WORLD TRADE ORGANIZATION

WT/DS18/9
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(99-0670)

AUSTRALIA - MEASURES AFFECTING IMPORTATION OF SALMON

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

Award of the Arbitrator
Said El-Naggar

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I. Introduction

1. On 6 November 1998, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1] and the Panel Report[2], as modified by the Appellate Body Report, in *Australia – Measures Affecting Importation of Salmon*. On 25 November 1998, Australia informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute and that, in doing so, it would be "mindful" of the provisions of Article 3.5 of the DSU. Australia indicated that it would require a reasonable period of time to complete the implementation process.

2. By letter of 27 November 1998, Australia sought Canada's agreement to a 15-month period as the "reasonable period of time" for implementation. In a letter of 14 December 1998, Canada advised Australia that it could not agree to this proposal. Pursuant to Article 21.3 of the DSU, consultations between the parties were held on 30 November, and on 18 and 21 December 1998, but these did not produce agreement on a reasonable period of time for the implementation process.

3. By communication of 24 December 1998, Canada requested that the reasonable period of time be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. By joint letter of 11 January 1999, the parties informed the Director-General of the World Trade Organization (the "WTO") that they had agreed that I should act as Arbitrator. The parties were informed, by letter of 13 January 1999, that the Director-General had conveyed their wishes to me and that I had accepted the appointment. Thereafter, by letter of 14 January 1999, the parties intimated to me that they had agreed to extend the time-period for the arbitration process, fixed at 90 days by Article 21.3(c) of the DSU, by a further 19 days, that is until 23 February 1999. Notwithstanding this extension of the time-period for the arbitration process, the parties stated that my award would be deemed to be an award made under Article 21.3(c) of the DSU.

4. Written submissions were received from Australia and Canada on 22 January 1999 and an oral hearing was held on 2 February 1999.

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[1] *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998.

[2] *Australia - Measures Affecting Importation of Salmon*, WT/DS18/R, adopted 6 November 1998

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II. Arguments of the Parties

A. *Australia*

5. Australia argues that it is impracticable to comply immediately with the relevant recommendations and rulings of the DSB, as decisions on implementation require the fulfilment of certain processes in accordance with Australia's legal system. In accordance with those processes, Australia estimates that 15 months from the date of adoption of the Appellate Body and Panel reports represent the shortest period possible for implementation under Australia's legal system.[3]

6. Australia rejects Canada's suggestion that the DSB's recommendations and rulings can be implemented either by repealing or amending the measure concerned or by granting an import permit under the Quarantine Proclamation 1998 ("QP 1998"), which is the successor to Quarantine Proclamation 86A ("QP86A"). Australia considers that the measure can be brought into conformity with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*") without repeal or amendment since it does not contain an absolute ban. Rather, it allows the Director of Quarantine to permit entry of otherwise prohibited products on the basis of a risk assessment.

7. As regards Canada's suggestion that a permit be granted to allow imports of Canadian salmon, Australia emphasizes that such a permit must be based on a risk assessment conducted in accordance with procedures determined by Government. Failure to respect those procedures may provide grounds for review under the *Administrative Decisions (Judicial Review) Act 1977* (the "*Judicial Review Act 1977*").

8. According to Australia, implementation of the obligation contained in Article 5.5 of the *SPS Agreement* could also not be achieved by the introduction of measures on certain other aquatic products, comparable to those currently applied on salmon, without risk assessments on those other products.

9. Australia states that decisions on implementation will be taken on the basis of generic risk assessments that have already commenced. These assessments cover: non-viable salmonids, live ornamental finfish and non-viable marine finfish. The measures adopted will be reflective of Australia's obligations under Article 3.5 of the DSU and they may incorporate measures differentiated by country of origin where that is justified by the risk assessments, provided that such measures

[3] Australia's written submission, para. 3.

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achieve Australia's appropriate level of protection. It has been estimated that it will be possible to take decisions on the basis of these risk assessment procedures by February 2000.

10. Australia emphasizes that, although it is required to bring its measure into conformity, it is not necessarily required to introduce less trade-restrictive measures. Members are afforded a measure of discretion in the means chosen to implement, provided that the means are consistent with the recommendations and rulings of the DSB, with the covered Agreements, and with the provisions of Article 3.5 of the DSU. Australia's obligation is to ensure that its measures are based on proper risk assessments and that measures applicable to salmon and other relevant aquatic products do not result in discrimination or a disguised restriction on trade.

11. The mandate of the arbitrator is solely to determine the "reasonable period of time" for implementation. It does not entitle him to suggest or determine ways or means of implementation. The guideline for the arbitrator in determining that period is 15 months from the date of adoption by the DSB of the Appellate Body and Panel Reports. However, this period may be shorter or longer than 15 months, according to the "particular circumstances" of the case. Australia considers that Canada has the burden of proof insofar as it seeks to prove that there are "particular circumstances" justifying a period of time shorter than 15 months. As Australia has not proposed a period longer than 15 months, it is not required to prove "particular circumstances" justifying a 15-month period.

12. It has been the practice of arbitrators to interpret the reasonable period of time as the shortest period possible, within the legal system of the Member concerned, to effect implementation.[4] But arbitrators are not required to consider the shortest period of time within which the measure can be withdrawn or modified, rather they should consider the shortest period of time for implementation according to the means chosen. In this case, implementation can be effected in a WTO-consistent manner without legislative amendment. Within the framework of Australia's legal system, this means of implementation will require a period of 15 months.

13. In that respect, Australia states that quarantine decisions are adopted on the basis of delegated legal authority, in accordance with Government decisions on the procedures applicable to the conduct of a risk assessment process. The *Quarantine Act 1908* constitutes the basic framework for the exercise of quarantine authority. The Act provides for the Governor-General to prohibit, by Proclamation, the importation into Australia of, *inter alia*, animals or other articles likely to introduce

[4]Award of the Arbitrator under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/15, WT/DS48/13, 29 May 1998, para. 26 and Award of the Arbitrator under Article 21.3(c) of the DSU, *Indonesia - Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, para. 22.

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disease. The Governor-General may also empower the Director of Quarantine to permit the import of otherwise prohibited "things". Proclamations by the Governor-General are subordinate legislation. QP 1998, promulgated by the Governor-General, provides the legal basis for the exercise of the Director of Quarantine's powers to authorize the import of, *inter alia*, the fresh, chilled or frozen salmon from Canada (the "salmon product at issue"). As noted, his decisions are subject to judicial review under the *Judicial Review Act 1977* and must, therefore, be based on the procedures determined by the Government for the conduct of risk assessments.

14. These procedures are set down in *The AQIS Import Risk Analysis Process Handbook* (the "AQIS Handbook").[5] This Handbook details a series of steps to be taken in the course of an "Import Risk Analysis" procedure. Some of the steps are allocated a specific time-period for completion, but others are not. Those with a specified time-period are generally concerned with public consultation periods and with appeals. A total of 315 days is required for the completion of those steps. Clearly, the remaining steps also require an appropriate time-period for completion. This is estimated on a case-by-case basis by AQIS and the Risk Analysis Panel concerned.

15. Since the three risk assessment procedures that are relevant to this dispute will be completed by February 2000, Australia requests that the reasonable period of time for implementation be 15 months. Australia is not seeking a 15-month period because that period of time is required to undertake risk assessments, but because risk assessments are a necessary part of the overall decision-making process and that process cannot be completed in less than 15 months. This period does not exceed the "guideline" set down in Article 21.3(c) of the DSU and Canada has the burden of proof in demonstrating that there are "particular circumstances" justifying a shorter period.

B. *Canada*

16. At the core of this arbitration is Australia's contention that the "reasonable period of time" should include the time to conduct new risk assessments. Australia's contention must be rejected, both because it runs directly contrary to the ruling of the arbitrator in *European Communities – Hormones* and because it is manifestly unreasonable for the effective functioning of both the *SPS Agreement* and the dispute settlement system.

17. Like the present case, the measure at issue in *European Communities – Hormones* was found to be inconsistent with Article 5.1 of the *SPS Agreement* because it was not based on a risk assessment. The European Communities sought to have the time needed to conduct a risk assessment

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[5]Australia's written submission, Exhibit A. AQIS is an acronym for Australian Quarantine and Inspection Service.

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included in the reasonable period of time for implementation. The arbitrator stated that the time needed to conduct scientific studies or to consult with experts had no relevance in determining the appropriate duration of the reasonable period of time.[6] Thus, according to Canada, Australia is seeking allowances for considerations that have been found to be irrelevant to the task confronting the Arbitrator.

18. Canada considers that Australia wishes to carry out the new risk assessments in order to provide the scientific evidence necessary to demonstrate the consistency of a measure already judged to be inconsistent with the *SPS Agreement*. This approach was rejected by the arbitrator in *European Communities – Hormones*.[7] Canada emphasizes that although the measure at issue was adopted 24 years ago and should have been consistent with the *SPS Agreement* as from 1 January 1995, Australia has never been able to provide credible evidence to support it. Indeed, there are several risk assessment studies that conclude that fresh, chilled or frozen salmon from Canada can be imported with negligible risk.[8]

19. In Canada's view, by seeking to include in the reasonable period the time required to conduct a further risk assessment on salmonids, Australia is, in effect, claiming the benefit of Article 5.7 of the *SPS Agreement* through the guise of implementing the DSB’s recommendations and rulings. In addition, by seeking to include the time to do risk assessments on non-salmonid species, Australia is attempting to win through the implementation process that which it was denied by the Panel: a delay in removing or modifying the measure's inconsistency with Article 5.5.

20. To take account of the time needed to do new risk assessments would invite abuse of Articles 5.1 and 5.5 of the *SPS Agreement*. Findings of inconsistency with either provision would have little or no consequence. A Member could adopt a measure inconsistent with those provisions secure in the knowledge that, even if the measure were found to be inconsistent with the *SPS Agreement*, the Member would then be granted time to conduct risk assessments. Furthermore, the Member might then claim that such risk assessments demonstrated the consistency of the original measure. Such an approach would deprive Articles 5.1 and 5.5 of the *SPS Agreement* of virtually all their effect.

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[6]*European Communities – Hormones*, *supra,* footnote 4, para. 39.

[7]*Ibid.*

[8]New Zealand, *The Risk of Introducing Exotic Diseases of Fish into New Zealand Through the Importation of Ocean-Caught Pacific Salmon from Canada*, prepared by Stuart C. MacDiarmid (September 1994); and M. Stone, S. MacDiarmid and H. Pharo, *Import Health Risk Analysis: Salmonids for Human Consumption* (New Zealand: Ministry of Agriculture Regulatory Authority, 1997); D. Vose, Quantitative analysis of the risk of establishment of *Aeromonas salmonicida* and *Renibacterium salmoninarum* in Australia as a result of importing Canadian ocean-caught salmon.

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21. Canada, therefore, submits that it would be manifestly unreasonable to allow Australia to include in the reasonable period of time the time needed to do new risk assessments.

22. In seeking a 15-month period for implementation, Australia appears to concede that, however else implementation might be accomplished, it can be achieved in 15 months by a decision of the Director of Quarantine. As this 15-month period includes the time to conduct new risk assessments, which in Canada's view are not related to implementation, Australia is implicitly conceding that the Director of Quarantine could make the necessary determinations well within 15 months.

23. Canada recalls that, in *European Communities – Hormones*, the arbitrator found that:

> Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.[9]

24. Furthermore, the arbitrator in *European Communities – Hormones* also stated that where implementation could be accomplished by "administrative means, the reasonable period of time should be considerably shorter than 15 months."[10] In Canada's opinion, the process involved in bringing the impugned measure into conformity with Australia's obligations under the *SPS Agreement* is an administrative, not legislative, process. It can, therefore, be effected in much less than 15 months.

25. To the best of Canada's knowledge, Australian *law* provides no time limits for administrative determinations by the Director of Quarantine since the procedures set out in the AQIS Handbook are merely policy guidelines and are not legally binding. Canada maintains that AQIS's choice of policy should not adversely affect Canada in terms of what constitutes a reasonable period of time for implementation.

26. Canada believes that, on the basis of the ample evidence already before Australia and in view of the absence of scientific justification for the measure, there is no reason why Australia should not bring its measure into compliance expeditiously, through the most direct means available: an administrative decision by the Director of Quarantine allowing the importation of fresh, chilled or frozen Canadian salmon.

[9] *Supra*, footnote 4, para. 26, cited with approval by the Arbitrator in *Indonesia – Autos*, *supra*, footnote 4, para. 22.

[10] *Supra*, footnote 4, para. 25.

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III. The Reasonable Period of Time

27. My mandate in this arbitration is governed by Article 21.3(c) of the DSU. It provides that when the "reasonable period of time" is determined through arbitration:

> … a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

28. The precise meaning of this provision becomes clear when it is read in its context. Paragraph 1 of Article 21 provides:

> Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

29. It should also be noted that the second sentence of paragraph 3 of Article 21 stipulates that the Member concerned shall have a reasonable period of time "[i]f it is impracticable to comply immediately with the recommendations and rulings" of the DSB. Article 3.7 of the DSU explains what is meant by immediate compliance:

> A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, *the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements*. The provision of compensation should be resorted to only if the *immediate withdrawal* of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. (emphasis added)

30. Taken together, these provisions clearly define the rights and obligations of the Member concerned with respect to the implementation of the recommendations and rulings of the DSB. In the absence of a mutually agreed solution, the first objective is usually the *immediate withdrawal* of the measure judged to be inconsistent with any of the covered agreements. Only if it is impracticable to do so, is the Member concerned entitled to a reasonable period of time for implementation. When the reasonable period of time is determined through arbitration, the guideline for the arbitrator is that it should not exceed 15 months from the date of adoption of the panel and/or Appellate Body reports. This does not mean, however, that the arbitrator is obliged to grant 15 months in all cases. The reasonable period of time may be shorter or longer, depending upon the particular circumstances.

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31. A certain difficulty arises in this case because of the divergent views of the parties as to what constitutes implementation. According to Australia, implementation of the recommendations and rulings of the DSB *in casu* involves conducting risk assessments, not only with respect to the salmon product at issue, but also with respect to non-salmonid products. In Australia's opinion, the "reasonable period of time" should be such as to enable it to conduct those risk assessments since they will form the basis of the decisions on implementation. Australia argued, both in its written submission and in its oral statement, that the outcome of the risk assessments currently being conducted cannot be prejudged. Implementation could well result in the continuation of the import prohibition on the salmon product at issue or in the admission, with or without conditions, of that product into the Australian market. It all depends, in the view of Australia, upon the outcome of the risk assessments.

32. Canada does not share Australia's view on the meaning of implementation of the recommendations and rulings of the DSB. According to Canada, whether or not Australia wishes to carry out studies or risk assessments, the conduct of such studies does not constitute implementation of the recommendations and rulings of the DSB and cannot be included in the calculation of the reasonable period of time. There is no reason, Canada argues, why Australia should not bring its measure into compliance expeditiously through the most direct means available, i.e., an administrative decision by the Director of Quarantine allowing the importation of fresh, chilled or frozen Canadian salmon.

33. Clearly, what constitutes a "reasonable period of time" depends upon the action which Australia takes under its legal system to implement the recommendations and rulings of the DSB. If implementation is effected by means of an administrative decision to repeal or modify the measure at issue or by means of a permit granted by the Director of Quarantine, the length of time needed to carry out such a process would be different from what it would be if Australia were to conduct a series of risk assessments.

34. I believe it is necessary to recall the findings and conclusions of the Appellate Body[11] and of the Panel[12], as modified by the Appellate Body, which are the subject of the recommendations and

[11] *Supra*, footnote 1.

[12] *Supra*, footnote 2.

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rulings of the DSB. The relevant aspects may be summarized as follows:

(a) the SPS measure at issue in this dispute is the import prohibition on fresh, chilled or frozen salmon set forth in QP 86A (now QP 1998), as confirmed by the 1996 Decision;

(b) by maintaining without a proper risk assessment, or without risk assessment, an import prohibition on fresh, chilled or frozen salmon from Canada, Australia has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the *SPS Agreement*;

(c) by maintaining the measure at issue, Australia has acted inconsistently with its obligations under Article 5.5 and, by implication, Article 2.3 of the *SPS Agreement*.

35. I am mindful of the limits of my mandate in this arbitration. I am particularly aware that suggesting ways and means of implementation is not part of my mandate and that my task is confined to the determination of the "reasonable period of time". Choosing the means of implementation is, and should be, the prerogative of the implementing Member. In the words of the arbitrator in *European Communities - Hormones*:

> … An implementing Member … has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.[13] (emphasis in original)

However, he also said:

> … It would not be in keeping with the requirement of *prompt* compliance to include in the reasonable period of time, time to conduct studies or to consult experts to demonstrate the *consistency* of a measure already judged to be *inconsistent*. That cannot be considered as "particular circumstances" justifying a longer period than the guideline suggested in Article 21.3(c). This is not to say that the commissioning of scientific studies or consultations with experts *cannot* form part of a domestic implementation process in a particular case. However, such considerations are not pertinent to the determination of the reasonable period of time.[14] (emphasis in original)

[13] *Supra*, footnote 4, para. 38.

[14] *Ibid*., para. 39.

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36. The Appellate Body was unequivocal in its conclusion that the measure in dispute is the import prohibition on Canadian fresh, chilled or frozen salmon, contained in QP 86A and confirmed by the 1996 Decision. It was equally unequivocal in its findings that such an import prohibition is inconsistent with Articles 5.1, 2.2, 5.5 and 2.3 of the *SPS Agreement*. Given these findings and conclusions, it is difficult, indeed, to accept the view that, in the determination of the reasonable period of time, account should be taken of the time needed to conduct risk assessments to demonstrate the consistency of the import prohibition already found to be inconsistent with the provisions of the *SPS Agreement*.

37. I turn now to the issue of the "reasonable period of time" in the case at hand. As mentioned before, Australia considers 15 months to be the minimum period for implementation in accordance with Australian law. Canada, on the other hand, holds the view that Australia can implement the recommendations and rulings of the DSB in much less than 15 months. Australia maintains that the burden of proof falls on Canada to demonstrate that there are "particular circumstances" justifying a shorter period than the guideline of 15 months. Australia also maintains that, as it has not proposed a period longer than 15 months, it is not required to prove "particular circumstances" justifying a 15-month period.

38. It has been pointed out that the arbitrator is not obliged to grant 15 months as the reasonable period for implementation in all cases. "Particular circumstances" justifying a longer or shorter period must be taken into account on a case-by-case basis. In the present case, there are certain considerations which persuade me that the reasonable period of time should be significantly less than 15 months. In the first place, Australia's request for 15 months was based on the assumption that a good part, if not most, of that period would be used to conduct a number of risk assessments. In its written submission, Australia points out that the AQIS Handbook details a series of steps to be taken in the course of an Import Risk Analysis procedure under Australian law. Some of the steps are allocated a specific time-period, but others are not. A total of 315 days, i.e., 10½ months, is required for the completion of the time-bound steps for scientific studies under the procedures of the AQIS Handbook.[15] Since I have concluded that conducting risk assessments is not pertinent to the determination of the reasonable period of time, it follows that the reasonable period in this case should be considerably less than 15 months. In the second place, both parties agree with the arbitrator in *European Communities - Hormones* that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.[16] Both parties also agree that the process

[15]Australia's written submission, para. 51.

[16]*European Communities - Hormones*, *supra*, footnote 4, para. 26.

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involved in bringing the measure in dispute into conformity with Australia's obligations under the *SPS Agreement* is an administrative, not a legislative, process. As pointed out by the arbitrator in *European Communities - Hormones*, when implementation can be effected by administrative means, the reasonable period of time should be "considerably shorter than 15 months."[17]

IV. The Award

39. In light of the above considerations, I determine that the reasonable period of time for Australia to implement the recommendations and rulings of the DSB in this case is *eight months* from the date of adoption of the Appellate Body and Panel Reports by the DSB, i.e. eight months from 6 November 1998.

[17] *European Communities - Hormones*, *supra*, footnote 4, para. 25.

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Signed in the original at Geneva this 11th day of February 1999 by:

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