Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions

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Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions

KEVIN C. KENNEDY *

I. INTRODUCTION

International sanitary and phytosanitary (SPS) standards have taken center stage at the World Trade Organization (WTO), in both the standard-setting and dispute settlement arenas. For example, the labeling, safety, and environmental impacts of genetically modified organisms (GMOs) are becoming among the most contentious trade issues of 2000.1 Do GMOs threaten human health or life? Do they threaten animal health or life? If science is inconclusive on either of these scores, should an importing country be permitted to ban their entry? Even if science shows that GMOs are safe, should an importing country be permitted to require labeling of products that contain GMOs so that consumers can decide whether or not to purchase such products? In the absence of scientific support indicating that GMOs pose a health risk, would such a labeling requirement be an impermissible restriction on trade because it would be the equivalent of a “Warning: This Product May Be Hazardous to Your Health” sticker?

What answers, if any, do the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),2 and the WTO jurisprudence interpreting it, give to these questions? Before turning to these specific questions and a review of three WTO SPS decisions, an overview of some core General Agreement on Tariff and Trade (GATT)—WTO provisions is discussed.

II. GATT

GATT strives for equal treatment of imported goods, regardless of their source of origin, through a nondiscrimination principle that operates on two levels: 1) nondis-

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2) nondiscrimination between imported goods and the domestic-like product. Despite its commitment to the goal of liberal trade, GATT does permit WTO members to restrict imports on a number of specific grounds. Of the ten enumerated general exceptions, the public health and safety exception touches directly on the promulgation and enforcement of food safety laws, standards, and regulations. 5

The national treatment obligation generally requires WTO members not to discriminate against imports vis-à-vis the domestic like product. 4 When an importing member’s food safety standards discriminate against imported goods in favor of the domestic like product, the exporting member may have a legitimate complaint under Article XXIII that a trade benefit has been nullified or impaired. Similarly, to the extent the importing member’s food safety regulations purport to have extraterritorial effect (for example, by targeting the production processes and methods by which the imported product was manufactured or processed by the exporting member), Article III:4 also may be violated. At the same time, however, GATT does not prevent a country from setting its own domestic priorities regarding the level of food safety it wants to achieve at home. The GATT food safety exception provides:

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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health; . . . 5

Thus, in order for an importing country to impose a GATT-permissible health or safety import measure, that measure must be necessary (i.e., no less trade restrictive alternative is available), must not discriminate arbitrarily or unjustifiably between countries where the same conditions prevail (i.e., it must be consistent with the most favored nation and national treatment obligations), and must not be a disguised restriction on international trade.

Considering the open-textured quality of the terms “necessary,” “arbitrarily,” and “unjustifiably,” the public health and safety exception has the potential for being a source of nontariff barriers to trade. Given the vagueness of the public health and safety exception, there is a potential for abuse by economically powerful countries against weaker trading nations. The GATT practice generally has been to construe Article XX narrowly in favor of trade and against nontariff barriers to trade. A GATT panel report concluded that the Thai ban on imported cigarettes was not “necessary” within the meaning of the *chapeau* to GATT Article XX: 6

[A] contracting party cannot justify a measure inconsistent with other GATT provisions as “necessary” . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. Similarly, in cases where a measure consistent

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4 GATT, art. III:4.
5 GATT, art. XX(b).
with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.  

This interpretation of "necessary" restates the minimum derogation principle, i.e., any measure taken under one of the Article XX exceptions must be the least trade restrictive measure available.

III. The SPS Agreement

The most important WTO agreement that addresses food safety issues is the SPS Agreement. Experience has shown that SPS measures are employed frequently as other, more traditional barriers to trade, such as tariffs and quotas, are reduced or eliminated. Many countries, including the United States, often have had the experience of negotiating the reduction of tariffs and the elimination of quotas only to be met with a suspect SPS measure that eliminates the benefit of the earlier bargain. Before the SPS Agreement was added to the GATT-WTO legal partnership, Article XX(b) was the only GATT provision dealing expressly with the subject of SPS measures. Until the SPS Agreement, no multilateral trade agreement existed with a fully articulated set of procedural rules governing a country's use of SPS measures in connection with imported goods. The SPS Agreement fills this gap by circumscribing WTO members' use of such measures as a nontariff barrier to trade.

The SPS Agreement applies to all SPS measures that may, directly or indirectly, affect international trade. The SPS Agreement does not establish any substantive SPS measures per se. Instead, the Agreement sets forth a number of general procedural requirements to ensure that an SPS measure is in fact a scientifically-based protection against the risk asserted by the member imposing the measure, and not a disguised barrier to trade.

The Agreement expressly recognizes that members have a legitimate right to protect human, animal, and plant life and health, and to establish a level of protection for life and health that they deem appropriate. The provisions of the SPS Agreement are designed to preserve the ability of members to act in this area while at the same time guarding against the use of unjustified SPS measures that are designed primarily to protect a domestic industry from foreign competition. The Agreement establishes criteria and procedures to distinguish the former from the latter. It emphasizes the need for transparency in the SPS regulatory process.

A. The Definition of SPS Measures

The SPS Agreement provides a comprehensive definition of SPS measures. An SPS measure is any measure applied: 1) to protect animal or plant life or health within the territory of the member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms; 2) to protect human or animal life or health within the territory of the member from risks arising from additives, contaminant, toxins, or disease-causing organisms in foods.

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7 Id. (quoting Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345, ¶ 5.26 (1990)).
9 See SPS Agreement art. 2.3.
beverages, or foodstuffs; 3) to protect human life or health within the territory of the member from risks arising from diseases carried by animals, plants, or products thereof, or from the entry, establishment, or spread of pests; or 4) to prevent or limit other damage within the territory of the member from the entry, establishment, or spread of pests.\textsuperscript{10}

SPS measures include all relevant laws, decrees, regulations, requirements, and procedures governing \textit{inter alia}: 1) end product criteria; 2) processes and production methods; 3) testing, inspection, certification, and approval procedures; 4) quarantine requirements including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; 5) provisions on relevant statistical methods, sampling procedures, and methods of risk assessment; and 6) packaging and labeling requirements directly related to food safety.\textsuperscript{11} If a measure is not intended to protect against one of these risks, then the measure is not an SPS measure.

\textbf{B. The Use of Scientifically-Based Measures}

The basic right of WTO members under the SPS Agreement is the ability to take SPS measures necessary for the protection of human, animal, or plant life or health. This right is qualified by three provisions. Such measures must be applied only to the extent necessary, must be based on scientific principles, and must not be maintained without sufficient scientific evidence, except that such measures may be imposed temporarily when evidence is insufficient, pending receipt of additional information necessary for a more objective assessment of risk.\textsuperscript{12} Article 2.3 reiterates the threshold inquiry of the GATT Article XX \textit{chapeau}, namely, that SPS measures must not constitute a means of arbitrary or unjustifiable discrimination, and must not constitute a disguised restriction on international trade.\textsuperscript{13} A member's failure to satisfy Articles 2.2 and 2.3 would in itself constitute a violation of GATT, regardless of the measure's consistency with the remainder of GATT.

A member is free to establish its own level of SPS protection, including a "zero risk" level if it so chooses. Regardless of the level of risk a member chooses to adopt, however, a measure must be based on scientific principles and on sufficient scientific evidence. The judgments to be drawn from that evidence are left to the member, be-

\textsuperscript{10} Id. Annex A, ¶ 1(a)-(d).
\textsuperscript{11} Id.
\textsuperscript{12} Article 2.2 provides: Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

Article 5.7 of the SPS Agreement provides:
In cases where relevant scientific is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary and phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary and phytosanitary measure accordingly within a reasonable period of time.

In tandem, these two articles represent the SPS Agreement's version of the precautionary principle; \textit{id.} arts. 2.2, 5.7.

\textsuperscript{13} Article 2.3 provides:
Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

\textit{id.} art. 2.3.
cause scientific certainty is rare. Many scientific determinations require judgments among competing scientific views.

C. The Use of International Standards

The SPS Agreement encourages members to harmonize their SPS measures by adopting international standards where such standards exist. Such international standards, guidelines, and recommendations are developed by several international bodies. The most important are the Codex Alimentarius Commission (Codex) established in 1963 and jointly administered by the World Health Organization and the United Nations Food and Agriculture Organization; the International Office of Epizootics (OIE) founded in 1924 and charged with the tasks of developing a worldwide livestock reporting system and expediting trade in livestock without increasing livestock disease; and the Secretariat of the International Plant Protection Convention (IPPC) an agreement intended to prevent the spread of plant pests.

Although the SPS Agreement generally obligates members to adopt international standards where they exist, the Agreement further provides that members may adopt more stringent standards if, based on scientific justification, the relevant international standard fails to provide an adequate level of protection. The Committee on SPS Measures has established a system under which standards, guidelines, and recommendations developed by the Codex, OIE, and IPPC that have a major trade impact are to be monitored. It may invite the appropriate international standards-setting body to consider reviewing the existing standards, guidelines, or recommendations. On July 8, 1999, the SPS Committee decided to extend its provisional procedure adopted in October 1997 to monitor the process of international harmonization until July 2001.

The Agreement offers an incentive for the adoption of international standards by establishing a rebuttable presumption that a national SPS measure that is based on an international standard is not only necessary to protect human, animal, or plant life or health, but also is consistent with GATT. At the same time, the SPS Agreement recognizes the politically sensitive nature of SPS measures for many members that

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14 "Members shall base their sanitary and phytosanitary measures on international standards ..." SPS Agreement art. 3.1 (emphasis added). These international standards, guidelines, and recommendations are further defined in Annex A.3 of the SPS Agreement to include those of the Codex, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention.

15 Codex has issued more than 200 commodity standards and approximately 2000 maximum limits for pesticide residues. General information about Codex, including the contents of the Codex Alimentarius is available at <www.fao.org/waicsfareconomic/esn/codex/Default.htm> (last modified Aug. 1, 1999).


18 See COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, Procedure to Monitor the Process of International Harmonization, G/SPS/13 (July 7, 1999).

19 Article 3.2 provides: Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994. SPS Agreement art. 3.2.
The drafters of the SPS Agreement bowed to pressure from environmental groups that feared that the SPS Agreement would lead to a ratcheting down of national standards if international standards became the mandatory maximum levels of protection a member could adopt. This fear was based in part on the status of Codex, OIE, and IPPC as arbiters of human, animal, and plant health issues. In the eyes of environmentalists, these organizations’ deliberations largely are influenced by transnational corporations. Thus, despite the encouragement to adopt international standards, Article 3.3 permits members to adopt measures that result in a higher level of protection if there is a scientific justification for doing so. Consequently, a member’s ability to adopt standards higher than those promulgated by these organizations is assured.

D. Making Risk Assessments

Because the levels of protection established by international bodies are regarded as the minimum level attainable, Article 5 permits members to maintain higher levels of protection than those based on international standards. “Risk assessment” is defined in two ways, depending on whether human or animal life or health is at stake, or whether plant health or life is the focus:

- The evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, toxins, or disease-causing organisms in food, beverages, or foodstuffs.
- 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 SPS measures which might be applied, and of the associated potential biological and economic consequences.

A member must have scientific evidence to justify such higher levels of protection, or must show that it is “the appropriate level of . . . protection” as determined under the criteria of Article 5. As long as there is a scientific justification for a particular SPS standard, a member is free to choose its own level of protection after determining that the health or safety risk is genuine. The SPS Agreement does not require “downward harmonization” through the adoption of less stringent SPS mea-

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21 See id.
22 Article 3.3 provides:
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 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. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.
For purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information with the relevant provisions of this Agreement, a member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of SPS protection. SPS Agreement art. 3.3.
23 Id. Annex A, ¶ 4.
24 See id. art. 5.3.
however, the SPS Agreement does not prevent a country from adopting standards which are less stringent than relevant international standards either. A country in its role as an importer can permit products to enter its market that fail to meet relevant international standards. No process exists in the SPS Agreement for challenging the adoption of SPS measures that are less protective of human, animal, or plant life and health than international standards. A fair argument can be made that an importing country’s decision to adopt weak SPS measures is of no concern to the WTO, although the international human rights community might take a different view.

The SPS Agreement identifies specific criteria to be used in evaluating the assessment of risk to human, animal, or plant life or health: 1) available scientific evidence; 2) inspection, testing, and sampling techniques; 3) relevant ecological and environmental conditions; 4) the existence of pest- or disease-free areas; and 5) production processes and methods. In the case of risks to animal and plant life and health, the economic impact and effectiveness of SPS measures for both the exporting and importing members also are to be considered. In all events, the objectives of minimizing negative trade effects, of avoiding discrimination or disguised restrictions on trade, and of adopting measures that are not more trade restrictive than required to achieve the appropriate level of protection are to guide members when imposing a level of protection higher than that provided under international standards.

If a member believes that another member’s SPS measure violates the SPS Agreement, the burden rests initially on the complaining member to identify a specific alternative measure that is reasonably available. A responding member need not take steps that are deemed to be unreasonable. Next, the complaining member must demonstrate that the alternative measure would make a significant difference in terms of its effect on trade. Once again, the responding member is not expected to adopt an alternative measure if doing so would make only an insignificant difference to the impact on trade.

E. Equivalency and Mutual Recognition of Standards

Because a range of SPS measures may be available to achieve the same level of protection, there may be differences among members’ SPS measures that achieve the same level of protection. Thus, the principle of equivalency is a key component of the SPS Agreement. Members are instructed to accept the measures of other members as equivalent, even if they differ formally from those of the importing member, if the

An example of more stringent domestic standards are the pre-1996 U.S. Delaney Clauses that prohibited the introduction of food additives or color additives in processed foods if the substances posed any risk of cancer in humans or animals. The Delaney Clauses established a level of protection that reflected a congressional decision that there should be zero risk of cancer to humans from the substances those clauses covered. That congressional determination was based on scientific evidence available at the time of its enactment and a risk assessment (i.e., an evaluation of the potential for adverse effects on human life or health, even though the risk of cancer was slight). The evidence and assessment resulted in a level of zero risk of carcinogenesis. See Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 348(c)(3)(A) (1994)). Under pressure from domestic farm groups, Congress amended the Delaney Clauses in the Food Quality Protection Act of 1996 to remove chemical pesticides in processed foods from the definition of “food additives.” See Pub. L. No. 104-170, § 405, 110 Stat. 1489 (1996). Advances in detection techniques had developed to the point that pesticide residues could be detected that fell far below levels considered to pose a serious health threat. A new health-based standard that permits less than a one in one million lifetime risk of cancer was enacted to replace the zero-risk standard set by the Delaney Clauses in connection with pesticide residues. The Delaney Clauses continue to apply to food additives, color additives, and compounds administered to food-producing animals.

SPS Agreement, supra note 2.

Id. art. 5.2.

Id. art. 5.6.
exporting member demonstrates that its measures achieve the importing member's appropriate level of protection. Members are obligated further to enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of equivalence of specified SPS measures.

In the view of some developing countries, a number of developed countries are requiring "sameness" rather than "equivalence" of measures. In addition, experience suggests that recognition of equivalence is indeed very difficult to achieve even among countries that are economic equals and close trading partners. Take, for example, the experience of the European Union (EU) which in 1996 imposed a ban on exports of British beef and related products from cattle possibly infected with "mad cow" disease. The EU imposed the ban over the objections of the British that its beef products posed no health risk and a threat to withdraw from the EU. Even after the EU declared British beef safe in late 1999, France continued to block its importation.

In a more progressive vein, 1996 amendments to U.S. legislation on poultry and meat inspections authorized the Secretary of Agriculture to certify that poultry and meat inspection systems of other countries are equivalent to those of the United States. In 1997, the EU and the United States reached a framework agreement on veterinary equivalency. On July 20, 1999, following this framework agreement, the United States and the EU signed a mutual recognition agreement covering trade in live animals and animal products, including meat, fish, pork, dairy products, pet food, hides, and skins.

F. Control, Inspection, and Approval Procedures

Conformity assessment procedures (i.e., control, inspection, and product approval procedures) are to be conducted under SPS guidelines. Procedures are to be undertaken and completed without undue delay and are to be nondiscriminatory vis-à-vis the procedures for the domestic-like product.

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29 Article 4.1 provides:

Members shall accept the sanitary and phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Id. art. 4.1.

30 Id. art. 4.2.

31 See COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, SPS Agreement and Developing Countries, G/SPS/GEN/128 (July 8, 1999).


36 SPS Agreement art. 8, Annex C:1(a).

37 See id.
The concept of disease-free areas and zones within an exporting member is to be recognized by importing members. This concept ensures that exports of a particular product are not banned on a country-wide basis, if it can be shown that the exporting member has implemented effective quarantine or buffer zone measures.

G. Administration

A Committee on SPS Measures (the Committee) was established to provide a forum for regular consultations. The Committee is responsible for maintaining close contact with the relevant international bodies in the field of SPS protection. It also monitors the process of international harmonization and the use of international standards. The SPS Agreement requires the Committee to develop a procedure for monitoring the process of international harmonization and the use of international standards, guidelines, or recommendations. A provisional procedure was adopted in 1997 and in July 1999, the Committee agreed to extend its harmonization work program until July 2001.

Members must notify the Committee of new, or modifications to existing, SPS regulations that substantially are not the same as an international standard and that may have a significant effect on international trade. As of the end of 1996, the Committee had received 396 such notifications from thirty-one WTO members. Article 12.7 directs the Committee to review the operation and implementation of the Agreement three years after its entry into force.

H. Dispute Settlement

As is the case for all WTO disputes, the consultation and dispute settlement procedures of GATT Articles XXII and XXIII, as amplified by the Dispute Settlement Understanding, apply to disputes under the SPS Agreement. If a dispute under the SPS Agreement involves scientific or technical issues, the panel is directed to seek advice from experts chosen by the panel in consultation with the parties.

I. Implementation at the Sub-Federal Level

Under Article 13 of the SPS Agreement, members are responsible for ensuring that their sub-federal levels of government and nongovernmental organizations re-
responsible for setting standards comply with the provisions of the SPS Agreement. Members are required to formulate and implement positive measures and mechanisms in support of observance of the SPS Agreement by sub-national government bodies.

State and local governments within the United States remain free to set their own SPS standards under the terms of the SPS Agreement. They are under no obligation to adopt federal standards, unless Congress so mandates under its commerce clause power.47

J. Extraterritoriality

The definition of SPS measures in Annex A of the SPS Agreement—"measures to protect human or animal life or health within the territory of the Member"—settles an issue regarding the extraterritorial application of SPS measures that arose in an unadopted GATT panel report.48 The panel concluded that application of measures taken under Article XX(b) are limited to the territorial jurisdiction of the country imposing the measures. Conceding that the United States' ban on imports of tuna was not a disguised restriction on trade, but rather a bona fide measure designed to protect dolphins inadvertently caught with tuna in purse-seine nets, the panel ruled that the U.S. measure could not extend in any event beyond its territorial jurisdiction. As noted by the GATT panel, if the rule were otherwise, then,

each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.49

The GATT panel concluded that unilateral, extraterritorial application by the United States of health regulations under Article XX(b) is impermissible. Nevertheless, under the SPS Agreement, a member may insist, for example, that imported food meet its health and safety standards, provided those standards are based on science and risk assessment.

K. Relationship to the Agreement on Agriculture

The problem of misuse of SPS measures is acute especially in connection with imports of agricultural products that frequently are the target of legitimate, and not so legitimate, SPS measures. There was a concern in some quarters that as the Uruguay Round Agreement on Agriculture (Agreement on Agriculture)50 eliminated or reduced barriers to agricultural trade, a new set of SPS measures would be introduced as contingent protection, that is, whose sole purpose would be to protect domestic agricul-

47 In 1997, tension built between 12 states and the Environmental Protection Agency (EPA) over allegedly lax enforcement of clean air and clean water regulations by the states. The EPA threatened to cut off federal funds and to limit the authority of those states to enforce those laws. See James L. Tyson, States Feud with EPA Over Regulations, CHRISTIAN SCIENCE MONITOR, Feb. 19, 1997, at 4.
49 Id. ¶ 5.27.
50 Uruguay Round Agreement on Agriculture, reprinted in STATEMENT OF ADMINISTRATIVE ACTION, supra note 2, at 1355.
terial producers from import competition. To counter such a development preemptively, the SPS Agreement was negotiated in tandem with the Agreement on Agriculture to ensure that the benefits of liberalized agricultural trade are not diluted. Indeed, the Agreement on Agriculture underscores the importance of not allowing unjustified SPS measures to undermine the gains of the Agreement on Agriculture by providing that “Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.”

L. Relationship to the TBT Agreement

The WTO Agreement on Technical Barriers to Trade (TBT Agreement) excludes from its scope of coverage SPS measures as defined in the SPS Agreement. The SPS Agreement similarly provides that it does not affect members’ rights under the TBT Agreement with respect to measures outside the scope of the SPS Agreement. Despite their mutual exclusivity, the substantive provisions of the two agreements mirror each other in most respects. A significant difference between the SPS and TBT Agreements is the test used to determine whether a measure is impermissibly protectionist in nature. The TBT Agreement relies on a nondiscrimination test, whereas the inquiry under the SPS Agreement is whether the measure has a scientific justification and is based on risk assessment. A strict requirement of nondiscrimination would not be practicable for SPS measures that discriminate against imported goods based on their origin. Goods may pose a risk of disease precisely because the goods come from a member where such disease is prevalent. The same situation might not be true for similar goods coming from another member. Discrimination is, therefore, tolerated under the SPS Agreement so long as it is not arbitrary or unjustifiable.

IV. WTO Resolution of SPS Disputes

By the end of 1999, the WTO had resolved three SPS trade disputes; the first dealt with human health and safety (EC—Beef Hormone); the second addressed animal health and life (Australia—Salmon); and the third resolved a phytosanitary dispute (Japan—Food Quarantine).

A. The EC Beef Hormone Dispute

The first WTO panel report to address the consistency of a member’s food safety measures under the SPS Agreement was issued in 1997. The panel ruled in EC Measures Concerning Meat and Meat Products (Hormones) that European Community (EC) measures restricting the importation of beef from cattle that were fed growth hormones violated the SPS Agreement. The Appellate Body upheld in part, modified in part, and reversed in part the panel report.

51 See id.
52 Id. art. 14.
53 See TBT Agreement art. 1.5, supra note 2.
54 See SPS Agreement art. 1.4.
56 See WTO Hormone Report, at 218, ¶¶ 8.214, 8.216.
The events leading up to the WTO panel proceeding span ten years. Following consumer concerns over the safety of hormone-fed beef, the EC in 1987 imposed a ban on imports of animals and meat from animals fed six specific growth-promoting hormones.\(^\text{58}\) The United States and Canada objected to this ban on the ground that the six hormones had been found safe for use in growth promotion by every country that had examined them.\(^\text{59}\) In addition, Codex had reviewed five of the six hormones and found them to be safe. Additionally, the EC itself twice commissioned experts to review these same five hormones, and on both occasions they found them to be safe.\(^\text{60}\)

The United States raised the matter under the Tokyo Round Agreement on Technical Barriers to Trade (the Standards Code) in March 1987.\(^\text{61}\) Bilateral consultations between the United States and the EC failed to resolve the dispute. Contending that the EC ban was not supported by scientific evidence, the United States requested the establishment of a technical experts group—under Article 14.5 of the Standards Code—to examine the question. The EC rejected this request, stating that the issue was outside the scope of the Standards Code.\(^\text{62}\)

On January 1, 1989, the United States imposed retaliatory measures of 100% \textit{ad valorem} duties on imports of certain EC-origin goods.\(^\text{63}\) A joint U.S.-EC Task Force reached an interim agreement that permitted imports of U.S. beef that was certified hormone-free. The United States in return lifted some of its retaliatory tariffs. In June 1996, the EC requested the establishment of a WTO panel to examine the matter. A month later, the United States removed the balance of its retaliatory tariffs pending the outcome of the panel proceeding.

1. The WTO Panel Report

Both the United States and the EC invoked the SPS Agreement, the TBT Agreement, and GATT in support of their respective positions. As a threshold matter, the panel considered whether the SPS Agreement, which entered into force on January 1, 1995, could apply to measures that predate it. The panel concluded that under the general rules of treaty interpretation found in Article 28 of the Vienna Convention on the Law of Treaties, the EC measures are continuing situations that were enacted before the SPS Agreement entered into force but which did not cease to exist after that date. The panel found no contrary intention in the SPS Agreement; in fact, it found that the Agreement generally applies to measures enacted before its entry into force but which are maintained in force after that date.\(^\text{64}\) Having found that the SPS Agreement is applicable to the dispute, the panel next concluded that the TBT Agreement \textit{a fortiori} was inapplicable. By their terms, the TBT Agreement and the SPS Agreement are mutually exclusive.\(^\text{65}\)


\(^{59}\) See WTO Hormone Report, \textit{supra} note 46, at 6-8, 11, ¶¶ 2.17-2.25, 2.33.

\(^{60}\) See id.

\(^{61}\) See Office of the U.S. Trade Representative Press Release, \textit{supra} note 58.

\(^{62}\) See id.

\(^{63}\) See id.; \textit{see also} Mueller, \textit{supra} note 58.


\(^{65}\) See TBT Agreement art. 1.5; SPS Agreement art. 1.4; WTO Hormone Report, \textit{supra} note 46, at 171, ¶ 8.29.
Finally, with regard to the applicability of GATT, the panel found that there is no requirement in the SPS Agreement that a prior GATT violation be established before the SPS Agreement applies. Moreover, even if a measure were to pass muster under GATT, it still would have to be examined for consistency with the SPS Agreement. Therefore, the panel limited its examination to the consistency of the EC measure under the SPS Agreement.66

The United States argued that the burden of proof rested on the EC to provide evidence that there is a risk to be protected against and that there has been a risk assessment. The EC responded that the burden of proof rests on the party challenging the consistency of a sanitary measure with the SPS Agreement to provide evidence that the use of the hormones in dispute is safe and without risk.67 The panel stated that,

the initial burden of proof rests on the complaining party in the sense that it bears the burden of presenting a \textit{prima facie} case of inconsistency with the SPS Agreement. It is, indeed, for the party that initiated the dispute settlement proceedings to put forward factual and legal arguments in order to substantiate its claim that a sanitary measure is inconsistent with the SPS Agreement. In other words, it is for the United States to present factual and legal arguments that, if unrebutted, would demonstrate a violation of the SPS Agreement. Once such a \textit{prima facie} case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party.68

Accordingly, the United States had the burden of presenting a \textit{prima facie} case of inconsistency with the SPS Agreement. Once that initial burden was met, the burden would shift to the EC to demonstrate that its measures did not violate the SPS Agreement.

The panel began its analysis with Article 3.1 of the SPS Agreement that requires members "to base their [SPS] measures on international standards, guidelines or recommendations, where they exist. ... "69 The SPS Agreement defines "international standards, guidelines or recommendations" as those established by Codex relating to veterinary drug residues.70 In line with Article 3.1, if such Codex standards exist with respect to the six hormones in dispute, then, the panel stated, a sanitary measure taken by a member either should be based on these standards or be justified under Article 3.3 of the SPS Agreement.71

Unless a member’s measure reflects the same level of protection as the standard, it is not “based on” that standard and violates Article 3.1. The panel found that Codex standards exist for five of the six hormones in issue.72 The panel further found that the EC measures resulted in a different level of protection than would be achieved by measures based on the Codex standards. The EC measures, accordingly, were not based on the Codex standards for purposes of Article 3.1.

Even though a member’s measures are not based on international standards, they are not inconsistent with the SPS Agreement \textit{ipso facto}. Article 3.3 of the SPS Agreement provides an exception to Article 3.1. It permits members to introduce measures

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67 See \textit{id.} at 174-75, ¶¶ 8.49-8.50.
68 Id. at 175, ¶ 8.51 (footnote omitted).
69 SPS Agreement art 3.1.
70 Id. Annex A:3(a).
72 See \textit{id.} at 180, ¶ 8.70.
that result in a higher level of protection than would be achieved under international standards, if there is a scientific justification for them, or it is the level of protection a member determines to be appropriate after making a risk assessment under Article 5 of the Agreement. There is a scientific justification if, based on available scientific information, a member determines that the international standards are not sufficient to achieve its appropriate level of protection. This concept is sometimes referred to as “the acceptable level of risk.”

Once the United States established that the EC measures were not based on an international standard, the burden shifted to the EC to prove that its measures are justified under Article 3.3 and meet the risk assessment criteria of Article 5. According to Annex A:4 of the SPS Agreement, a risk assessment is “the evaluation of the potential for adverse effects on human or animal health arising from the presence of ... contaminants ... in food, beverages or foodstuffs.” The EC thus had the burden of identifying the adverse effects on human health caused by the presence of hormones in meat products and if any such adverse effects exist, evaluating the potential or probability of occurrence of these effects.

To assist it in determining whether there is a scientific basis for the EC ban, the panel appointed three scientific experts to advise the panel. After considering all of the sources cited by the EC in support of the first prong of the two-pronged risk assessment test, the panel concluded that none of the scientific evidence cited indicates that an identifiable risk arises for human health from the use of the growth hormones in issue. In fact, all of the studies cited by the EC indicate that such hormones are safe when used in accordance with good practice.

Once the risks are assessed, i.e., their probability of occurrence identified, the next step is risk management, i.e., the decision by a member as to what risks it can accept, or its “appropriate level of sanitary protection.” If a risk assessment is based on scientific evidence, then a member can set its own acceptable level of risk, provided the level is not arbitrary or unjustifiable, takes into account the objective of minimizing negative trade effects, and is not a disguised restriction on international trade.

Because there was no scientific evidence of an identifiable risk associated with the growth hormones, the panel found that no basis exists under the SPS Agreement for the EC’s adoption of any measure to achieve any level of protection. If it were otherwise, then the obligations of Article 5 would be eviscerated. Assuming arguendo such scientific evidence did exist, the panel continued, the EC measures were arbitrary, unjustifiable, discriminatory, and a disguised restriction on trade in connection with naturally occurring hormones. The panel concluded that the measures distinguished between products with higher hormone residues that are endogenous (naturally occurring), such as eggs and soy oil that were not subject to an import ban, and the imported meat and meat products with lower hormone residues that are endogenous as well. With regard to the synthetic hormones, the EC measures set a “no

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73 See SPS Agreement art. 3.3 n.2.
74 See SPS Agreement Annex A:5.
75 See WTO Hormone Report, supra note 46, at 185, ¶¶ 8.87-8.89.
77 See WTO Hormone Report, supra note 46, at 187, ¶ 8.98.
78 Pursuant to Article 11.2 of the SPS Agreement and Article 13 of the Dispute Settlement Understanding. For the experts’ analyses and conclusions, see WTO Hormone Report, supra note 46, at 113-61, ¶¶ 6.1-6.241, and the Annex to the Report.
79 See WTO Hormone Report, supra note 46, at 196, ¶ 8.124.
80 See id.
81 See SPS Agreement arts. 5.4, 5.5, 2.3.
82 See WTO Hormone Report, supra note 46, at 214, 215, ¶¶ 8.197, 8.203.
residue” level for those hormones when used as growth promoters, but set an unlimited residue level for naturally occurring hormones. Because the EC could not justify the significant difference in treatment, the panel concluded that the measure was arbitrary, unjustifiable, and discriminatory.83

2. The Appellate Decision

The Appellate Body upheld the panel’s conclusions in most respects; it reversed the panel’s findings and conclusions on Article 5.5 of the SPS Agreement, but agreed with its conclusions that the EC measures violate Article 5.1 of the Agreement.84 The Appellate Body agreed with the panel that although the EC measures under challenge predated the entry into force of the SPS Agreement, the SPS Agreement nevertheless governed the parties’ dispute.85 The Appellate Body noted that the SPS Agreement does not contain any provision limiting its temporal application, and that Article XVI:4 of the Agreement establishing the WTO obligates members to bring their national laws and regulations into conformity with the WTO Agreements (i.e., no existing legislation is grandfathered).86

Regarding the panel’s allocation of burden of proof, the Appellate Body rejected the panel’s allocation to the responding member where the SPS measure under challenge is not based on an international standard. The Appellate Body reversed that panel, instructing that complaining members should be required to present evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with each Article of the SPS Agreement addressed by the panel.87

In response to the EC’s claim that the panel failed to apply the appropriate standard of review in assessing certain facts and scientific material, the Appellate Body observed as a threshold matter that the SPS Agreement was silent on the question of the appropriate standard of review. Focusing on Article 11 of the WTO Dispute Settlement Understanding, the Appellate Body concluded that the proper standard of review was neither a de novo nor a deferential standard, but rather an “objective assessment” standard.88 Turning to the panel’s objective assessment of the facts, the Appellate Body was constrained to conclude that the panel had not failed to discharge its duty under DSU Article 11.89 While conceding that the panel’s assessment was not error-free, the Appellate Body could not say that the panel disregarded deliberately, willfully distorted, or willfully misrepresented evidence.90

In part, the EC defended its measures on the ground that they were based on the “precautionary principle” which states that as long as there is some scientific basis for adopting a particular SPS measure, such measure should satisfy the SPS Agreement.91 The Appellate Body agreed that the precautionary principle is reflected in Articles 5.7 and 3.3 of the SPS Agreement, declined to state whether it was part of customary international law, and agreed with the panel that whatever its status, the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement dealing with risk assessment.92 In this case, the EC failed to carry out a proper risk assessment.

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83 See id. at 218, ¶¶ 8.214, 8.216.
84 See Appellate Body Hormone Report, supra note 57.
85 See id. at 47-48, ¶128.
86 Id.
87 Id. at 39, ¶109.
88 Id. at 43, ¶117.
89 Id. at 50-55, ¶¶ 135-145.
90 Id.
91 Id. at 46-47, ¶¶ 123-125.
92 Id.
Article 3.1 of the SPS Agreement obligates members to base their SPS measures on international standards, except as otherwise provided in the Agreement. The panel equated the phrase "based on" with "conform to." The Appellate Body rejected the panel’s reading of Article 3.1, concluding that the plain meaning of "based on" is built upon, not "in compliance with." Article 3.3 of the SPS Agreement permits members to adopt SPS measures that afford a higher standard of protection than would an international standard, however, a member may do so only if they comply with Article 5 of the SPS Agreement dealing with scientific justification and risk assessment.

Taking the phrase from Article 5.1 of the SPS Agreement that an SPS measure must be "based on a risk assessment," the panel insisted that under Article 5.1 the competent EC authorities actually had to take into account risk assessment studies at the time they promulgated their SPS measures in order to satisfy the "minimum procedural requirement" of Articles 5.1 and 5.2. The Appellate Body rejected the panel’s interpretation of Article 5.1. The Appellate Body concluded that a member could rely on risk assessment studies performed by another member when making its Article 5 risk assessment, and that risk assessment studies did not have to precede the promulgation of the SPS measure under challenge. Nevertheless, the EC had failed to carry out a proper risk assessment.

With regard to the panel's conclusion that the EC's measures violated Article 5.5 of the SPS Agreement as being arbitrary or unjustifiable, the Appellate Body reversed. It assayed the evidence and concluded:

We are unable to share the inference that the Panel apparently draws that the import ban on treated meat and the Community-wide prohibition of the use of the hormones here in dispute for growth promotion purposes in the beef sector were not really designed to protect its population from the risk of cancer, but rather to keep out US and Canadian hormone-treated beef and thereby protect the domestic beef producers in the EC.

The EC measures on hormone-treated beef failed to satisfy the SPS Agreement on two counts: 1) all available scientific evidence, as well as the experts consulted by the panel, stated that the hormones in question are safe when used in accordance with good practice; and 2) the EC had failed to conduct a risk assessment that satisfied the provisions of the SPS Agreement. Even as late as September 1999, the European Commission conceded that no scientific evidence existed to show that hormone-treated beef poses a health risk. Following the refusal of the EC to rescind its import ban, in July 1999, the WTO approved American and Canadian sanctions on EC imports of $124.5 million.

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93 See WTO Hormone Report, supra note 46, at 176, 180, ¶¶ 8.56-8.57, 8.70.
94 See Appellate Body Hormone Report, supra note 57, at 63, ¶ 163.
95 Id. at 68, ¶ 176.
96 See WTO Hormone Report, supra note 46, at 196, ¶ 8.124.
97 See Appellate Body Hormone Report, supra note 57, at 74, ¶ 190.
98 Id. at 96, ¶ 245.
100 See Daniel Pruzin & Gary G. Yerkey, WTO Approves U.S., Canada Sanctions on EU of $124.5 Million in Beef Hormone Dispute, 16 Int'l Trade Rep. (BNA), at 1158 (1999).
B. The Australia Salmon Dispute


Fresh, chilled, or frozen salmon could be imported into Australia only if it was heat treated prior to importation. Canada complained that the import ban violated the SPS Agreement to the extent that the Australian import ban was not based on a risk assessment conducted in conformity with Article 5 of that Agreement. 2. See id. ¶ 3.2.

The central question presented to the Appellate Body was the same as the one presented in the Beef Hormone dispute: Did Australia carry out a proper risk assessment under Article 5.1 of the SPS Agreement? 3. See Appellate Body Salmon Report, supra note 103, ¶ 121.

Australia contended that a 1996 Final Report constituted a risk assessment for purposes of Article 5.1 of the SPS Agreement. 4. See id. ¶ 3.2. The Appellate Body found that a proper risk assessment must: 1) identify the diseases whose entry or spread the member wants to prevent; 2) evaluate the probability of entry of a pest or disease, not just the possibility of such entry; and 3) evaluate the likelihood of entry, establishment, or spread of these diseases according to the SPS measures which might be applied. 5. Appellate Body Salmon Report, supra note 103, ¶ 122. Because the 1996 Final Report did not contain an evaluation of the likelihood of entry, establishment, or spread of the diseases of concern nor an evaluation of the likelihood of entry, establishment, or spread of these diseases according to the SPS measures which might be applied, the 1996 Final Report could not qualify as a risk assessment. Australia, therefore, acted inconsistently with Article 5.1 of the SPS Agreement.

The Appellate Body also upheld the panel’s finding that Australia’s import prohibition was arbitrary, unjustifiable, and a disguised restriction on international trade. While herring and ornamental fin-fish presented an equal or greater risk of the introduction and spread of disease that could threaten domestic stocks, the Australian import ban was limited strictly to salmon. 6. See id. ¶ 177-178. This fact gave rise to a strong inference that the import ban was intended and designed to protect the domestic salmon aquaculture industry from import competition.

The Appellate Body did, however, reverse the panel’s finding that Australia violated Article 5.6 of the SPS Agreement relating to alternative SPS measures that are available reasonably to the member. 7. See id. ¶ 241. Because no evidence was offered to show what level of protection could be achieved by each of the four alternative SPS measures mentioned in the 1996 Final Report, it was not possible to state definitely that Australia had or had not violated Article 5.6. 8. See id. ¶ 242.

In dictum, the Appellate Body reconfirmed that members have the right to determine their own appropriate level of SPS protection, however, the “appropriate level” is to be distinguished from the actual SPS measure adopted. The SPS measure adopted has to be a method that is related rationally to achieving the appropriate level of protection. Also, whatever appropriate level of protection a member chooses, a mem-
ber may choose “zero risk” as an appropriate level of protection under the SPS Agreement. The Appellate Body clarified that,

it is important to distinguish . . . 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.” This does not mean, however, that a member cannot determine its own appropriate level of protection to be “zero risk.”\footnote{See id. ¶ 125.}

The Appellate Body’s decision is an important one for determining what constitutes a proper risk assessment in the context of the spread of pests and diseases. What a proper risk assessment will be in the context of additives or contaminants to food remains to be seen.

C. The Japan Food Quarantine Dispute

To prevent the introduction of codling moth, a pest of quarantine significance to Japan, since 1950 Japan has had in place a requirement that the efficacy of quarantine treatment for each variety of certain agricultural products be tested and confirmed before those products may be imported into Japan.\footnote{See Report of the WTO Panel, Japan — Measures Affecting Agricultural Products, WT/DS76/R, ¶¶ 2.18-2.22 (Oct. 27, 1998).} The United States challenged the varietal testing requirement as applied to eight products (apples, cherries, nectarines, walnuts, apricots, pears, plums, and quince) as violative of the SPS Agreement.\footnote{See id. ¶¶ 4.16-4.24.} The United States claimed that the testing-by-variety (versus a testing-by-product) requirement lacked a scientific justification. Japan countered that having established that the products in question are host plants of codling moth, Japan was justified in taking a precautionary approach and, therefore, that its varietal testing requirement was warranted under the precautionary principle.\footnote{See id. ¶¶ 4.25-4.34.}

While conceding that Japan could apply a standard that was stricter than an international standard, the Appellate Body noted that Japan was free to do so only if there was a scientific justification for such an SPS measure. According to the Appellate Body, “there is a ‘scientific justification’ for an SPS measure . . . if there is a rational relationship between the SPS measure at issue and the available scientific information.”\footnote{Report of the Appellate Body, Measures Affecting Agricultural Products, AB-1998-8, WT/DS76/AB/R, at 21. ¶ 79 (Feb. 22, 1999).} The Appellate Body concluded that the varietal testing requirement as applied to apples, cherries, nectarines, and walnuts lacked sufficient scientific evidence.\footnote{See id. ¶¶ 81-85.} The Appellate Body added in connection with Japan’s reliance on the precautionary principle that the precautionary principle, while reflected in the preamble, Article 3.3, and Article 5.7 of the SPS Agreement, was not written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the specific obligations of WTO members under the Agreement.\footnote{See id. ¶¶ 81-82.}
With regard to the varietal testing requirement for apricots, pears, plums, and quince, the Appellate Body struck down Japan’s SPS measure on the ground that Japan had failed to conduct a risk assessment as required under Article 5.1 of the SPS Agreement. A risk assessment must: 1) identify the diseases to be prevented; 2) evaluate the likelihood of entry of such diseases; and 3) evaluate the likelihood of entry according to the SPS measures that might be applied. Because Japan’s 1996 risk assessment did not take into account the third factor, i.e., what alternative SPS measures might be applied, the Appellate Body invalidated the varietal testing requirement in connection with apricots, plums, pears, and quince.

V. What Are the Broad Lessons of These WTO Decisions?

Although the burden of proof of a violation of the SPS Agreement rests with the complaining WTO member, WTO jurisprudence to date shows that that burden is a relatively low barrier to clear. This is not a surprising result: the WTO is first and foremost the premier international organization for the enforcement of rules designed to promote open trade, and only incidentally an institution that enforces SPS standards.

Why have responding countries been uniformly unsuccessful in WTO dispute settlement proceedings? While the pro-trade bias of the WTO might explain this result in part, the ultimate outcome of SPS disputes brought to the WTO are not a foregone conclusion. The Appellate Body jurisprudence teaches at least five valuable lessons for future respondents:

- The WTO’s own “precautionary principle” seems to be, “If in doubt, trade wins out.” The burden of proof certainly favors the exporting WTO member and, consequently, trade.
- Be active in the international standards-setting process. To the extent that importing countries’ SPS measures are a barrier to trade with an insufficient basis in science, then international standards can act as a sword to cut down such measures.
- Use (or do not use) international standards, but be clear on the consequences. In the absence of a genuine SPS emergency, e.g., mad cow disease or the introduction of tainted food, if an importing country elects not to use a relevant international standard, it must be exhaustively thorough in the preparation of SPS measures that are not based on and that do not conform to international standards. An importing country that adopts its own SPS standards must do so on the basis of “sufficient scientific evidence” (whatever the term “sufficient” means).
- Conduct a proper risk assessment. A proper risk assessment must identify the diseases whose entry or spread the member wants to prevent, evaluate the probability of entry of a pest or disease, not just the possibility of such entry, and evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied. Do not merely make some evaluation of the likelihood of entry or spread of a disease or pest; rather, establish a likelihood that a pest or disease will enter or be spread in the absence of the SPS measure. In the Australia Salmon decision, for example, Australia’s ban on the importation of fresh salmon could not be justified on the basis of a risk assessment that considered only the possibility of entry of disease. Likewise, in the

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116 See id. ¶¶ 112-114.
Japan Food Quarantine decision, Japan’s SPS measure violated the SPS Agreement because its risk assessment did not take into account what alternative SPS measures might be applied.

- Reliance on the precautionary principle is misplaced. Although the precautionary principle is reflected in Articles 5.7 and 3.3 of the SPS Agreement, it only can be invoked when scientific evidence is “insufficient.” As the EC Beef Hormone decision illustrates, all the available scientific evidence pointed to the conclusion that the hormones in dispute are safe when used in conformity with good practice. The precautionary principle does not override the express provisions of Articles 2 and 5 of the SPS Agreement requiring that SPS measures be based on scientific evidence and a risk assessment. 117

Moving forward, two conclusions are clear. First, a strategy for any importing country to pursue is to leverage international standards-setting bodies for the adoption of international standards that meet a country’s SPS standards. Under the SPS Agreement, an international standard presumptively is valid, thereby placing a heavy burden of proof on a complaining WTO member. Having made that suggestion, however, the reality is that leveraging international standards-setting bodies is problematic for developing countries because they lack the scientific expertise and resources to influence the debate. The commitment that developed countries made in Article 10.4 of the SPS Agreement to encourage and facilitate the participation of developing countries in the international standards-setting organizations seems to have turned out to be hollow. Coalition building with developed countries perhaps offers a better alternative strategy for influencing the debate. In that connection, the Cairns Group, named after a 1986 meeting held in Cairns, Australia, represents sixteen agricultural exporting nations from developed and developing countries which support liberalization of agricultural trade. 118 Given their common goal, this coalition of developed and developing countries should become more active in the international standards-setting process. 119

Second, the precautionary principle is not a viable defense in a WTO dispute settlement proceeding. A number of environmental groups and the EU have advocated amending the SPS Agreement to permit reliance on the precautionary principle. 120 Nevertheless, the Appellate Body, although somewhat delphic in its pronouncements on this score, has signaled that the SPS Agreement will have to be amended if WTO members want to raise the precautionary principle as a legal defense in WTO dispute settlement.

VI. What Are the Specific Lessons of These WTO Decisions for the GMO Controversy?

What insight do these three WTO decisions give to the current international controversy over GMOs? To the extent that relevant scientific evidence is insufficient to show that GMOs are safe to humans, animals, and plants, importing countries may on

117 See Kirwin, supra note 99.
118 The Cairns Group members include Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay. Bolivia, Costa Rica, and Guatemala joined the Cairns Group as observers in 1999.
a temporary basis exclude such products after conducting a risk assessment (i.e., an
evaluation that GMOs are a potential source of adverse effects on human or animal
health). There currently exists some scientific evidence which indicates that certain
GMOs pose just such a threat to animal life. At the same time, other genetically
modified (GM) products appear to pose no health risk.

What importing countries do with this science is the next question. If they impose
an import ban, it will be up to the United States and Canada, the chief advocates of
GMOs, to collect sufficient scientific evidence to show that exported products con­taining GMOs are safe. If they are unable to do so, then under the Article 5.7 pre­cautionary principle importing countries may exclude their importation, provided they
continue to gather additional information necessary for a more objective assessment
of risk within a reasonable period of time.

As of November 1999, the United States and the EU were discussing the creation
of an ad hoc scientific panel to resolve GMO issues. Biotech companies also had
extended an olive branch, offering, inter alia, to label all GM products through all
processing stages. American farmers, however, do not want U.S.—EU negotiations
to drag on indefinitely. Japan has proposed the creation of a forum in connection
with the WTO agricultural negotiations set to begin January 1, 2000 to address the
issue of GMOs. The United States has urged WTO members to participate in the
work of Codex to advance agreement on relevant international standards for GMOs.
Interestingly, the United States has not engaged in any WTO dispute settlement panel
"saber rattling" over the GMO issue. Bearing in mind that the United States has not
been hesitant about using the WTO dispute settlement mechanism to resolve trade
disputes that some observers have considered trivial, its hesitancy in calling for the
creation of a WTO panel suggests that there is insufficient clarity in the SPS Agree­ment to ensure a U.S. victory.

In connection with proposed EU regulations requiring that all products containing
GMOs be labeled for the benefit of consumers, the United States has objected that

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121 See Toshio Aritake, Japan Enacts Labeling Standards for Processed Agricultural Products, 16 Int'l
said as many as 44 percent of butterfly larvae used in their experiment died four days after consuming leaves
sprinkled with the pollen of GMO com"); EC Freezes Approval of U.S. GMO Seed, supra note 1.
122 See EU Scientists OK Food Products Derived from Genetically Modified Corn Seeds, 16 Int'l Trade
123 See Canadian Minister Dismisses Allegations That Genetically Modified Foods Are Unsafe, 16 Int'l
Trade Rep. (BNA), at 1762 (1999); U.S. Canada Lodge Complaints Over Rapid Rise in Genetic Labeling
124 See Mark Felsenthal & Corbett B. Daly, Clinton, Prodi Vow to Ease WTO Differences, Create Tem­porary
Scientific Panel on GMOs, 16 Int'l Trade Rep. (BNA), at 1776 (1999); Gary G. Yerkey, U.S., EU to
Begin Talks Aimed at Settling Row Over EU Ban on GMO Imports, 16 Int'l Trade Rep. (BNA), at 1862
(1999).
125 See Biotech Companies Propose to EU Measures Aimed at Fears of GMO Products, 16 Int'l Trade
126 See Gary G. Yerkey, Farm Leader Urges U.S. to Establish Six-Month Deadline for Biotech Pact with
127 See Preparation for the 1999 Ministerial Conference, Proposal of Japan on Genetically Modified
Organisms (GMOs), WT/GC/W/365 (Oct. 12, 1999).
128 See COMMITTEE ON TECHNICAL BARRIERS TO TRADE, Genetically Modified Agricultural and Food Prod­ucts,
Submission from the United States, G/TBT/W/115 (June 17, 1999).
129 See Yerkey, supra note 126 ("I[sl Siddiqui, special assistant to the secretary of agriculture for interna­tional affairs, .. said that if the U.S.—EU discussions were to fail, the United States would be prepared to seek
clarification of existing WTO rules to ensure that national import approval procedures for biengineered prod­ucts were transparent, science-based, and predictable."). See also Yerkey, supra note 124 ("Senior U.S. officials said .. that the United States was prepared to bring the issue into the WTO negotiating process if it cannot be
settled on a bilateral basis.").
unless such labeling requirements are science-based, they are invalid under either the SPS Agreement or the TBT Agreement. Yet even as the United States objects to GMO labeling requirements proposed by its trading partners, a bill entitled, “Genetically Engineered Food Right to Know Act,” was being introduced in Congress in November 1999. Also, it is ironic that environmental groups are among the most vocal opponents of GMOs when it is indisputable that the cultivation of GM crops has direct and substantial benefits for the environment. GM corn and soybeans, for example, are designed to be drought, disease, weed, and pest resistant, meaning that fewer chemical pesticides, fungicides, and herbicides have to be used to control pests, diseases, and weeds, and less water has to be used to irrigate GM crops.

VII. FUTURE DIRECTIONS: SHOULD THE SPS AGREEMENT, OR OTHER WTO AGREEMENTS, BE AMENDED?

As the 135-member WTO launches its latest round of multilateral trade negotiations, the SPS Agreement undoubtedly will be on the agenda. An immediate first step should be the call for a standstill on all SPS disputes pending completion of the negotiations. In the course of the negotiations, countries will have the opportunity to air concerns over SPS measures that block market access. Many of these measures predate the SPS Agreement, which was the case with the three previously discussed disputes. These SPS measures need to be revisited in an atmosphere that is less charged than the WTO dispute settlement process.

Beyond a cease-fire/moratorium on WTO complaints, a nonexhaustive list of possible reforms include the following proposals:

- Risk analysis has three components: risk assessment (addressed in the SPS Agreement), risk management, and risk communication. The role of risk communication needs to be elaborated on, especially in connection with labeling of products to address consumer concerns about the safety of products.
- The WTO has an image problem. Many groups view the WTO as secretive and closed. Meaningfully increasing the role of non-governmental organizations and civil society in the discussions will improve the WTO’s legitimacy, increase trust, and polish its tarnished image.
- The ability of developing countries to participate in the process needs improvement. If and when a developing country is put into the WTO docket for allegedly violating the SPS Agreement, it will be burdened economically in meeting the scientific arguments that are an inherent part of such disputes. Article 11.2 of the SPS Agreement dealing with the appointment of experts should be amended by making the appointment of expert advisory panels mandatory, making such expert panels exclusive, and providing that they be paid out of the WTO’s budget. A closely related issue is the provision of technical assistance to developing coun-

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130 Article 2.2 of the Agreement on Technical Barriers to Trade provides in part: technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective. Such legitimate objectives are, inter alia: protection of human health or safety, animal or plant life or health, or the environment.

TBT Agreement art. 2.2.


133 See id.
tries, a commitment that developed countries made in Article 9 of the SPS Agree-
ment, which needs to be redoubled.

- The WTO Dispute Settlement Understanding should be amended to provide for fee
  shifting, so that the loser pays the winner’s attorneys’ fees and related costs of
  prosecuting or defending a WTO complaint. The expense alone of bringing a WTO
  complaint can deter a developing country from bringing an otherwise meritorious
  complaint against a developed country. This cost also can be used as an instrument
  of harassment of developing countries by developed countries. Alternatively, the
  WTO should create the equivalent of a legal aid attorney (or public defender) to
  represent developing countries in WTO disputes. This reform could have the salu-
  tary effect of reducing the WTO dispute settlement caseload across the board.

- The SPS Agreement should be amended to clarify the status of multilateral envi-
  ronmental agreements vis-à-vis the SPS Agreement, namely, in the event of a
  conflict, which prevails? For example, Article 104 of the North American Free
  Trade Agreement (NAFTA) provides that in the event of an inconsistency be-
  tween NAFTA and one of three multilateral environmental agreements (the Con-
 vention on International Trade in Endangered Species, the Basel Convention on
  Transboundary Movements of Hazardous Wastes, and the Montreal Protocol on
  Substances that Deplete the Ozone Layer), the latter prevails.

- The SPS Agreement should be expanded to include animal welfare issues. For
  instance, the EU ban on the hormone bovine somatotropin, which enhances milk
  production in dairy cows on October 26, 1999, on the ground that such a ban
  promotes animal health and welfare.134

- A precautionary principle based on clear guidelines should be included in the
  SPS Agreement.135

VIII. CONCLUSION

On January 29, 2000, 130 countries concluded a biosafety protocol to the Con-
vention on Biological Diversity.136 Under the Cartagena Protocol on Biosafety,137 gov-
ernments have the right to block imports of certain GMOs if there is a reasonable
 doub whether they could endanger public health or the environment. The Miami
 Group of the major GMO-producing nations—Argentina, Australia, Canada, Chile,
 the United States, and Uruguay—compromised on this precautionary principle lan-
 guage by agreeing to the inclusion of the word “health” in the principle. Under Article
 10 of the Protocol, an importing country may reject GM imports despite the “lack of
  scientific certainty . . . regarding the extent of the potential adverse effects of a living
  modified organism on the conservation and sustainable use of biological diversity.”138
 At the same time, however, Article 15 provides that an importing country “shall en-
 sure that risk assessments are carried out in a scientifically sound manner” in decid-
 ing whether to permit the transboundary movement of a living modified organism.139

134 See Joe Kirwin, EU Proposes Permanent Ban on BST; Expected to Heighten Tensions with U.S., 16
135 See Gary G. Yerkey, EU Set to Unveil Plan to Defuse Dispute with U.S. Over “Precautionary Prin-
136 See Roland Blassnig & Gary G. Yerkey, Countries Agree on Biosafety Protocol Regulating
 Transboundary Movement of GMOs, 17 Int’l Trade Rep. (BNA), at 187 (2000); Ruth Walker, Global Pact on
 GMOs Approved, CHRISTIAN SCI. MONITOR, Jan. 31, 2000, at 6.
137 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000. The text of
138 See id. art. 10.
139 See id. art. 15.
What is the relationship of the Protocol to the SPS Agreement? What will be the Protocol’s impact, if any, on WTO dispute resolution under the SPS Agreement? The short answer is quite likely “none.” The preamble to the Protocol underscores that the Protocol “shall not be interpreted” as changing the rights and obligations of countries under other international agreements.140 The preamble states further that trade agreements and international environmental agreements should be mutually supportive.141 U.S. Trade Representative Charlene Barshefsky has stated that the Protocol preserves the rights of countries under other international agreements, such as the SPS Agreement, thereby ensuring that the Protocol is not misused for protectionist purposes.142 The Protocol’s impact is further muted by its limited scope: GMOs intended for food, feed, and processing (i.e., commodities) are exempted from the export-approval process established under the Protocol.143

The Protocol will not take effect until fifty countries have ratified it. Entry into force is not expected before the end of 2001.144

140 See id. Preamble.
141 See id.
142 See Blassnig & Yerkey, supra note 136, at 187.
143 See id. The Protocol covers items such as trees and seeds.
144 See id.