frozen ocean-caught Pacific salmon. On the contrary, it appears clearly from Annex 1 to the Panel Report, entitled "The Four Comparisons under Article 5.5", that the Panel examined diseases of concern which, according to Australia, may be carried by fresh, chilled or frozen ocean-caught Pacific salmon but which have not yet been positively detected in this type of salmon.[104] We also note that the Panel stated explicitly that:

> ... To the extent that both the other products and the salmon products further examined are known to be hosts to one of these disease agents or - for the salmon products - *give rise to an alleged concern for that disease agent*, they can be associated with the same kind of risk, namely a risk of entry, establishment or spread of that disease.[105] (emphasis added)

152. In addition, we believe that for situations to be comparable under Article 5.5, it is sufficient for these situations to have in common a risk of entry, establishment or spread of *one* disease of concern. There is no need for these situations to have in common a risk of entry, establishment or spread of *all* diseases of concern. Therefore, even if the Panel had excluded from its examination *some* diseases of concern not positively detected in fresh, chilled or frozen ocean-caught Pacific salmon, this would not invalidate its finding in paragraph 8.121 on comparable situations under Article 5.5.

153. We, therefore, uphold the Panel's finding in paragraph 8.121 of its Report that the import prohibition on fresh, chilled or frozen salmon for human consumption *and* the admission of imports of other fish and fish products are "different" situations which can be compared under Article 5.5 of the *SPS Agreement*.[106]

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[104]We recognize that the Panel in footnote 469 to Annex 1 stated: "When addressing 'disease occurrence' in this Annex, we focus on whether or not the specific disease agent has been detected in the product concerned. We realize that [in] doing so we simplify the comparison and that a better comparison could be made if more data was available. …". In the light of the information contained in the Annex itself, this cannot be understood to mean that diseases not positively detected were not considered.

[105]Panel Report, para. 8.119.

[106]We note that the Panel subsequently examined whether there is, for each of these "different" situations, a distinction in levels of sanitary protection. In para. 8.129, it concluded:

> ... We thus assume in this case that the rather substantial difference in sanitary measures imposed by Australia for ... [ocean-caught Pacific salmon] (an import prohibition) as opposed to those imposed for the other four situations (where imports are allowed, often without control; ...), does reflect a difference in the levels of protection considered to be appropriate by Australia for each of the four comparisons in the sense of the first element of Article 5.5.

This finding is not appealed.

2. Second element of Article 5.5

154. With regard to the second element of Article 5.5, namely, the existence of arbitrary or unjustifiable distinctions in appropriate levels of protection in different situations, the Panel began its analysis by noting that in view of the difference in SPS measures and corresponding levels of protection for salmon products, on the one hand, and the four categories of other fish and fish products, on the other, one might expect some justification for this difference, such as a higher risk from imported salmon.[107] However, as the Panel noted:

> ... the arguments, reports, studies and expert opinions submitted to us in this respect - rather than pointing in the direction of a *higher* risk related to ...[ocean-caught Pacific salmon], in order to justify the stricter sanitary measures imposed for these products - all provide evidence that the two categories of non-salmonids [herring used as bait and live ornamental finfish], for which more lenient sanitary measures apply, can be presumed to represent at least as high a risk - if not a higher risk - than the risk associated with ... [ocean-caught Pacific salmon].[108]

155. The Panel, therefore, found that, on the basis of the evidence before it, the distinctions in levels of sanitary protection reflected in Australia's treatment of, on the one hand, ocean-caught Pacific salmon and, on the other, herring used as bait and live ornamental finfish, are "arbitrary or unjustifiable" in the sense of the second element of Article 5.5.[109]

156. Australia argues that the Panel erred in determining that its examination under Article 5.5, second element, must be limited solely to those disease agents positively detected in ocean-caught Pacific salmon. Australia raises the same objections to this limitation as it did in the context of the first element discussed above.[110]

157. We do not agree with Australia that the Panel excluded diseases of concern which have not been positively detected in ocean-caught Pacific salmon from its examination under Article 5.5. The Panel explicitly took into account diseases which have not been positively detected in ocean-caught Pacific salmon but had been detected in herring used as bait and live ornamental finfish.[111] In addition, we observe that the inclusion in the examination under Article 5.5, second element, of *all* diseases of concern which have not been positively detected in ocean-caught Pacific salmon would

[107]Panel Report, para. 8.133.

[108]Panel Report, para. 8.134.

[109]Panel Report, para. 8.141.

[110]*Supra.*, para. 150.

[111]Panel Report, para. 8.140.

logically have led to the inclusion of all diseases of concern which have not been positively detected in herring used as bait and live ornamental finfish. Due to the lack of reliable scientific information, this exercise would have become highly speculative and, moreover, would probably not have changed the Panel's finding in paragraph 8.141 on the "arbitrary or unjustifiable" character of the distinctions in the levels of protection.

158. Australia determined explicitly that its appropriate level of protection with respect to ocean-caught Pacific salmon is "a high or 'very conservative' level of sanitary protection aimed at reducing risk to 'very low levels', 'while not based on a zero-risk approach'."[112] The level of protection reflected in Australia's treatment of herring used as bait and live ornamental finfish is definitely lower. We note the Panel's factual finding that herring used as bait and live ornamental finfish can be presumed to represent at least as high a risk - if not a higher risk - than the risk associated with ocean-caught Pacific salmon.[113] Therefore, we uphold the Panel's finding in paragraph 8.141 of its Report to the extent that the Panel found that the second element of Article 5.5 is fulfilled.

3. Third element of Article 5.5

159. With regard to the third element of Article 5.5, i.e., that the arbitrary or unjustifiable distinctions in levels of protection result in "discrimination or a disguised restriction on international trade", we note that the Panel identified three "warning signals" as well as three "other factors more substantial in nature" ("additional factors").[114] The Panel considered that each of these "warning signals" and "additional factors" can be taken into account in its decision on the third element of Article 5.5. In paragraph 8.159 of its Report, it concluded:

> On the basis of all "warning signals" and factors outlined above, *considered cumulatively*, ... the distinctions in levels of protection imposed by Australia for, on the one hand, ... [ocean-caught Pacific salmon] and, on the other hand, herring ... use[d] as bait and live ornamental finfish, ... result[...] in "a disguised restriction on international trade", in the sense of the third element of Article 5.5.[115] (emphasis added)

[112]Panel Report, para. 8.107.

[113]Panel Report, para. 8.134 quoted in relevant part in para. 154 of this Report.

[114]Panel Report, paras. 8.149 and 8.158.

[115]Panel Report, para. 8.159.

160. Australia contends that the Panel made a number of substantive errors of law in using these "warning signals" and "additional factors" to come to its conclusion on the third element of Article 5.5.[116]

161. The first "warning signal" the Panel considered was the arbitrary or unjustifiable character of the differences in levels of protection.[117] It noted what we stated in *European Communities - Hormones*:

> ... the arbitrary or unjustifiable character of differences in *levels of protection* [...] may in practical effect operate as a "warning" signal that the implementing *measure* in its application *might* be a discriminatory measure or *might* be a restriction on international trade disguised as an SPS measure for the protection of human life or health".[118]

The Panel, therefore, considered that:

> ... In this dispute, ... the arbitrary character of the differences in levels of protection is a "warning signal" that the measure at issue results in "a disguised restriction on international trade".[119]

162. According to Australia, the Panel erred in according the first "warning signal", the status of evidence which demonstrates that the measure results in a disguised restriction on international trade.[120] We note however, that it appears clearly from the Panel Report, and in particular, from the reference therein to our Report in *European Communities – Hormones*, that the Panel considered the arbitrary or unjustifiable character of differences in levels of protection as a "warning signal" for, and not as "evidence" of, a disguised restriction on international trade.[121]

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[116]Australia also claims that the Panel exceeded its terms of reference, violated the rules on burden of proof and failed to make an objective assessment of the matter as required by Article 11 of the DSU. These claims are examined in Section B of Part IV and Sections A and B of Part VI of this Report.

[117]Panel Report, para. 8.149.

[118]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 215.

[119]Panel Report, para. 8.149.

[120]Australia's appellant's submission, para. 216.

[121]Panel Report, para. 8.149.

163. The second "warning signal" considered by the Panel was the *rather substantial difference* in levels of protection between an import prohibition on ocean-caught Pacific salmon, as opposed to tolerance for imports of herring used as bait and of live ornamental finfish.[122] The Panel noted our statement in *European Communities - Hormones* that:

> ... the degree of difference, or the extent of the discrepancy, in the levels of protection, *is only one kind* of factor which, along with others, may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure.[123] (emphasis added)

On that basis, the Panel stated:

> ... we do consider that the rather substantial difference in levels of protection is one of the factors we should take into account in deciding whether the measure at issue results in "a disguised restriction on international trade", as argued by Canada.[124]

164. Australia contends that this second "warning signal" is effectively no different in character from the first "warning signal" and should therefore be discounted.[125] We note, however, that in this case the degree of difference in the levels of protection (prohibition *versus* tolerance) is indeed, as the Panel stated, "rather substantial". We, therefore, consider it legitimate to treat this difference as a separate warning signal.

165. The third "warning signal" the Panel considered was the inconsistency of the SPS measure at issue with Articles 5.1 and 2.2 of the *SPS Agreement*. The Panel considered that its earlier finding of inconsistency with Articles 5.1 and 2.2:

> ... may, together with other factors, lead to the conclusion that the measure at issue results in a "disguised restriction on international trade". Indeed, considering these violations of Articles 5.1 and 2.2 it would seem that the measure at issue constitutes an import prohibition, i.e., a restriction on international trade, "disguised" as a sanitary measure. We do stress, however, that this additional "warning signal" as such cannot be sufficient to conclude that the measure results in a "disguised restriction on international trade".[126]

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[122]Panel Report, para. 8.150.

[123]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 240.

[124]Panel Report, para. 8.150.

[125]Australia's appellant's submission, para. 217.

[126]Panel Report, para. 8.151.

166. Australia objects to the use of this inconsistency as a warning signal in the context of the third element of Article 5.5.[127] It argues that inconsistency with Article 5.1 cannot "presume" or pre-empt a finding under Article 5.5. We note that a finding that an SPS measure is not based on an assessment of the risks to human, animal or plant life or health - either because there was no risk assessment at all or because there is an insufficient risk assessment - is a strong indication that this measure is not really concerned with the protection of human, animal or plant life or health but is instead a trade-restrictive measure taken in the guise of an SPS measure, i.e., a "disguised restriction on international trade". We, therefore, consider that the finding of inconsistency with Article 5.1 is an appropriate warning signal for a "disguised restriction on international trade".

167. The first "additional factor" considered by the Panel is the fact that the two substantially different SPS measures that Australia applies (import prohibition versus import tolerance) lead to discrimination between salmon, on the one hand, and herring used as bait and live ornamental finfish on the other. In the Panel's view, the concept of "disguised restriction on international trade" in Article 5.5 includes, among other things, restrictions constituting arbitrary or unjustifiable discrimination between certain products.[128]

168. Australia contends that this first "additional factor" is merely a combination of the first two "warning signals" and does not, therefore, constitute additional "evidence". Furthermore, Australia argues that this first "additional factor" is based on an inappropriate analogy to Article III of the GATT 1994 and a wrong concept of discrimination which, in the context of Article 5.5, means, in its view, discrimination between countries.[129] According to Australia, the first "additional factor" should therefore be excluded.

169. We believe that the first "additional factor" should indeed be excluded from the examination of the third element of Article 5.5. All "arbitrary or unjustifiable distinctions" in levels of protection will lead logically to discrimination between products, whether the products are the same (e.g., discrimination between imports of salmon from different countries or between imported salmon and domestic salmon) or different (e.g., salmon versus herring used as bait and live ornamental finfish). The first "additional factor" is therefore not different from the first warning signal, and should not be taken into account as a *separate factor* in the determination of whether an SPS measure results in a "disguised restriction on international trade".

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[127]Australia's appellant's submission, paras. 218 and 273 - 276.

[128]Panel Report, para. 8.153.

[129]Australia's appellant's submission, paras. 219 and 277 - 280.

170. The second "additional factor" considered by the Panel was the substantial, but unexplained change in conclusion between the 1995 Draft Report (which recommended allowing the importation of ocean-caught Pacific salmon under certain conditions) and the 1996 Final Report (which recommended continuing the import prohibition). The Panel suggested that the decisive reason for the reversal of the 1995 draft recommendation "might well have been inspired by domestic pressures to protect the Australian salmon industry against import competition".[130]

171. Australia argues that the Panel erred in considering this difference as a factor to be taken into account in the examination of the third element of Article 5.5. Australia contends that the Panel has incorrectly accorded a draft recommendation the status of an SPS measure and that no provision of the *SPS Agreement* requires WTO Members to implement draft recommendations absent new scientific evidence. Moreover, Australia argues that the Panel refused to consider its arguments and evidence on the role of draft reports and recommendation in the decision-making process of governments. Australia contends that the Panel mischaracterized the reasons for the introduction of QP86A. In Australia's view, the Panel also erred in speculating about the presence and role of lobbying in Australia's decision to adopt the 1996 Final Report.[131]

172. We consider Australia's arguments to be without merit. First, we note that paragraph 1 of Annex A of the *SPS Agreement* defines a sanitary measure of the type relevant in this dispute as a measure applied to protect animal life or health within the territory of a Member from risks arising from the entry, establishment or spread of diseases. In the light of this definition, the Panel was correct to consider the recommendation of the 1995 Draft Report to allow *under certain conditions* the importation of ocean-caught Pacific salmon to be a recommendation of an SPS measure.

173. Second, we note that the Panel did not at any point state that WTO Members are obliged to implement draft recommendations absent new scientific evidence. It did not introduce such obligation. We note that the Panel explicitly acknowledged that the substantial but unexplained reversal of the 1995 draft recommendation does not constitute, in itself, sufficient proof that the measure results in a disguised restriction on trade.[132] The Panel merely considered that this factor "can be taken into account cumulatively with other factors" in the examination under the third element of Article 5.5. We agree with the Panel. We do not share Australia's criticism on the Panel's use of the 1995 Draft Report, which the Panel used correctly as "part of the architecture" or "part of a process"[133] leading to the 1996 Final Report. We also do not see the relevance of the historical

[130]Panel Report, para. 8.154.

[131]Australia's appellant's submission, paras. 281 - 289.

[132]Panel Report, para. 8.154.

[133]Panel Report, footnote 418.

reasons for the introduction of QP86A in 1975 to the examination of the substantial changes in conclusion between the 1995 Draft Report and the 1996 Final Report.

174. The third "additional factor" considered by the Panel was the absence of controls on the internal movement of salmon products within Australia compared to the prohibition of the importation of ocean-caught Pacific salmon.[134] The Panel did not come to a conclusion on the existence or nature of this alleged difference, but considered that its doubts whether Australia applies similarly strict sanitary standards, "though probably not conclusive as such, can also be taken into account, cumulatively with other factors, in [its] decision on whether the measure at issue results in a 'disguised restriction on international trade'."[135]

175. Australia contends that the Panel erred in implying that consistency with Article 5.5, requires either restrictions on the internal movement of salmon products within Australia or, alternatively, that Australia apply import zoning to grant access to Australia for ocean-caught Pacific salmon.[136]

176. We note that, as acknowledged by Australia[137], the Panel did not conclude that the alleged absence of internal controls constituted a violation of Article 5.5 or any other provision of the *SPS Agreement*. The Panel merely stated its doubts on whether Australia applies similarly strict sanitary standards on the internal movement of salmon products within Australia as it does on the importation of salmon products and considered that as *a* factor which can be taken into account in the examination under the third element of Article 5.5. We consider that these doubts do not carry much weight, but we agree with the Panel that they can nevertheless be taken into consideration.[138]

177. In the above analysis, we have upheld the Panel's findings on the first, second and third "warning signals" as well as its findings on the second and third "additional factors". We have only reversed the Panel's finding on the first "additional factor". We consider, however, that this reversal does not affect the validity of the Panel's conclusion in paragraph 8.159 of its Report, that the "warning signals" and "other factors", *considered cumulatively*, lead to the conclusion that the distinctions in the levels of protection imposed by Australia result in a disguised restriction on international trade.

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[134]Panel Report, para. 8.155.

[135]Panel Report, para. 8.158.

[136]Australia's appellant's submission, para. 290.

[137]*Ibid.*

[138]That such doubts can be taken into consideration in the examination of the existence of discrimination in the context of Article 5.5 does not prejudice the question of whether or not there is a violation of Article 2.3, first sentence. This point will be taken up in Section F of Part V of this Report.

178. We, therefore, uphold the Panel's finding that, by maintaining the measure at issue, Australia has acted inconsistently with its obligations under Article 5.5, and, by implication, Article 2.3 of the *SPS Agreement*.[139]

D. *Article 5.6 of the SPS Agreement*

179. We next consider the question of whether the Panel erred in finding that the SPS measure at issue is "more trade-restrictive than required" to achieve Australia's appropriate level of protection, and, therefore, that Australia has acted inconsistently with Article 5.6 of the *SPS Agreement*.

180. After noting that Article 5.6 must be read in context and, in particular, in light of Article 2.2 of the *SPS Agreement*[140], the Panel turned its attention to the footnote to Article 5.6.[141] In the Panel's view, this footnote defines an SPS measure to be "more trade-restrictive than required" only if there is another SPS measure which:

(1) is "reasonably available taking into account technical and economic feasibility";

(2) "achieves [Australia's] appropriate level of sanitary ... protection"; and

(3) is "significantly less restrictive to trade" than the sanitary measure contested.

The Panel viewed these three elements as cumulative in nature.[142]

181. Applying this three-pronged test to the facts in this case, the Panel first recalled that the 1996 Final Report identifies five potential quarantine policy options, ranging from heat treatment to simple evisceration, which are:

> 1. Permit the importation of product effectively heat treated for pathogens of concern
>   - product might be heat treated prior to export, or
>   - heat treated on arrival prior to general distribution
> 2. Implement the recommendations of the BRS report "Aquatic Animal Quarantine in Australia: Report of the Scientific Working Party on Aquatic Animal Quarantine" in part or in full [allowing imports of salmon but, inter alia, with certain certification and inspection requirements and only as eviscerated, filleted flesh].

[139]Panel Report, para. 8.160.

[140]Panel Report, para. 8.165.

[141]Panel Report, para. 8.167.

[142]Panel Report, para. 8.167.

> 3. Permit the importation of retail-ready fillets, for distribution in raw form under specified conditions.
>
> 4. Implement the recommendations of AQIS's 1995 draft IRA, that is, permit the importation of headless, gilled, eviscerated product under specified conditions.
>
> 5. Permit importation of product that complies with current international standards for trade in salmon product for human consumption, that is, OIE recommends that product be eviscerated and that no other risk reduction measures need be taken.[143]

182. The Panel then examined whether any of the latter four quarantine policy options (options 2 to 5, "the four options") meet the three elements of the test under the footnote to Article 5.6. The Panel excluded option 1 since it speaks of the heat-treatment requirement which the Panel considered to be the SPS measure against which the other four options are to be examined.

183. On the first element of the test under Article 5.6, i.e., whether there is an alternative SPS measure which is "reasonably available, taking into account technical and economic feasibility", the Panel noted that the four options were described in the 1996 Final Report as options "which merit consideration", and found that "this implies that the 1996 Final Report put forward the four alternatives … as technically or economically feasible policy options". The Panel, therefore, concluded that the first element of the test under Article 5.6 is met.[144]

184. On the second element, i.e., whether any of these four quarantine policy options "achieves Australia's appropriate level of sanitary protection", the Panel started from the premise that:

> ... the *level of* protection implied or reflected in a sanitary *measure* or regime imposed by a WTO Member can be presumed to be at least as high as the level of protection considered to be *appropriate* by that Member.[145]

[143]Panel Report, para. 8.168, which incorporates the list of quarantine policy options found in the 1996 Final Report, p.62. "IRA" refers to "Import Risk Analysis".

[144]Panel Report, para. 8.171.

[145]Panel Report, para. 8.173.

On the basis of this premise, it stated that:

> ... To determine whether any of the alternative measures meet Australia's appropriate level of protection, we should […] examine whether these alternatives meet the level of protection currently achieved by the measure at issue.[146]

According to the Panel, Australia's "appropriate level of protection" with respect to ocean-caught Pacific salmon can, therefore, be presumed to be at least as high as the level of protection implied in the measure currently imposed, which in the view of the Panel is in effect and from a sanitary perspective the heat-treatment requirement.[147]

185. Following this reasoning and focusing its attention on the second quarantine policy option, i.e., certification, inspection, evisceration and filleting, the Panel found that there are alternative SPS measures which would meet Australia's appropriate level of protection.[148] It, therefore, concluded that the second element of the test under Article 5.6 is met.[149]

186. On the third element, i.e., whether any of the four quarantine policy options is significantly less restrictive to trade than the SPS measure currently applied, the Panel pointed out that these four alternative quarantine policy options would "allow imports" of ocean-caught Pacific salmon, albeit under specific conditions, whereas the SPS measure currently applied amounts to an "outright prohibition". The Panel, therefore, concluded that the third element of the test under Article 5.6 is also met.[150]

187. Having found that all three elements of the test under Article 5.6 are fulfilled, the Panel reached the conclusion that Australia, by maintaining the measure at issue, has acted inconsistently with Article 5.6.[151]

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[146]Panel Report, para. 8.173. *See also* para. 8.175, where the Panel said:

> We recall, … that to determine whether any of the alternative measures meet Australia's appropriate level of protection, we should examine whether these alternatives meet the level of protection currently achieved by the measure in place (in effect, the heat treatment requirements in the 1988 Conditions) …

[147]Panel Report, para. 8.173.

[148]Panel Report, para. 8.176.

[149]Panel Report, para. 8.181.

[150]Panel Report, para. 8.182.

[151]Panel Report, para. 8.183.

188. We note that, in the examination of Canada's claim under Article 5.6, the Panel referred to its earlier ruling[152] that "the measure in dispute is inconsistent with Article 2.2", and, therefore, the Panel decided that it "shall not further address the legal relationship between Articles 5.6 and 2.2".[153]

189. Australia appeals from the finding of inconsistency with Article 5.6. Australia does not disagree with the three-pronged legal test under Article 5.6 as set out by the Panel. Australia argues, however, that the Panel erred in law, particularly in the way in which it examined the second element of the test under Article 5.6, i.e., whether any of the four options achieves Australia's appropriate level of protection.[154]

190. According to Australia, the Panel incorrectly characterized the existing measure which currently achieves Australia's appropriate level of protection. Australia asserts that the Panel has effectively determined that Australia's appropriate level of protection for fresh, chilled or frozen salmon can be met by certain heat-treatment conditions.[155] In line with its claim of error on the SPS measure at issue, Australia argues that the Panel erred in considering that heat treatment "constitutes" the level of protection for fresh, chilled or frozen salmon. According to Australia, its appropriate level of protection is "explicit in the measure currently imposed, i.e., the import prohibition on fresh, chilled or frozen salmon."[156]

191. We recall that we have already concluded that the SPS measure at issue is not the heat-treatment requirement, but rather is the import prohibition on fresh, chilled or frozen salmon.[157] As we observed in the context of our examination of Article 5.1 of the *SPS Agreement*, the measure to be examined under the *SPS Agreement* is, therefore, the import prohibition. The Panel had to examine under Article 5.6 whether the import prohibition is "not more trade-restrictive than required" to achieve Australia's appropriate level of protection. Instead, the Panel examined whether the heat-treatment requirement is "not more trade-restrictive than required". Because of this error, we reverse the Panel's finding in paragraph 8.183 that Australia, by maintaining the SPS measure at issue, has acted inconsistently with Article 5.6.

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[152]Panel Report, para. 8.99.

[153]Panel Report, para. 8.165.

[154]We note that Australia also claims with regard to the first element of the test under Article 5.6 that the Panel misapplied the rules on burden of proof. We deal with this claim in Part VI of this Report.

[155]Australia's appellant submission, para. 306.

[156]Australia's appellant submission, para. 311.

[157]*Supra.*, para. 105.

192. There is no finding nor examination in the Panel Report on the question of whether the import prohibition on fresh, chilled or frozen salmon is "not more trade-restrictive than required" to achieve Australia's appropriate level of protection.

193. However, in the same context and manner that we did our examination under Article 5.1 of the *SPS Agreement*, we believe that - to the extent this is possible on the basis of the factual findings of the Panel and/or facts that are undisputed between the parties - we should complete the legal analysis and determine whether the proper SPS measure at issue, i.e., Australia's import prohibition on fresh, chilled or frozen salmon, is "not more trade-restrictive than required" to achieve Australia's appropriate level of protection.

194. We agree with the Panel that Article 5.6 and, in particular, the footnote to this provision, clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:

(1) is reasonably available taking into account technical and economic feasibility;

(2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and

(3) is significantly less restrictive to trade than the SPS measure contested.

These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, *or* if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, *or* if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6.

195. With regard to the first element of this test, we note the Panel's factual finding that there are alternative SPS measures that are reasonably available, taking into account technical and economic feasibility. We, therefore, consider that the first element of the test under Article 5.6 is met.

196. With regard to the second element of the test under Article 5.6, i.e., whether the available alternative SPS measures meet the appropriate level of protection, we note that the Panel stated in paragraph 8.173 of its Report, that "[t]o determine whether any of the alternative measures meet Australia's appropriate level of protection, we should […] examine whether these alternatives meet the level of protection currently achieved by the measure at issue." As already noted, this statement is based on the Panel's premise that "the *level of* protection implied or reflected in a sanitary *measure*

or regime imposed by a WTO Member can be presumed to be at least as high as the level of protection considered to be *appropriate* by that Member." We disagree with the Panel.

197. We note that, in this case, the level of protection *reflected* in the SPS measure at issue, i.e., the import prohibition, is undisputedly a "zero-risk level" of protection. However, Australia determined explicitly that its *appropriate* level of protection is:

> ... a high or "very conservative" level of sanitary protection aimed at reducing risk to "very low levels", "while not based on a zero-risk approach".[158]

It is clear, in this case, that the *appropriate* level of protection as determined by Australia is definitely *not* at least as high as the level of protection *reflected* in the SPS measure at issue.

198. In discussing Australia's position with respect to its appropriate level of protection, the Panel noted:

> It is for Australia to decide on ... [its appropriate level of protection], but, again, in so doing it has to act consistently with the SPS Agreement, in particular Articles 2, 5.1 to 5.3 and 5.6. Our examination under Article 5.6 is not aimed at a *de novo* review of what sanitary measure Australia should have chosen to achieve its appropriate level of protection. On the other hand, we cannot completely defer this decision to Australia and thus not give effect to Article 5.6. Our mandate under Article 11 of the DSU requires us to "make an objective assessment of the matter before [us], including an objective assessment of the facts of the case".[159]

199. We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as "the level of protection deemed appropriate by the Member establishing a sanitary … measure", is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body.

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[158]Panel Report, para. 8.107.

[159]Panel Report, para. 8.172.

200. The "appropriate level of protection" established by a Member and the "SPS measure" have to be clearly distinguished.[160] They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective.

201. It can be deduced from the provisions of the *SPS Agreement* that the determination by a Member of the "appropriate level of protection" logically precedes the establishment or decision on maintenance of an "SPS measure". The provisions of the *SPS Agreement* also clarify the correlation between the "appropriate level of protection" and the "SPS measure".

202. According to Article 3.3 of the *SPS Agreement*:

> Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, ... *as a consequence* of the level of sanitary or phytosanitary protection a Member determines to be appropriate … (emphasis added)

Article 5 of the *SPS Agreement*, entitled "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection", provides in paragraph 3:

> In assessing the risk to animal or plant life or health and *determining* the measure *to be applied for achieving* the appropriate level of sanitary or phytosanitary protection from such risk ... (emphasis added)

Paragraph 4 of Article 5 of the *SPS Agreement* addresses, specifically, the determination of the appropriate level of protection in requiring that:

> Members should, *when determining* the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects. (emphasis added)

203. The correlation between the "appropriate level of protection" and the "SPS measure" is perhaps shown most clearly in Article 5.6 of the *SPS Agreement* which reads:

> ... *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 ... (emphasis added)

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[160]That the level of protection and the SPS measure applied have to be clearly distinguished results already from our Report in *European Communities – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 214.

The words of Article 5.6, in particular the terms "*when establishing or maintaining* sanitary ... protection", demonstrate that the determination of the level of protection is an element in the decision-making process which logically *precedes* and is *separate* from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case.

204. We, therefore, conclude that the Panel's statement that "to determine whether any of the alternative measures meet Australia's appropriate level of protection, we should […] examine whether these alternatives meet the level of protection currently achieved by the measure at issue" is wrong. What is required under Article 5.6 is an examination of whether possible alternative SPS measures meet the appropriate level of protection *as determined by the Member concerned*.

205. We recognize that the *SPS Agreement* does not contain an *explicit* provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the *SPS Agreement*, in particular, in paragraph 3 of Annex B, Article 4.1[161], Article 5.4 and Article 5.6 of the *SPS Agreement*. [162] With regard to Article 5.6, for example, we note that it would clearly be impossible to examine whether alternative SPS measures achieve the appropriate level of protection if the importing Member were not required to determine its appropriate level of protection.

206. We thus believe that the *SPS Agreement* contains an implicit obligation to determine the appropriate level of protection. We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement*, such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the *SPS Agreement* in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement.

[161]Reasonable questions from interested Members within the meaning of paragraph 3 of Annex B can arise, in particular, with respect to the application of Article 4 of the *SPS Agreement*. Articles 4.1 and 4.2 imply, in our view, a clear obligation of the importing Member to determine its appropriate level of protection.

[162]Furthermore, it could be argued that an implicit obligation for a Member to determine the appropriate level of protection results also from Article 5.8 and Article 12.4 of the *SPS Agreement*.

207. While in this case Australia determined its appropriate level of protection, and did so with sufficient precision to apply Article 5.6, we believe that in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection – with sufficient precision – would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6.

208. We recall that the second element of the test under Article 5.6 requires us to examine whether any of the possible *alternative SPS measures* identified above would achieve Australia's appropriate level of protection. To be able to do this, first of all, we have to know what level of protection could be achieved by each of these alternative SPS measures.

209. We note, however, as we already stated in the context of our examination of Article 5.1, that the Panel made the following factual finding:

> ... the 1996 Final Report does not substantively *evaluate* the relative risks associated with these different options [i.e., the five quarantine policy options mentioned in the 1996 Final Report].[…] Even though the definition of risk assessment requires an "evaluation … according to the sanitary … measures which might be applied", the 1996 Final Report identifies such measures but does not, in any substantial way, evaluate or assess their relative effectiveness in reducing the overall disease risk.[163]

210. This makes it impossible to verify in an objective manner on the basis of the 1996 Final Report, whether any of the alternative policy options discussed in this Report would achieve Australia's appropriate level of protection for ocean-caught Pacific salmon.

211. In addition, we note that the Panel Report does not contain any other factual element which would allow us to examine the alternative quarantine policy options, as the Panel examined them only in comparison to the erroneous yardstick of the level of protection implied from the heat-treatment requirement. It was on this basis that the Panel made its finding that Canada had raised "a presumption – which has not been rebutted – that there are alternative measures available which would meet Australia's appropriate level of protection". The Panel was however cautious to add:

> ...

[163]Panel Report, para. 8.90.

> Our finding does, therefore, not endorse any of the alternative options we examined. It does not imply that Option 2 would actually achieve Australia's appropriate level of protection nor does it imply that Option 2 would be the only option which could achieve that level.[164]

212. We, therefore, are not in a position to complete the examination of the second element of the test under Article 5.6, i.e., whether there is another measure that achieves the appropriate level of sanitary protection.

213. We recall that because of the Panel's error of examining whether the heat-treatment requirement, rather than the proper SPS measure at issue, i.e., the import prohibition, is "not more trade-restrictive than required", we are compelled to reverse the Panel's finding that Australia has acted inconsistently with Article 5.6.[165] In reversing the Panel's finding on Article 5.6, we do not, however, conclude that Australia did or did not violate Article 5.6. There may well be a violation of Article 5.6, and possibly Article 2.2[166], but we are unable to come to a conclusion on these issues due to the insufficiency of the factual findings of the Panel and of facts that are undisputed between the parties.

E. *Articles 5.5 and 5.6 of the SPS Agreement with Respect to Other Canadian Salmon*

214. The next issue which we have to address is whether the Panel erred in law by misapplying the principle of judicial economy, in particular, in failing to extend its assessment of Canada's claims regarding Articles 5.5 and 5.6 to other Canadian salmon.[167]

215. We recall that the Panel distinguished, in its findings, between ocean-caught Pacific salmon and other Canadian salmon. The Panel found for both ocean-caught Pacific salmon, in paragraph 8.99, and other Canadian salmon, in paragraph 8.59, that Australia, by maintaining the measure at issue, has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the *SPS Agreement*. However, the Panel limited its findings on Article 5.5 and, by implication, on Article 2.3, as well as its findings on Article 5.6, to ocean-caught Pacific salmon.

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[164]Panel Report, para. 8.181.

[165]*Supra.*, para. 191.

[166]Article 2, entitled "Basic Rights and Obligations", requires in paragraph 2 that:

> Members shall ensure that any sanitary or phytosanitary measure is applicable *only to the extent necessary* to protect ... animal life or health. (emphasis added)

The establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a violation of the necessity requirement of Article 2.2.

[167]Canada's appellant's submission, para. 24.

216. The Panel justified this limitation of the product scope of its findings on Articles 5.5, 2.3 and 5.6 in the following manner:

> Given the fact that (1) most of the studies and reports before us, and in particular the 1996 Final Report (Australia's only formal risk assessment) specifically address and discuss adult, wild, ocean-caught Pacific salmon (even though the data they contain may relate to or be relevant for other salmon) and (2) Canada itself also focused on adult, wild, ocean-caught Pacific salmon during our proceedings, we, in turn, concentrated our attention and questions (to both the parties and the experts advising the Panel) on adult, wild, ocean-caught Pacific salmon. For these reasons, the evidence and arguments before us which are relevant to Articles 5.5 and 5.6 are centred on adult, wild, ocean-caught Pacific salmon. We do not therefore consider it appropriate or necessary "in order to resolve the matter in issue in the dispute"[251] to further address the salmon products in dispute other than those from adult, wild, ocean-caught Pacific salmon.[168]
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> [251] Appellate Body Report on *US - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted 23 May 1997, WT/DS33/AB/R, pp.17-20, addressing the issue of judicial economy, at p.19 ("A panel need only address those claims which must be addressed in order to resolve the matter at issue in the dispute").

217. Canada appeals from this finding. Canada submits that the Panel's failure to assess the consistency of the measure at issue with Articles 5.5 and 5.6 for other Canadian salmon was based on a misapplication of the "principle of judicial economy" that we set out in *United States – Shirts and Blouses*. According to Canada, this misapplication led to a result contrary to Article 3.7 of the DSU. Canada argues, "in the alternative", that the Panel's limited consideration of Articles 5.5 and 5.6 disregarded the ample evidence before it, thereby constituting a violation of Article 11 of the DSU.[169]

218. Australia does not address Canada's claims of legal error with regard to judicial economy. According to Australia, it is readily apparent that judicial economy was not, in fact, the principal reason for the Panel's limitation of its findings. Australia argues that the Panel limited its findings on Articles 5.5 and 5.6 to ocean-caught Pacific salmon because Canada did not present sufficient evidence to allow the Panel to make findings with regard to other Canadian salmon.[170]

[168]Panel Report, para. 8.60.

[169]Canada's appellant's submission, para. 27.

[170]Australia's appellee's submission, para. 30.

1. The Principle of Judicial Economy

219. As cited by the Panel, we stated in *United States – Shirts and Blouses* that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[171]

220. The matter at issue is set forth in the Panel's terms of reference, which are usually defined by the request for establishment of a panel which must contain a statement of both the specific measure at issue and the legal basis of the complaint.[172] The standard terms of reference, used in this case[173], instruct the Panel:

> To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS18/2, the matter referred to the DSB by Canada in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[174]

221. Article 3.7 of the DSU provides as follows:

> ... The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. ...

This is affirmed in Article 3.4 of the DSU which stipulates:

> Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

222. As recommendations and rulings of the DSB are a function of the findings and recommendations of panels and the Appellate Body, Canada submits that a panel must address, at a minimum, those claims covered by the terms of reference that will determine the course of implementation. If making a ruling on one claim will sufficiently determine the course of implementation, it would be redundant for a panel to go further. However, a panel that addresses

[171]Adopted 23 May 1997, WT/DS33/AB/R, p. 19.

[172]DSU, Article 6.2. The "legal basis of the complaint" involves the claims of the complainant. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 141.

[173]Panel Report, para. 1.4.

[174]WT/DS18/3/Rev.1, 11 June 1997.

certain claims, but declines to address others that would better frame the course of implementation will, in Canada's view, not necessarily have resolved the matter at issue.[175]

223. The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute".[176] To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."[177]

224. In this case, for the Panel to make findings concerning violation of Article 5.1 with respect to other Canadian salmon, without also making findings under Articles 5.5 and 5.6, would not enable the DSB to make sufficiently precise recommendations and rulings so as to allow for compliance by Australia with its obligations under the *SPS Agreement*, in order to ensure the effective resolution of this dispute with Canada. An SPS measure which is brought into consistency with Article 5.1 may still be inconsistent with either Article 5.5 or Article 5.6, or with both.

225. Furthermore, there is no reason, in applying the principle of judicial economy, to examine Articles 5.5 and 5.6 for only one category of the products in dispute, i.e., ocean-caught Pacific salmon, and not to undertake the same analysis for the other categories, i.e., other Canadian salmon. The Panel gave no convincing reason why it examined Article 5.5 and 5.6 for only one category of the products in dispute, i.e., ocean-caught Pacific salmon, and did not undertake the same analysis for other categories, i.e., other Canadian salmon. The Panel's only explanation for limiting its examination of Article 5.5 and 5.6 to ocean-caught Pacific salmon was that "the evidence and arguments before us which are relevant to Articles 5.5 and 5.6 are *centered* on adult, wild, ocean-caught Pacific salmon."[178] (emphasis added) The Panel made no finding that Canada has not made a *prima facie* case relating to its Articles 5.5 and 5.6 claims concerning other Canadian salmon. We note that, in this respect, the case at hand presents similarities with *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*") in which we considered the panel's failure to address all

[175]Canada's appellant's submission, paras. 34 - 36.

[176]DSU, Article 3.7.

[177]DSU, Article 21.1.

[178]Panel Report, para. 8.60.

the products referred to in its terms of reference to be an error of law.[179] Likewise, in the present case, the Panel's terms of reference include not only ocean-caught Pacific salmon, but also other Canadian salmon.

226. We, therefore, find it to be an error of law that the Panel did not consider it appropriate or necessary "in order to resolve the matter at issue" to address Article 5.5 and 5.6 with respect to other Canadian salmon.

2. Article 5.5

(a) *First element of Article 5.5*

227. We recall that with regard to ocean-caught Pacific salmon, the Panel examined the first element of Article 5.5, i.e., the existence of distinctions in appropriate levels of protection in different situations, on the basis of four comparisons. In each of these comparisons, ocean-caught Pacific salmon was compared to other fish and fish products. The Panel found that ocean-caught Pacific salmon and other fish and fish products have one or several disease agents in common, or - for ocean-caught Pacific salmon - give rise to an alleged concern for a disease agent. According to the Panel, the situation regarding ocean-caught Pacific salmon and the situations of other fish and fish products are therefore different, i.e., comparable, within the meaning of the first element of Article 5.5. We recall that we have upheld this finding.[180]

228. Furthermore, the Panel noted that imports of fresh, chilled or frozen ocean-caught Pacific salmon are prohibited while imports of other fish and fish products, under certain conditions, are allowed. This difference in SPS measures indicates a difference in the appropriate levels of protection. The Panel found, on that basis, distinctions in the appropriate levels of protection in the different situations which were covered by the four comparisons.[181]

229. In its examination of the comparability of situations under the first element of Article 5.5, the Panel considered only ocean-caught Pacific salmon, not other Canadian salmon. The Panel did not examine whether other Canadian salmon and other fish and fish products have one or several disease agents in common, or - for other Canadian salmon - , give rise to an alleged concern for a disease

[179]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 26. We note that in the Panel Report in *Japan – Alcoholic Beverages* there was no finding at all on certain products whereas in the present case there is a finding on Article 5.1 with regard to all products covered by the terms of reference.

[180]*Supra.*, para. 153.

[181]Panel Report, para. 8.129. See also footnote 106 of this Report.

agent.[182] It did not, therefore, come to a conclusion on whether the situation regarding other Canadian salmon and the situations regarding other fish and fish products are comparable within the meaning of the first element of Article 5.5.

230. We do not believe, however, that the comparability of these situations under Article 5.5 depends on an exact knowledge of the nature and number of diseases positively detected or possibly occurring in other Canadian salmon. The situation of other Canadian salmon may be the same as that of ocean-caught Pacific salmon; it may be better or worse. The risks for the Australian aquatic environment resulting from imports of other Canadian salmon may therefore be identical to, lower or higher than, those arising from imports of ocean-caught Pacific salmon. However, these differences, if there are any, do not make the comparisons with other fish and fish products, as undertaken in the four comparisons, any less meaningful. They do not diminish the comparability of risks for the Australian aquatic environment arising from the imports of, on the one hand, other Canadian salmon and, on the other, other fish and fish products.

231. Furthermore, we recall that the Panel noted in the context of its examination of Article 5.5 regarding ocean-caught Pacific salmon that Australia had explicitly determined its appropriate level of protection to be as "a high or 'very conservative' level of sanitary protection aimed at reducing risk to 'very low levels', while 'not … a zero-risk approach' ".[183] However, the Australian statements on its appropriate level of protection, which were noted by the Panel, are not limited to ocean-caught Pacific salmon, but apply to all salmon in dispute including other Canadian salmon.[184] We, therefore, consider that for other Canadian salmon, Australia's *appropriate* level of protection is also a high or very conservative level of protection aimed at reducing risk to very low levels, but not a zero risk level.

232. Australia did not explicitly determine the appropriate levels of protection for other fish and fish products. We recall, however, that the importation of other fish and fish products is, under certain circumstances, allowed. The appropriate levels of protection reflected in the SPS measures applied to other fish and fish products are, therefore, not "very conservative" and thus different from the appropriate level of protection for ocean-caught Pacific salmon.

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[182]We note that Table 3 in para. 4.41 of the Panel Report lists all diseases of concern to Australia and shows wide agreement among the parties about their occurrence in Canadian salmon. However, Table 3 does not distinguish between ocean-caught Pacific salmon and other Canadian salmon.

[183]Panel Report, para. 8.107.

[184]See in addition to the references made in support of para. 8.107, i.e., footnotes 326, 327 and 328, the earlier footnote 274 of the Panel Report.

233. We, therefore, conclude that, with respect to other Canadian salmon, there are distinctions in the appropriate levels of protection in different, i.e., comparable, situations and that the first element of Article 5.5 is fulfilled.

(b) *Second element of Article 5.5*

234. We recall that for ocean-caught Pacific salmon, the Panel began its analysis of the second element of Article 5.5, i.e., the existence of arbitrary or unjustifiable distinctions in appropriate levels of protection, by noting that in view of the difference in SPS measures and corresponding appropriate levels of protection for ocean-caught Pacific salmon, on the one hand, and the other fish and fish products, on the other, one might expect some justification with regard to this difference, such as higher risk related to imported salmon products. The Panel noted, however, that the arguments, reports, studies and expert opinions, in this respect, point in the other direction. The Panel stated that these data provide evidence that two categories of non-salmonids, for which more lenient SPS measures apply, i.e., herring used as bait and live ornamental finfish, can be presumed to represent at least as high a risk - if not a higher risk - than that associated with ocean-caught Pacific salmon.[185] The Panel found that the distinctions in the levels of protection for ocean-caught Pacific salmon, on the one hand, and herring used as bait and live ornamental finfish, on the other, are arbitrary or unjustifiable. The Panel, therefore, concluded that the second element of Article 5.5 is fulfilled.[186] We recall that we have upheld this finding.[187]

235. We believe that this reasoning applies also to other Canadian salmon. In our view, this reasoning is not affected by the possibility that other Canadian salmon may represent a higher risk for the Australian salmonid population than ocean-caught Pacific salmon. We note that the Panel stated that the evidence submitted to it pointed in the direction of a higher risk of disease introduction associated with imports of herring used as bait and live ornamental finfish than the risk posed by imports of salmon products for human consumption.[188]

236. We, therefore, conclude that with respect to other Canadian salmon the second element of Article 5.5 is fulfilled.

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[185]Panel Report, para. 8.134.

[186]Panel Report, para. 8.141.

[187]*Supra.*, para. 158.

[188]Panel Report, para. 8.137.

(c) *Third element of Article 5.5*

237. We recall finally that, with regard to ocean-caught Pacific salmon, the Panel examined the third element of Article 5.5, i.e., the existence of discrimination or a disguised restriction on international trade, in taking into account three "warning signals" and three "additional factors". On the basis of these "warning signals" and "additional factors", considered cumulatively, the Panel found that the distinctions in the levels of protection imposed by Australia for ocean-caught Pacific salmon, on the one hand, and, herring used as bait and live ornamental finfish, on the other, result in a disguised restriction on international trade. We recall that we have upheld this finding.[189]

238. Australia's import prohibition applies to both ocean-caught Pacific salmon and other Canadian salmon. In the context of our examination of the third element of Article 5.5, we do not see any plausible reason why conclusions reached for ocean-caught Pacific salmon would not also be valid for other Canadian salmon. If the arbitrary or unjustifiable distinctions in the levels of protection for ocean-caught Pacific salmon, on the one hand, and herring used as bait and live ornamental finfish, on the other, was correctly found to result in a disguised restriction on international trade, the arbitrary or unjustifiable distinctions in the levels of protection for other Canadian salmon, on the one hand, and herring used as bait and live ornamental finfish, on the other, must necessarily also result in a disguised restriction on international trade.

239. In fact, we believe that with respect to one "warning signal", there is even more reason to conclude that the arbitrary or unjustifiable distinctions in the levels of protection for other Canadian salmon, on the one hand, and herring used as bait and live ornamental finfish, on the other, result in a disguised restriction on international trade. In the context of its examination regarding ocean-caught Pacific salmon, the Panel considered that the "insufficiency" of the 1996 Final Report, as a risk assessment reasonably supporting the SPS measure within the meaning of Article 5.1, constitutes a "warning signal" in the examination under Article 5.5, third element. For other Canadian salmon, there is *not even* the beginning of a risk assessment.

240. We thus conclude that, with respect to other Canadian salmon, the third element of Article 5.5 is also fulfilled and that Australia, by maintaining its import prohibition on all Canadian salmon, has acted inconsistently with Article 5.5 and, by implication, with Article 2.3 of the *SPS Agreement*.

[189]We upheld this finding although we reversed the Panel's intermediate finding on the first "additional factor". See paras. 177 and 178 of this Report.

3. Article 5.6

241. With regard to ocean-caught Pacific salmon, the Panel concluded that the SPS measure at issue - which it considered to be the heat-treatment requirement - is "more trade restrictive than required" to achieve Australia's appropriate level of protection, and therefore that Australia has acted inconsistently with Article 5.6 of the *SPS Agreement*. Australia appealed this finding of the Panel. We recall that, because of the Panel's error of examining whether the heat-treatment requirement rather than the proper SPS measure at issue, i.e., the import prohibition, is "not more trade-restrictive than required", we reversed the Panel's finding that Australia has acted inconsistently with Article 5.6. We note that, in reversing the Panel's finding on Article 5.6, we did not conclude whether or not Australia's import prohibition on ocean-caught Pacific salmon is consistent with Article 5.6. We recall that we are unable to come to a definitive conclusion on this issue due to the insufficiency of relevant factual findings by the Panel and of facts that are undisputed between the parties.

242. For the same reasons we are unable to come to a conclusion on the question of whether or not the import prohibition on other Canadian salmon is consistent with Article 5.6 of the *SPS Agreement.*

F. *Article 2.3 of the SPS Agreement*

243. The last substantive issue we address is whether the Panel erred in law in not making a finding that Australia has acted inconsistently with Article 2.3, first sentence, independently from its finding that Australia has acted inconsistently with Article 5.5 of the *SPS Agreement*.

244. The Panel's findings with respect to Article 2.3 are limited to the following statements:

> 8.109. ... We conclude … that if we were to find that all three elements under Article 5.5 - including, in particular, the third element - are fulfilled and that, therefore, the more specific Article 5.5 is violated, such finding can be presumed to imply a violation of the more general Article 2.3.
>
> 8.160 ... Since all three elements of Article 5.5 are present in this case, we find that Australia, by maintaining the measure at issue, acts inconsistently with its obligations under Article 5.5. Given our earlier finding - that a violation of the more specific Article 5.5 can be presumed to imply a violation of the more general Article 2.3 - we find that Australia, to that extent, also acts inconsistently with Article 2.3.
>
> 8.184 Since we have found that the measure in dispute is inconsistent with the requirements of Articles 5.1, 5.5 and 5.6 and is, on that ground, also inconsistent with the requirements of Articles 2.2 and 2.3, we see no need to further examine Canada's other claims under Article 2 nor its claims under Article 3.

245. In its appeal, Canada argues that the Panel erred in applying Article 2.3, first sentence, solely through Article 5.5, rather than focusing on this provision as an independent obligation. Canada criticizes the Panel for not having found a violation of Article 2.3, first sentence, independently from the finding of a violation of Article 5.5.[190] Furthermore, Canada argues that in applying Article 2.3, first sentence, as an afterthought to its analysis of Article 5.5, the Panel compounded the error it had made in confining the analysis of, and the finding under, Article 5.5, to ocean-caught Pacific salmon.[191]

246. With regard to Canada's second ground of appeal, we refer to Section E of Part V of our Report, in which we deal *inter alia* with the Panel's failure to extend its findings on Article 5.5, and, by implication, Article 2.3 to other Canadian salmon. In this section, we will focus on Canada's first ground of appeal.

247. We note that the Panel indeed failed to examine Canada's claim that Australia's import prohibition on fresh, chilled or frozen salmon violated the first sentence of Article 2.3. Canada argued before the Panel that Australia does not control the internal movement of salmonid products from infected states to disease-free states to protect its salmonid populations from salmonid disease agents such as EHN. In contrast to this absence of control on the internal movement of salmonid products, Australia completely prohibits the importation of fresh, chilled and frozen salmon. Canada argued before the Panel that in this sense the import prohibition on fresh, chilled or frozen salmon constitutes an arbitrary or unjustifiable discrimination between imported Canadian and domestic Australian salmonid products, and that Australia has thereby acted inconsistently with Article 2.3, first sentence.

248. We do not believe that the Panel, by not examining Canada's claim on Article 2.3, first sentence, intended to deny that Article 2.3, first sentence, contains an obligation independent from Article 5.5. We note that although the Panel stated that Article 5.5 provides for more specific and detailed rights and obligations than the "Basic Rights and Obligations" set out in rather broad wording in Article 2.3[192], the Panel explicitly recognized

> … that, given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5.[193]

[190]Canada's appellant's submission, para. 10.

[191]*Ibid*.

[192]Panel Report, para. 8.48.

[193]Panel Report, para. 8.109.

249. Furthermore, the Panel made it clear that it abstained from a separate examination of Article 2.3, first sentence, because it saw no need for such an examination, having already found that the measure in dispute is inconsistent with the requirements of Articles 5.1, 5.5 and 5.6 and is, on that ground, also inconsistent with the requirements of Articles 2.2 and 2.3.[194] In other words, the Panel abstained from a separate examination of Article 2.3 on grounds of judicial economy, not because it considered that Article 2.3, first sentence, does not contain any obligation independent of Article 5.5.

250. According to Article 2.3, first sentence:

> 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. ...

251. This provision takes up obligations similar to those arising under Article I:1 and Article III:4 of the GATT 1994 and incorporates part of the "chapeau" to Article XX of the GATT 1994. Its fundamental importance in the context of the *SPS Agreement* is reflected in the first paragraph of the preamble of the *SPS Agreement*.

252. We recall that the third - and decisive - element of Article 5.5, discussed above, requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in "discrimination or a disguised restriction on international trade". Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination "between Members, including their own territory and that of others Members" within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5.[195] However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5.

253. We now turn to the question of whether the measure at issue, i.e., the import prohibition on fresh, chilled or frozen salmon, violates Article 2.3, first sentence.

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[194]Panel Report, para. 8.184.

[195]In *European Communities – Hormones* we characterized Article 5.5 as "marking out and elaborating a *particular* route leading to the same destination set out in Article 2.3" (emphasis added). Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 212.

254. We recall that in the context of its examination of the third element of Article 5.5, the Panel noted that it had doubts whether Australia applies similarly strict sanitary standards on the internal movement of salmon products within Australia as it does on the importation of salmon products. The Panel did not come to a conclusion on this alleged difference in sanitary standards. It merely acknowledged the arguments advanced by both Canada and Australia and stated that it saw "no benefit in trying to compare" the risk arising from EHN as opposed to that arising from the diseases of concern to Australia with respect to ocean-caught Pacific salmon.[196] It also stated that it saw no benefit in trying to compare the different measures imposed by Australia to deal with these risks.[197] The Panel's discussion is characterized by caution and an absence of factual findings.

255. In the context of an examination under Article 2.3, first sentence, it would first of all be necessary to determine the risk to Australia's salmonid population resulting from diseases, such as EHN, which are endemic to some parts of Australia but exotic to others. There are, however, no factual findings by the Panel or undisputed facts between the parties on this matter. It is, therefore, impossible for us to determine whether the import prohibition on fresh, chilled or frozen salmon, for both ocean-caught Pacific and other Canadian salmon, constitutes an arbitrary or unjustifiable discrimination within the meaning of Article 2.3, first sentence of the *SPS Agreement*.

VI. Procedural Issues

256. Australia raises a number of procedural issues concerning the Panel's conduct of the proceedings and its examination of the case. These issues relate to the Panel's allocation and application of the burden of proof; its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU; the admission of, and consideration by, the Panel of certain evidence; and the Panel's response to Australia's request to submit a third written submission in reply to Canada's oral statement at the second meeting of the Panel with the parties.

[196]Panel Report, para. 8.157.

[197]*Ibid*.

A. *Burden of Proof*

257. First, Australia claims that the Panel erred in its allocation and application of the burden of proof under Articles 2 and 5 of the *SPS Agreement*. In paragraph 8.40 of its Report, the Panel referred to our report in *European Communities – Hormones* which stated:

> The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS *Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency ...[198]

Applying this rule, the Panel found:

> In this dispute it is thus for Canada to establish a *prima facie* case of inconsistency of the Australian measure at issue with each of the provisions of the SPS Agreement Canada invokes. Once this is done, it is for Australia to counter or refute the claimed inconsistency. In other words, if Canada "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to [Australia], who will fail unless it adduces sufficient evidence to rebut the presumption".[199]

258. In addressing the various claims of Canada challenging the consistency of the measure at issue with Articles 5.1, 5.5. and 5.6 (and, indirectly, 2.2 and 2.3), the Panel examined the evidence submitted by Canada in support of its claims and the evidence submitted by Australia in rebuttal. For each of these claims, the Panel came to the conclusion that Canada had established a *prima facie* case of inconsistency with the relevant provisions of the *SPS Agreement* and that Australia had not rebutted the presumption of inconsistency.[200]

259. Australia concedes that the Panel correctly articulated the burden of proof as established by us in *United States – Shirts and Blouses* and, in its specific application to the *SPS Agreement*, *European Communities – Hormones.*[201] However, Australia contends that the Panel "applied the burden

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[198]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 98.

[199]Panel Report, para. 8.40.

[200]Panel Report, paras. 8.59, and 8.99 (on Article 5.1), paras. 8.137, 8.139 8.141 and 8.159 (on Article 5.5) and paras. 8.171, 8.181 and 8.182 (on Article 5.6).

[201]Australia's appellant's submission, para. 85.

incorrectly"[202] and failed to properly assess, in its consideration of the evidence before it, whether Canada had met the burden of proof in relation to its claims under Articles 5.1, 5.5 and 5.6.[203]

260. It appears to us that the core of Australia's appeal on this question is not a related to the allocation of the burden of proof, but rather how the Panel considered and weighed the evidence in concluding that Canada had established a *prima facie* case of inconsistency with Articles 5.1, 5.5 and 5.6. We stated in *European Communities – Hormones*:

> Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel … Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.[204]

261. The Panel's consideration and weighing of the evidence in support of Canada's claims relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU.

B. *Objective Assessment of the Matter*

262. Australia claims that the Panel failed to make an objective assessment of the matter before it and to apply the appropriate standard of review pursuant to Article 11 of the DSU. Australia contends that the Panel "partially or wholly ignored relevant evidence placed before it, or misrepresented evidence in a way that went beyond a mere question of the weight attributed to it, but constituted an

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[202] *Ibid*.

[203] These allegations can be found in Australia's appellant's submission in paras. 90-96. We note that in the parts of Australia's appellant's submission dealing with Articles 5.1, 5.5 and 5.6, these allegations are reiterated in the following paragraphs:

- Article 5.1: paras. 137, 138 and 141;
- Article 5.5: paras. 147, 184, 186, 187, 190, 198, 199, 205, 210, 212, 218, 220 - 224, 275, 297;
- Article 5.6: paras. 299 - 302, 305, 318 and 319.

[204] Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 132.

egregious error amounting to an error of law".[205] Australia also contends that the Panel failed to accord due deference to matters of fact put forward by parties.[206]

263. Among the various allegations made by Australia, there are two which stand out. The first concerns the consideration by the Panel of scientific studies which, according to Australia, were either not relevant or were too general to answer the question of relative risks to the Australian salmonid population from the entry, establishment or spread of salmonid *vis-à-vis* non-salmonid products.[207] The second is the allegation that the Panel seriously mischaracterized the process relating to, and the character and purpose of, Australian government draft reports, recommendations and legislation.[208]

264. In our report in *European Communities - Hormones*, we stated:

> ... Clearly, not every error in the appreciation of the evidence ... may be characterized as a failure to make an objective assessment of the facts. ... The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an *egregious error that calls into question the good faith of a panel*. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[209] (emphasis added)

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[205]Australia's appellant's submission, para. 105. Australia's specific allegations of failure by the Panel to undertake an objective assessment of the matter in the examination of Canada's claims under Articles 5.1, 5.5 and 5.6 are set out in the following paragraphs of Australia's appellant's submission:

- Article 5.1: paras. 142 - 144;
- Article 5.5: paras. 147, 177, 212, 225 - 297;
- Article 5.6: paras. 299 - 301, 305, 312 – 314.

[206]Australia's appellant's submission, para. 100. The facts put forward by Australia which, according to Australia, the Panel failed to give due deference, relate to Australia's determination of its appropriate level of protection, Australia's 1996 Final Report, Australia's characterization of the measure at issue and the fact that the 1988 Conditions do not have application to fresh, chilled or frozen salmon, Australia's domestic practices and processes in risk assessment including the role of draft reports and recommendations, and the legal status and application of SPS measures.

[207]Australia's appellant's submission, paras. 168 - 183, 231 - 239 and 243 - 246.

[208]Australia's appellant's submission, paras. 281 - 289.

[209]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 133.

265. We also recall our statement in *European Communities – Poultry*:

> An allegation that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 of the DSU is a *very serious allegation*. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself. ...[210] (emphasis added)

266. In our view, the Panel did not "deliberately disregard", "refuse to consider", "wilfully distort" or "misrepresent" the evidence in this case; nor has Australia demonstrated in any way that the Panel committed an "egregious error that calls into question the good faith" of the Panel. We, therefore, conclude that the Panel did not abuse its discretion in a manner which even comes close to attaining the level of gravity required for a claim under Article 11 of the DSU to prevail.

267. Finally, in response to Australia's contention that the Panel failed to accord "due deference" to matters of fact it put forward, we note that Article 11 of the DSU calls upon panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Therefore, the function of this Panel was to assess the facts in a manner consistent with its obligation to make such an "objective assessment of the matter before it". We believe the Panel has done so in this case. Panels, however, are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.

C. *Admission and Consideration of Certain Evidence*

268. Australia claims that the Panel erred in admitting certain evidence submitted by Canada after 7 October 1997, the deadline set by the Panel in its working procedures. According to Australia, the Panel drew on some of this evidence in reaching its findings.[211] Australia raises due process concerns, in particular, about the original and revised version of the "Vose Report", submitted to the Panel on 18 December 1997 and 5 February 1998, respectively. Australia also objects to the fact that the Panel considered, as stated in paragraph 8.98 of its Report, evidence which was referred to, but not submitted by Canada.

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[210] Adopted 23 July 1998, WT/DS69/AB/R, para. 133.

[211] Australia's appellant's submission, para. 116.

269. With regard to the "Vose Report", the Panel stated:

> At our second substantive meeting, Australia requested us to exclude Annex K…the "Vose Report" . . . submitted after the 7 October 1997 deadline we imposed. … [S]ince, in our view, the Vose Report is in any event not crucial to our report, we shall not further consider it in our examination. ...[212]

270. In footnote 315 of its Report, the Panel characterized the evidence at issue in paragraph 8.98 as:

> Evidence referred to by Canada in its oral statement at the second substantive meeting, not submitted to the Panel, but not contested by Australia.

271. We note that the Panel explicitly stated that it would not consider the "Vose Report" in its final examination. We also note that Australia did not demonstrate that the Panel, contrary to this statement of the Panel, considered the "Vose Report" in its final examination. We, therefore, fail to see how Australia could raise due process concerns about the Panel's alleged "consideration" of this report.

272. More generally, with regard to Australia's claim that the Panel erred in admitting evidence submitted after 7 October 1997, we note that the Working Procedures in Appendix 3 of the DSU do not establish precise deadlines for the submission of evidence. Under the provisions of Article 12.1 of the DSU, panels are permitted to establish their own working procedures, in addition to those set out in Appendix 3. In this case, the Panel initially set the deadline for the submission of evidence on 7 October 1997, but later decided to admit evidence submitted after this date. We note that Article 12.2 of the DSU provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process." However, a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted. Whether the Panel afforded Australia adequate opportunity to respond is the question addressed in the next section.

273. Finally, with regard to the evidence Canada referred to, but did not submit, we note that this evidence was referred to in the 1996 Final Report, submitted by Australia as its risk assessment. It must, therefore, have been known and available to Australia. We can find no error in the Panel's consideration and admission of this evidence.

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[212]Panel Report, para. 8.4.

D. *Right of Response*

274. Australia claims that the Panel erred in failing to accord it an opportunity to submit a formal written rebuttal submission to respond to the oral statement made by Canada at the second meeting of the Panel. Australia contends that Canada raised "substantially new matters" in this oral statement.[213]

275. In paragraph 8.22 of its Report, the Panel stated:

> At our second substantive meeting, Australia raised a procedural claim related to Canada's oral statement made at that meeting. According to Australia, Canada's oral statement introduced fundamental changes in the nature of its specific legal claims which are of such significance that Australia should be allowed to rebut them through a formal written rebuttal submission. On this ground, Australia requested the Panel to give it more time - suggesting one extra week - to submit a third written rebuttal submission. ... We thus granted Australia's request to submit a third written submission within one week after our second substantive meeting. We gave the same opportunity to Canada and specified that both third submissions had to be limited to the "fundamental changes" introduced by Canada as they were identified in an oral statement made by Australia at the second substantive meeting. On 13 February 1998, we received such third submission from both parties.[214]

276. We note that Australia in its appellant's submission contends that this description in paragraph 8.22 of the Panel Report is not accurate.[215] However, it is clearly not within the scope of appellate review for us to examine the factual correctness of this description by the Panel.

277. We also note that while Australia contends that Canada's oral statement at the second meeting with the Panel raised "substantially new matters"[216], Australia clarified during our oral hearing that it did not contend that the issues or claims that Canada raised were outside the Panel's terms of reference, in the sense of being "new claims" which the Panel had no mandate to examine.

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[213]Australia's appellant's submission, para. 107 ff.

[214]We also note that in para. 7.8 of the "Interim Review" part of its Report, the Panel stated:

> Australia submits that it should have been given the opportunity to rebut the "fundamental changes" introduced by Canada through a formal written submission, not through a written comment limited to certain matters… Whether the additional opportunity we granted to the parties to submit arguments resulted in a formal written submission or a written comment is in our view irrelevant.

[215]Australia's appellant's submission, paras. 108, 110 and 111. Australia does not regard the short paper entitled "Written Comment by Australia", submitted on 13 February 1998 to have status of a formal written submission. (Australia's appellant's submission, para. 114.)

[216]Australia's appellant's submission, para. 107. See also the Notice of Appeal, point 6.

278. We understand the essence of Australia's argument to be that it had no time to prepare an appropriate response to Canada's oral statement made at the second meeting of the Panel, given its length and the substantial elaboration of its arguments. However, from the Panel's description of the proceedings, it appears that Australia had requested one week to respond to Canada's oral statement and that the Panel granted Australia's request. A fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it. In this case, we believe that the Panel *did* accord Australia a proper opportunity to respond by allowing Australia to submit a third written submission. We cannot see how the Panel failed to accord due process to Australia by granting the extra time it had requested.

VII. Findings and Conclusions

279. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's findings that the 1988 Conditions and the 1996 Requirements are within the Panel's terms of reference; and concludes that the SPS measure at issue in this dispute is the import prohibition on fresh, chilled or frozen salmon set forth in QP86A, as confirmed by the 1996 Decision, rather than the heat-treatment requirement set forth in the 1988 Conditions;

(b) considers that the Panel's reference to Article 6.1 of the *SPS Agreement* is not "a legal finding or conclusion" and that the Panel did not, therefore, exceed its terms of reference;

(c) reverses the Panel's finding that the measure at issue, as it applies to ocean-caught Pacific salmon, is not based on a risk assessment in accordance with Article 5.1, and that Australia has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the *SPS Agreement*, because the Panel made this finding on the wrong premise that the heat-treatment requirement, rather than the import prohibition, is the SPS measure at issue in this dispute;

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

(e) upholds the Panel's finding that, by maintaining the measure at issue as it applies to ocean-caught Pacific salmon, Australia has acted inconsistently with its obligations under Article 5.5 and, by implication, Article 2.3 of the *SPS Agreement*;

(f) reverses the Panel's finding that the measure at issue, as it applies to ocean-caught Pacific salmon, is "more trade-restrictive than required" to achieve Australia's appropriate level of protection, and that Australia has acted inconsistently with Article 5.6 of the *SPS Agreement*, because the Panel made this finding on the wrong premise that the heat-treatment requirement, rather than the import prohibition, is the SPS measure at issue in this dispute;

(g) is unable to come to a conclusion on whether or not the SPS measure at issue, i.e., the import prohibition, as it applies to ocean-caught Pacific salmon, is consistent with Article 5.6 of the *SPS Agreement* as a result of insufficient factual findings and undisputed facts in the Panel record;

(h) finds that the Panel 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, and in considering that it was unnecessary to address Articles 5.5 and 5.6 of the *SPS Agreement* with respect to other Canadian salmon;

(i) finds that by maintaining the SPS measure at issue with regard to other Canadian salmon, Australia has acted inconsistently with Article 5.5 of the *SPS Agreement*;

(j) is unable to come to a conclusion on whether or not the SPS measure at issue, i.e., the import prohibition, as it applies to other Canadian salmon, is consistent with Article 5.6 of the *SPS Agreement* as a result of insufficient factual findings and undisputed facts in the Panel record;

(k) concludes that a finding of inconsistency with Article 2.3, first sentence, can be reached independently of a finding of inconsistency with Article 5.5; but because of insufficient factual findings and undisputed facts in the Panel record, is unable to determine whether the measure at issue constitutes arbitrary or unjustifiable discrimination within the meaning of Article 2.3, first sentence, of the *SPS Agreement;*

(l) concludes that the Panel's consideration and weighing of the evidence in support of Canada's claims relates to the Panel's assessment of the facts and, therefore, falls outside the scope of appellate review;

(m) concludes that the Panel did not abuse its discretion contrary to its obligations under Article 11 of the DSU;

(n) concludes that the Panel's admission and consideration of certain evidence submitted, or referred to, by Canada does not raise due process concerns contrary to the DSU; and

(o) concludes 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.

280. The Appellate Body *recommends* that 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.

Signed in the original at Geneva this 7th day of October 1998 by:

_____

Claus-Dieter Ehlermann

Presiding Member

_____ _____

Christopher Beeby

Member

Said El-Naggar

Member