衛生暨植物衛生措施與原料產品的出口：保護與保護主義

紐西蘭威靈頓維多利亞大學法律系
安德森

關鍵字：烏拉圭回合、有關衛生暨植物衛生措施（SPS）協議、WTO、GATT

中文摘要

自完成烏拉圭回合談判以來，加拿大已兩度牽扯進有關衛生暨植物衛生措施（SPS）協議的爭議。Appelate Body 有關這兩次紛爭的報告對決定在 SPS 協定下國家的義務至爲重要。雖然這兩個案子加國皆獲勝利，但是 Appelate Body 的報告隱約地顯示加拿大將難以在未來類似爭議時再度勝訴。本文主旨在評估風險的本質，因此將從兩個角度來思考 SPS 措施。其一是從面臨 SPS 障礙挑戰的某些特定產品的出口商的角度來分析。其二則是從一個爲防止具破壞性的有機體進口，而試圖實施檢疫限制以達成適度保護的國家的角度來度量。

由於那些試圖護衛 SPS 措施的國家所採行的政策明顯地功效不彰，本文的另一項企圖是探討 SPS 協定與相關案件的法律是否意味著某種適切的平衡已經在真正 SPS 和貿易需求間形成，同時

剖析防衛 SPS 措施成效不彰是否有可能會成爲未來的典範。這些問題都是所有國家，尤其是那些對出口原料依存度極高的國家，的主要關切。

SPS Measures and the Export of Primary Products Protection and Protectionism

Gordon Anderson
Faculty of Law, Victoria University of Wellington New Zealand

Key words：Uruguay Round、SPS Agreement、WTO、GATT

Since the completion of the Uruguay Round Canada has been involved in two major disputes concerning the Agreement on the Application of Sanitary and Phytosanitary Measures. The Appellate Body reports in these two disputes have been critical in determining the obligations of countries under the SPS Agreement. Although Canada was successful in those cases the Appellate Body reports suggest that future disputes may prove more difficult to win. This paper will focus primarily on the nature of the risk assessment that is required to be undertaken under the SPS Agreement and in doing so will consider SPS measures from two perspectives. First that of an exporter facing SPS barriers to the particular product being exported and secondly that of a country wishing to prevent the introduction of damaging organisms and therefore seeking to impose quarantine restrictions to achieve appropriate protection. The paper will also raise the question of whether the SPS Agreement and associated case law suggest that a proper balance has been developed between genuine SPS and trade needs and consider whether the lack of success in defending SPS measures is likely to the norm in future. These issues are of major concern to all countries but particularly those that are heavily dependent on the export of primary products.

Current indications are that disputes over SPS measures will become increasingly important over the next one to five years. This

paper is an attempt to review the current state of the play in relation to the interpretation and application of the SPS Agreement and to make some comments on possible future trends. The topic is of particular importance for countries that have a significant trade in the export of primary products. All countries have a high level of concern with human, animal and plant health and safety. As such SPS protection is of particular concern to all governments. This is especially so in an increasingly uncertain world where the food production process is vulnerable not only to naturally occurring introduced dangers but also to those that are the result of unintentional or intentional human intervention. An example of unintentional effects was the chain of events which led to the development of BSE in cattle and the resultant CJD threat to human health. The threat of intentional interference is more alarming and especially the threat of terrorist action. In New Zealand for example it is estimated that a deliberate introduction of foot and mouth disease would cause significant economic loss for at least a decade.[1] An example of the concern with such threats are now being treated is the US Food and Drug Administration recently implemented measures requiring the registration of foreign food facilities (facilities that manufacture, process, pack or hold food for human or animal consumption) and pre-arrival notification of food exports. The danger that exporting nations face of course is that measures intended to provide SPS protection, whatever the original justifications, have the tendency to expand (deliberately or incidentally) and take on a strongly protectionist nature not justified by the level of risk.

Given that the context of this paper in a conference concerned with Canadian - China/Taiwan trade relations it is pertinent to begin the paper by referring to two WTO disputes in which Canada has been a leading party – and perhaps diplomatic to note that both decisions were resolved in Canada's favour. These two cases, which will be

[1] A speaker at a recent Defence Industry Seminar suggested the loss could be as high as $10 billion.

covered in more depth below, provide useful illustrations of two core problems representative of those that arise out of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The first of these, Beef Hormones[2] dealt with the issue of the use of growth hormones in the course of beef production, a practice used extensively in the United States in particular. As is now well known the EU introduced a total ban on the use of such hormones internally and refused to allow the importation of beef that had been grown using growth hormones. In that dispute the Appellate Body upheld the Panel's opinion that the EU restrictions were in breach of its WTO obligations. The result of this case has been particularly controversial and many of the arguments, both political and legal, flowing from that case are almost certain to be reprised in a number of disputes concerning the introduction of genetically modified substances into either human or animal food products. A number of complaints on biotechnology restrictions have already been received by the Disputes Settlement Body (DSB) and have now led to requests for the establishment of Panels[3]

The second case, Australian Salmon[4], was a case of particular concern to Canada. The case concerned Australian restrictions on the import of uncooked salmon, the restrictions being intended to prevent the spread of diseases associated with Canadian salmon into Australia's wild salmon stock. These restrictions were held to be

---

[2] *EC Measures Concerning Meat and Meat Products* (*Hormones*) WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998)

[3] Panels have now been established at the request of US and Canada (20 May 2003) and Argentina on (21 May 2003) to consider the a range of EU restrictions on the approval and marketing of biotech products. See DS 291, 292, 293.

[4] *Australia- Measures Affecting Importation of Salmon* WT/DS18/AB/R (20 October 1998)

contrary to WTO rules.[5] Quarantine issues have also been considered in Japan Agriculture[6] and are currently being revisited in Japan Apples[7] as well as upcoming cases relating to Australia's quarantine standards that have been initiated by a number of countries including the EU.[8] Canada requested to join consultations in that dispute and presumably will seek third party status as the dispute progresses.

These two cases are illustrative of the different categories of SPS risk and also of the opposing interests that can face countries that are major exporters of primary products and lead to a potentially disjunctive approach to SPS measures. Beef Hormones was concerned with risks posed to human health by the presence of unsafe substances in food products while Australian Salmon was concerned with the risk of the introduction of pests or disease into a countries ecosystem. The cases illustrate the point that on the one hand there is the economic concern to ensure that access to international market is not blocked or limited by measures that cannot be properly justified in SPS terms and on the other that of ensuring the protection of the economic base for those exports. The latter is of course threatened by the introduction of animal or plant pests and diseases that have the potential to cripple significant proportions of the primary sector. One only has to recall such examples as the impact of the foot and mouth outbreak in the UK in 2001 and the recent incident of a single cow displaying symptoms of BSE in Alberta to appreciate the quantum of the potential economic damage. The arguments of a dairy or beef industry lobbyist may vary significantly depending whether they are

[5] It might be noted that New Zealand withdrew similar restriction as a result of this dispute.

[6] Japan – Measures Affecting Agricultural Products WT/DS76/AB/R (February 1999).

[7] *Japan – Measures Affecting the Import of Apples* WT/DS245/AB/R (26 November 2003).

[8] DS 287 (9 April 2003). The DSB established a Panel in relation to this dispute on 7 November.

arguing for the export of beef derived from hormone treated cattle or against the import of meat potentially contaminated by foot and mouth. On a broader level, illustrating the accidental introduction of exotic pests, the New Zealand government is under considerable pressure to tighten border biosecurity generally as the result of the recent accidental introduction of a number of destructive pests including the Varroa Mite which has significant economic consequences for the bee industry.[9]

The two cases noted above also provide clear illustrations of the controversial nature and the emotions generated by SPS issues. The Beef Hormones case in particular has been seized on by a variety of groups as illustrative of a number of problems that are perceived as arising out of the WTO agreements and from its dispute settlement system. A brief visit to the website of Public Citizen's Global Trade Watch[10] for example will find a wide range of material critical of WTO rules and rulings, much of which relates to the actual or potential implementation of the SPS Agreement. One publication, for example, states that:

> 'The WTO enforces subjective rules that undercut countries' democracies by limiting the subject matter, level of protection and design of domestic food safety policies"

and

> 'No country's SPS measure challenged in the WTO has ever been upheld. In past cases, WTO panels consistently have interpreted WTO member countries' food and quarantine measures to be barriers to trade that must be weakened or eliminated, rather than as

[9] It is estimated that the economic impact is that, under beekeeper management only, Varroa is likely to cost New Zealand agriculture at best around $400 million and at worst around $900 million, in present value terms, over the next 35 years.

[10] http://www.citizen.org/trade/. Public Citizen is a major US based group which claims a membership of over 250,000.

public health safeguards or prudent measures aimed at avoiding the spread of pests or animal or plant disease.'[11]

These comments would be echoed and amplified by a wide range of other groups who question the WTO's approach to SPS issues. In many cases the criticisms of the WTO may be extreme and overstated but in others they are based on genuine concerns as to whether trade-related concerns are given undue priority over non-trade concerns such as public health and protection of the local environment. Given the potentially devastating consequences of a major public health or quarantine threat the concerns of critics must be taken seriously. Indeed it is probably not an understatement to argue that if a major public health threat could be wholly or partially attributed to a WTO SPS ruling the whole legitimacy of not only the SPS Agreement but the WTO would be called into question. One need only contemplate, for example, the consequences that would have arisen if precautions to prevent the spread of BSE had been held contrary to the SPS Agreement and as a result CJE entered the human population in an exporting country. That being said, it is also true that SPS standards are capable of being manipulated for protectionist purposes and indeed the popular sentiment and emotion that surrounds human, animal and plant health can be used to bolster a protectionist regime. Agricultural policies in most of the major developed economies are already highly protectionist and it is crucial for exporters of primary products that SPS measures are not manipulated to increase that protection.

The problem that faces the WTO institutions and member governments in dealing with SPS matters is, therefore, to reach an appropriate balance between legitimate concerns relating to environmental and health protection and societal values and legitimate

[11] *The GMO Dispute: Bush Administration Attack on European Food Safety Policy latest Challenge to WTO's Legitimacy* (June 2003). Available at http://www.citizen.org/documents/GMOmemo.pdf

trade objectives. The SPS Agreement is intended to achieve that balance and the primary issue addressed in this paper is whether this balance has been achieved in the Agreement and in the disputes that have been decided since the Agreement came into effect.

The SPS Agreement

Article XX (b) of GATT 1994 allows measures '*necessary to protect human, animal or plant life or health'* subject to the chapeau to that Article which provides that measures are:

> 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...'

The principle of Article XX is reaffirmed in the preamble to the SPS Agreement negotiated as part of the Uruguay Round 'to elaborate rules for the application of the provisions of GATT 1994'. Article 2 of that Agreement sets out the core principles governing SPS measures which include the principle that countries 'have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health' if they are not inconsistent with the Agreement. Article 2 does however, qualify this right in several ways. The measure may be applied:

- 'only to the extent necessary to protect human, animal or plant life or health';
- it must be 'based on scientific principles and .. not maintained without sufficient scientific evidence';
- the measure must not 'arbitrarily or unjustifiably discriminate between members where identical or similar conditions apply'; and
- the measures are not to be 'applied in a manner which constitutes a disguised restriction on international trade.'

Overall the SPS Agreement would appear to allow countries considerable discretion to take genuine and justified measures, as seem appropriate to that country, to protect human, animal and plant health. Arguably the Agreement does indicate some preference for the adoption of standards and measures which conform to international standards[12] as these are presumed to be consistent with the Agreement and with GATT 1994.[13] Nevertheless the actual requirement of Article 3.1 is that members 'shall *base*' their measures on international standards and this is itself qualified by allowing other approaches 'as provided for in this Agreement, and in particular in paragraph 3' as long as such measures are set in accordance with Article 5 of the Agreement and are not otherwise inconsistent with other provisions of the Agreement.

In essence then the SPS Agreement clearly permits member countries to determine their own level of SPS protection subject to meeting the requirements of the Agreement in so doing. It might also be noted that the complaining party carries the initial burden of proof and must establish a prima facie case that measures adopted by the respondent party are inconsistent with its WTO obligations. The Appellate Body has specifically ruled that the fact a country has chosen to adopt its own measures under Article 3.3, rather than the international measure, does not impose any prima facie obligation on the country to justify that measure.[14]

Given what would seem to be an acceptance of the right of a member country to set its own standards the question needs to be asked as to why the respondents in *Beef Hormones*, *Australian Salmon*, *Japan Agriculture* and *Japan Apples* were unable to convince the respective Panels and the Appellate Body that there measures were in

[12] International standard setting bodies are defined in Annex A.3 of the Agreement.

[13] Article 3.2.

[14] *Beef Hormones* para 97 et seq.

conformity with the SPS Agreement. Perhaps more importantly the question that also needs to be addressed is what circumstances would allow a country to satisfy a Panel that there measures were WTO consistent?

Risk assessment

Article 2.2 provides that 'Members shall ensure that any sanitary or phytosanitary measure is ... based on scientific principles and is not maintained without sufficient scientific evidence" except as provided for in Article 5.7 which allows provisional measures where the relevant scientific evidence is insufficient. Unless a country has adopted an international standard, and is thus protected by Article 3.2, its measures are vulnerable to a challenge that the Article 2.2 requirement has not been met.[15] In *Japan Agriculture* the Appellate Body ruled that :

> 'the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence' (para 84)

While a finding under Article 2.2 that there is no sufficient scientific evidence for an SPS measure seems to be able to be made independently, it is normally the function of the risk assessment to demonstrate the sufficiency of the scientific evidence. However, it is clear from Article 3.3 that it is for the country concerned to set its own level of SPS protection consistent with the 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, guidelines or recommendations, if there is a

[15] Cases to date have not involved SPS measures based on international standards.

scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5

Article 5 is entitled *Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection.* Article 5.1 requires that SPS measures are based on an 'assessment of ... risks'. The exception to this is Article 5.7 which allows provisional measures 'where relevant scientific evidence is insufficient' subject to an obligation 'to seek to obtain the additional information necessary for a more objective assessment of risk.' Available pertinent information must be used in constructing provisional measures and the measures must be reviewed within a reasonable period of time.

A risk assessment is defined in Annex A.4 and contains two separate aspects with the exact nature of the assessment varying between them.

'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; ['disease risk']

or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.' ['food risk']

This distinction does affect the nature of the assessment to be undertaken. In *Beef Hormones,* dealing with food risk, a two step analysis was seen as appropriate, the Appellate Body supporting the Panel approach of:

'a two-step process that "should (i) *identify* the *adverse effects* on human health (if any) arising from the presence of the hormones at issue when used as growth promoters *in meat* ..., and (ii) if any such adverse effects exist, *evaluate* the *potential* or probability of occurrence of such effects".(para 183).

In *Australian Salmon,* dealing with disease risk. a three step analysis was required.

'a risk assessment ... 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.*' (para 121)

Article 5.2-3 elaborate the factors that a member 'shall' take into account in assessing risk:

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

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, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.'

The nature and requirements of a risk assessment have now been addressed by Appellate Body in a number of cases, most notably *Beef Hormones* and *Australian Salmon*, and a reasonably clear picture of the requirements has emerged. It is clear that a risk assessment is permitted to include a broad range of factors and in particular that it is not confined to strict scientific factors.

The main points that have emerged from the Appellate Body reports can be summarised as follows:

Countries have the right to set their own level of risk. A country has the right, subject to the Agreement to determine for itself the level of risk that it is prepared to accept and to set SPS measures accordingly. The Appellate Body has made it clear that each of the choices in Article 3 are equally valid and that in particular an Article 3.3 choice is not an 'exception' to measures based on international standards.[16] The Appellate Body has commented:

> 'a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement of embody that level of protection in a measure not "based on" the international standard. The Member's appropriate level of protection

[16] The Appellate Body had earlier indicated that to require standards to be based on international standards would effectively make compulsory what were intended to be recommendations by such bodies as the Codex Alimentarius Commission (para 165).

> may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.' (para 172)

In this context note should be taken of the role of the 'precautionary principle' in relation to SPS measures. The status and nature of the precautionary principle are both controversial in international law generally although its application in international environmental law seems more accepted. In *Beef Hormones* the Appellate Body declined to rule on the current status of the principle in international law. While noting that the principle is not explicitly written into the Agreement it did, comment that the SPS Agreement incorporated elements of the approach of the precautionary principle, a ruling that adds further flexibility to the discretion of a state imposing an SPS measure. The Appellate Body saw the principle being reflected in at least two paragraphs. Article 5.7, which allows provisional SPS measures to be taken pending the availability of adequate scientific evidence, is the most obvious case. Perhaps more significantly it was also seen as relevant in relation to Article 5.3. The Appellate Body commented:

> 'It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.' (para 124)

In *Australian Salmon* the Appellate Body accepted that a country may determine its appropriate level of protection to be zero risk.[17] As will be discussed below, however, the 'right' to set a level of protection may be illusory in many respects, especially when a country attempts to set a zero-risk based on a precautionary approach.[18]

Risk assessment allows consideration of a broad range of factors. The Appellate Body has taken a broad approach to the notion of risk and a risk assessment. In *Beef Hormones* the Panel construed risk assessment in relatively narrow terms and in particular inclined to the view that a particular magnitude of scientifically identified risk must be demonstrated. The Appellate Body was critical of this approach and in particular of the distinction made by the Panel between 'risk assessment' and 'risk management' (the latter encompassing policy involving social and value judgments and 'non-scientific' matters). This distinction was held not to be justified by the text of the Agreement. It noted that the factors that could be taken into account under Article 5.2 went beyond matters susceptible of quantitative analysis and added that there was nothing to indicate that Article 5.2 was intended to be a 'closed list'. The Appellate Body commented:

> 'assessment of risk under Article 5.1 is not only risk assessable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.' (para 187)

'Based on' a risk assessment allows room for judgment. The Appellate Body while confirming that there must be a 'rational

[17] At para 125

[18] 'The WTO's own "precautionary principle' seems to be, "If in doubt trade wins out". Kennedy, K (2000) Resolving International Sanitary and Phytosanitary Disputes in the WTO. *Food and Drug Law Journal*, 81.

relationship' between the SPS measure and the risk assessment does not require that the relationship between the measure and the scientific conclusion in the risk assessment be the only factor taken into account – 'the results of a risk assessment must sufficiently warrant – that is to say reasonably support – the SPS measure at stake.[19] The flexibility possible was summarised in *Beef Hormones* as follows:

> We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the "mainstream" of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. In some cases, the very existence of divergent views presented by qualified scientists who have investigated the particular issue at hand may indicate a state of scientific uncertainty. Sometimes the divergence may indicate a roughly equal balance of scientific opinion, which may itself be a form of scientific uncertainty. In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety. Determination of the presence or absence of that relationship can only be done on a case-to-case basis, after account is taken of all

[19] At para 192.

considerations rationally bearing upon the issue of potential adverse health effects. (para 194)

Obviously the completion of the risk assessment is only the first stage of implementing a defensible SPS measure and once the risk assessment has been carried out and an appropriate level of risk determined a country has several other potential pitfalls to overcome. In particular the overriding obligation of Article 2.2 that the measures 'be based' on scientific principles remains to be satisfied as does the requirement of Article 2.2 that the measures be 'based on' the risk assessment. Additionally Article 5 imposes obligations relating to the consistency of application of the measure and as to its trade impact. Article 5.5 has 'the objective of achieving consistency in the application' of appropriate SPS measures - 'appropriate' referring to the risk level set after the carrying out of the risk assessment. Consistency is to be achieved by requiring the avoidance of arbitrary or unjustifiable distinctions of the levels deemed in different situations *if such distinctions result in discrimination or a disguised restriction on international trade*. Article 5.6 requires further that:

'measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.'

SPS disputes to date

Rulings in disputes to date seem to make it clear that a country has considerable latitude both in setting a level of risk regarded as appropriate by that country and in determining which factors identified in a risk assessment are relevant in setting the SPS measure. Why then have respondents been unsuccessful in having their SPS measures upheld? The first SPS disputes, *Beef Hormones*, *Australian Salmon* and *Japan Agriculture*, are all disputes that were decided in the first few years of the life of the SPS Agreement. Moreover the SPS measures in contention largely predated the Agreement's coming into force on 1 January 1995. In *Beef Hormones* for example the

measures went back to the early 1980s and in *Australian Salmon* to the mid-1970s. In *Beef Hormones* the Appellate Body ruled that the Agreement applied to all SPS measures currently having application even if there enactment predated 1 January 1995.[20] This meant of course that in these cases there had either been no risk assessment attempted or where this had been done, as in the case of *Australian Salmon*, the assessment was almost certainly made in some haste and without the benefit of the rulings of the Appellate Body on the detailed requirements of a valid risk assessment let alone the other requirements of the Agreement. At the risk of over generalising, and without wishing to discuss the reasoning in each in detail, the disputes decided to date have been largely determined on whether an appropriate risk assessment was in fact carried out.

In *Beef Hormones* the critical finding of the Panel, upheld by the Appellate Body was that the EU processes leading up to and justifying the continuation of the ban on growth hormones did not constitute a risk assessment within the meaning of Article 5.[21] Although the EU could point to some scientific studies these were not sufficiently specific and focussed on the risks at issue – moreover they tended to suggest that there was in fact no evidence for a ban. The Appellate Body commented that the studies 'may represent the beginning of an assessment of such risks.'

In *Australian Salmon* the risk assessments undertaken were somewhat more sophisticated than that in *Beef Hormones* and were more obviously focussed on the requirements of the SPS Agreement. These consisted of a draft report in 1995 and a final report in 1996. This report, given it dealt with a disease risk assessment was required to meet all three elements of the Annex A.4 definition. The Appellate Body ruled that there had been no proper risk assessment as required.

---

[20] At para 128.

[21] At para 208.

The report satisfied element (1) in that it had identified the relevant diseases and the potential biological and economic consequences associated with their entry. It had not, however, satisfied the other two elements. First there had been no proper evaluation of criteria (2), the 'likelihood' of entry and establishment, the Appellate Body equating 'likelihood' with 'probability'. The Panel had held that as Australia had addressed 'some elements' of both probability it had meet the requirement. The Appellate Body, having earlier stated that Annex A 'refers to "the evaluation of the likelihood" and not to some evaluation of the likelihood', overruled this finding and held that 'some evaluation ..is not enough'. The fail to meet criterion (3), the 'likelihood of entry ... according to the SPS measures which might be applied', was based on similar grounds and again reversed the Panel's finding. The Appellate Body's report on this case can be regarded as borderline. Australia's 1996 report was clearly directed at the requirements of the Agreement and failed to meet them on what come close to semantic distinctions by the Appellate Body. It should be noted that the Appellate Body upheld findings by the Panel that Australia was in breach of Article 5.5 but was unable to determine if there had been a breach of Article 5.6 as the Panel's report did not provide sufficient information. The Panel had held there was a violation but the Appellate Body reversed this finding as the Panel had sought to examine the appropriate level of protection – something the Appellate Body stressed was for the country itself to determine.

Australian Salmon returned to a Panel[22] following changes to the quarantine regime, in particular Australia moved to allow uncooked 'consumer' ready salmon although not whole fresh, frozen of chilled salmon. On this occasion the Panel was required to consider a 1999 import risk assessment. The Panel again used the three step process required for a 'disease' assessment and ruled that Australia had meet each of the three requirements. In particular Australia had been careful to ensure that criteria (2) and (3) were each properly addressed

[22] WT/DS/18/RW

both generally and with respect to the elements within each, with what the Panel saw as the necessary level of objectivity. The Panel had noted that any risk evaluation, especially one involving qualitative elements, 'inevitably involves subjective elements.'[23] The Australian SPS measures did, however, fail at the final hurdle in that the SPS measures put in place were not 'based on' a risk assessment and therefore did not comply with Article 5.1. In this case the risk assessment gave no evidence that the risks identified continued once salmon were eviscerated, head and gills removed and properly washed – ie the SPS risk was eliminated at this stage and the further processing to a 'consumer ready' stage was not justified by the assessment. In this dispute the Panel rejected arguments that the SPS measures were in breach of Article 5.5 but upheld Canada's complaint under Article 5.6.

Japan Agriculture resulted in a comprehensive defeat for Japan. This case related to Japan's 'varietal testing' requirements for imported agricultural products that might host codling moth – a pest not present in Japan and one of considerable quarantine significance. Japan required that each variety of an agricultural product on which codling moth might occur be separately tested for the efficacy of the quarantine treatment. In this case the Panel found that there was not sufficient scientific evidence for the measure as required by Article 2.2. This is of course a factual finding and not review able as such although the Appellate Body upheld the Panel's methodology in reaching this conclusion – particularly the need to demonstrate a rational relationship between the measure and the scientific evidence. The Appellate Body also held that no proper risk assessment had been carried out – primarily because element (3) of a disease assessment had not been considered. This case is probably atypical in that Japan could not rebut the prima facie case established by the respondent and

[23] at para 7.47. The panel noted that some assessments may be 'so flawed and biased' that they do not meet any standard of objectivity.

persuade the Panel that there was a sufficient scientific basis for the measures in question.

The recent Appellate Body report in *Japan Apples* also held that Japan had imposed SPS measures without sufficient scientific evidence. This dispute related to restrictions on mature apples intended to prevent the introduction of fire blight. It was also held that there was no proper risk assessment as required by Article 5.1.

Commentary

Trachtman[24] makes the point that since the inception of the GATT in 1947

> "It is obvious, but not always accepted, that neither trade values nor other social values are, by themselves, pre-eminent. Rather, we are forced to choose the extent to which each value is to be implemented: i.e. we must make trade-offs among these values.'

Trachtman looks at a number of legal devices that are used to achieve this trade-off including the 'necessity test' under GATT Article XX(b) and (d). The history of the development of the jurisprudence surrounding the interpretation of Article XX(b), and since 1995 the SPS Agreement, has been one of attempting to achieve the appropriate trade-off balance for SPS measures.

Cases concerning SPS measures are almost certainly the most politically sensitive that come before WTO Panels and the Appellate Body. The fact that they raise serious issues of human health as well as environmental security gives them a more universal emotional and political dimension than is likely to be present in, for example, safeguard or anti-dumping disputes. For that reason there is a need to tread a fine line between legitimate protective measures and

[24] Trachtman, J (1998) Trade and...Problems, Cost-Benefit Analysis and Subsidiarity. *European Journal of International Law* **9** 32.

protectionism. One might argue that, as to date, no disputed measure has been upheld that this balance has not been correctly achieved. On the facts of the disputes to date, however, such a view seems to be unfounded. Although the disputes to date have been decided in favour of the complainants the reasons for this, in several of the cases at least, would appear to have more to do with the failure of the respondent party to ensure full compliance with the procedural requirements of the SPS Agreement rather than the underlying SPS measure. The successful justification of an SPS measure clearly depends very strongly on how that measure is determined and implemented. This suggests, of course, that criticisms that the trade focussed values of WTO Panels are allowed to override safety and health concerns may be misplaced or at least premature. Until Panels and the Appellate Body have considered disputes where there is a more sophisticated and meticulous attention to the Agreement's requirements, taking into account Appellate Body jurisprudence, it is difficult to make any final judgment on some of the more controversial debates surrounding SPS measures and in particular whether a correct balance has been struck between trade and non-trade values. The second Panel report in *Australian Salmon* may well be the first case of this type.

Commentary to date, at least from experts with a degree of trade expertise, has generally been favourable towards SPS Agreement although it is clearly acknowledged that there are considerable tensions in its application and that the jurisprudence surrounding the Agreement is far from complete.

In terms of the balance struck between trade and non-trade values one commentary suggests the balance in fact may be a tilted a little too much in favour of non-trade values. Quick and Blüthner[25] argue that *Beef Hormones* may prove a Pyrrhic victory for the EU given it is

[25] Quick R, and Blüthner, A (1999) Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case. *Journal of International Economic Law* 2(4) 603 –639.

one of the world's largest food exporting blocs. In their conclusion[26] they commend the Appellate Body decision in that dispute and comment that the report 'strikes a fine balance between sovereignty, health protection and free trade.' They also argue that the Appellate Body properly corrected the Panel for leaving countries inadequate latitude to evaluate their own SPS measures and for overstating the degree to which countries had transferred sovereignty to the international level. They state that the ruling 'not only had a calming effect on public opinion but also contributed to an increase in the legitimacy and the public acceptance of the WTO as a whole.' This last conclusion may perhaps be premature at a general level although possibly less so if there is a more informed view of the cases. It was also reached before it became clear that the EU would not lift the measures in question and pay compensation – a scenario that Quick and Blüthner regarded as destabilising should it occur.[27] Quick and Blüthner are, however, critical of, among other things, the wide interpretation given to what constitutes a risk assessment and particularly for the potential for factors such as 'societal and consumer concerns, other than health related' to be taken into account. They suggest that the Appellate Body did not give sufficient weight to the Article 2.2 requirement relating to the need for 'sufficient scientific evidence.' Given the results in the two *Japan* cases this criticism may have been somewhat premature although it still remains to be seen how trade and non-trade values will be weighed when a dispute with procedurally correct risk-assessment is presented. It might also be noted, as does the article, that in *Beef Hormones* the Appellate Body expressed surprise that the Panel did not begin its analysis by focussing on Article 2[28], a point that Panels seems to have addressed in later cases.

[26] At p 636.
[27] At p 639.
[28] At para 250.

Another commentator, Garcia[29] has also taken a positive approach to the way in which non-trade values have been recognised in SPS cases and in particular the fact that the Agreement places greater emphasis on a country's discretion to set its own appropriate levels of protection as in cases 'involving very important values such as human life or health, such determinations should be largely within the discretion of members.'[30] Full agreement on this last point, or at least the extent to which it is permitted, is not universal among commentators. One of the strongest arguments made in favour of the balance of the Agreement is that of Taylor[31]. Discussing the *Australian Salmon* case, 'the first case in which a sanitary measure was substantially upheld', he sees the case as a major vindication of the Agreement. He comments that before this case persons critical of the WTO took the cynical view that 'the burden of demonstrating the scientific validity of a sanitary or environmental measure was insurmountable.' Taylor regards *Australian Salmon* as proving otherwise, arguing that the Panel in fact upheld a variety of import restrictions with only one of those restrictions being held to be insufficiently scientifically justified.

Another commentator, Thomson,[32] also considering the *Australian Salmon* case, sees a significant problem arising out of the concept of 'appropriate level of protection.' (ALOP) Thomson notes that in SPS disputes the Agreement is not concerned with the ALOP but the SPS

---

[29] Garcia, F (2003) The *Salmon* Case: Evolution of Balancing Mechanisms for Non-Trade Values in the WTO. Research Paper No 19 Boston College Law School (downloadable from SSRN http:/com/abstract=450820)

[30] At p 40.

[31] Taylor, M D (2000) The WTO Panel Decision on Australia's Salmon Import Guidelines: Evidence that the SPS Agreement can Effectively Protect Human Health Interests. *Pacific Rim Law and Policy Journal*

[32] Thomson, A (2002). Australia Salmon and Compliance Issues Surrounding the SPS Agreement: Sovereign Acceptance and Measure Adaptation. *Law and Policy in International Business* **33**; 717.

measures that are applied to achieve it. The problem he describes is that ALOP is a difficult concept to grasp (other than in theory) and one that gives a false impression of the powers that countries have to set there level of protection. He argues:

> 'At first glance, the notion of an ALOP seems logical, even comforting. It suggests that sovereignty is intact and that a member has complete freedom to protect its precious state of pristine human, animal or plant health if it is so blessed. Yet members have no such freedom. The ALOP is a soothing phrase designed to provide political comfort. When put to the test, however, it is found to be almost beyond grasp. Herein lies the seed of misunderstanding, recalcitrance and compliance difficulty.'[33]

Thomson has a number of criticisms of the ALOP, which in summary relate to the unrealistic nature of the concept and the false expectations that follow, and concludes that it would be best done away with. He suggests for example it would be preferable to focus on 'optimum level of restriction.' Thomson's argument is particularly cogent when it considers zero-risk which he regards as never sustainable but as too easily misunderstood at a political level. He argues that the notion that there is an achievable 'zero-risk' gives rise to political confusion and threatens the public acceptability of the SPS Agreement in the longer term. Optimum level of restriction, argues Thomson is about calibration of the measure in question to the risk identified. For example if it is known that product A is host to a particularly dangerous disease it makes more sense to talk in terms of the existence of a measure that (a) kills the disease and (b) does not completely destroy the product rather than to talk of zero or minimum risk. This optimum level of restriction, Thomson argues, was what was eventually achieved in *Australian Salmon*.

[33] At p 738.

The body of jurisprudence developed around the SPS Agreement gives a strong indication of the way future disputes are likely to be resolved and a well developed, if incomplete, body of jurisprudence has emerged. Nevertheless, as suggested above, the developing jurisprudence has yet to be seriously tested in a 'hard' case and there are still a number of contentious issues that have to be resolved of which the following are two.

First, there remains a major debate in relation to the nature and role of the precautionary principle in trade law. The WTO approach is far from meshing comfortably with other areas of international law, especially environmental law, and with public perceptions in many countries. Whether a balance is struck between the trade interests and other values will, except in the (unlikely) event of further international agreement, depend very much on the approach of future Panels. The GMO disputes in particular may be crucial in this respect. These cases are perhaps the most likely to concern contentious and disputed scientific findings. The approach of Panels to uncertain, incomplete, inadequate, of disputed scientific findings has yet to be determined.

Second, there also remains a question of just how real is the concept that countries are free to determine their own appropriate level of protection. Such a determination is of course subject to the other obligations in the Agreement and particularly the need for the SPS measure not to be maintained without sufficient scientific justification. There is a very delicate balance for a Panel in determining whether there is scientific justification for a particular measure if that in practice means overriding a countries own determination of its level of risk. If, for example, a country decides on a 'minimal' level of risk and sets in place an SPS measure to achieve that a Panel must among other things decide under Article 5.6 if the measure is 'more trade-restrictive than required' to achieve the determined level of protection. If it is decided that some other measure is more appropriate this, in effect, comes very close to determining the level of acceptable risk. The line between

determination of the risk and choice of an appropriate SPS measure is a very fine one.

The above issues are serious but they are issues that will need to be resolved in the context of particular disputes. Their practical and political significance will therefore depend on the nature of the disputes that arise. Most of the disputes to date (with the possible exception of *Beef Hormones*) tend to demonstrate that when the focus is on a particular measure affecting particular products the Panels and the Appellate Body have been able to resolve disputes satisfactorily, a trend that has increased with the passage of time. *Australian Salmon*, particularly after the second Panel, would seem to be a good example of how the dispute process can work. As the requirements of a risk assessment become clearly known and acted on, and the necessary rational connections made, it seems likely that the resulting SPS measures will increasingly stand up to scrutiny.

There are however some potential pitfalls ahead. First, we have yet to see a dispute involving an SPS measure where there has been a proper risk assessment but the underlying science remains contentious and disputed among reputable scientists. Such a dispute will be extremely testing on a Panel and particularly so if the Panel sets itself up as the arbitrator of the science. In the disputes to date (and again with the possible exception of *Beef Hormones*) the scientific evidence appears to have been both non-contentious but also restricted to a relatively well defined issue.

A second potential problem will arise if countries become too aggressive in pushing trade values over other values. The *Beef Hormones* dispute, or at least the subsequent fallout from it are indicative of the tensions that are possible. If the United States aggressively attacks not only SPS measures limiting imports of GMO products but also attempts to block the labelling of such products (and possibly country of origin) a highly charged and negative political reaction with the EU is almost certainly inevitable. Regardless of the scientific arguments the damage will be enormous.

The future

As was indicated in the introduction to this paper the next one or two years are likely to see a significant upsurge in disputes involving SPS measures. Two disputes in particular *GMO* and *Australian Quarantine* look likely to be of particular importance and will almost certainly provide a major test of the issues involved in the SPS debate. *GMO* dispute in particular will be particularly contentious given the consumer and 'green' emotion that surrounds the debate. Moreover it is almost certainly a dispute where the scientific arguments will be particularly contentious. At its best there is always a degree of uncertainty in any scientific study and this is of course even more so in the case of a technology that, if the sceptics are correct, has the potential to cause enormous damage.

Nevertheless, and leaving a hopefully small number of future potentially contentious cases aside, the SPS Agreement and the rulings on disputes to date suggest that an appropriate balance may be being met between trade and non-trade values. *Beef Hormones* was, in most ways, an initial unfortunate case. Politically it involved an unusually high level of dissatisfaction from a consumer viewpoint and arguably the requirement for rapid removal of the measure (instead, for example of requiring a proper risk assessment) gave the impression that the WTO was careless of or unconcerned with human health issues. Even though there was and remains significant political fallout in Australia, the *Australian Salmon* case is perhaps the best example of how the system should work and of the appropriate balance that can be achieved. While there are still some important hurdles to be met the SPS Agreement appears to be working well in what might be regarded as routine/ingle measure cases even if not yet fully tested in the most controversial areas.