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**THE AGREEMENT ON THE APPLICATION OF SANITARY AND
PHYTOSANITARY MEASURES AND THE AGREEMENT ON TECHNICAL
BARRIERS TO TRADE¹**

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Nature of the Agreements

The WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”) and the *Agreement on Technical Barriers to Trade* (“TBT Agreement”) are in many ways related accords. Both agreements recognize the right of WTO member countries to establish technical regulations and to apply those regulations to imported products. Both circumscribe that right by laying down rules governing the development and application of such regulations, using a certain number of similar provisions. For the most part, the coverage of the two agreements is complementary; indeed, the TBT Agreement defines its scope in part through reference to the SPS Agreement².

Nevertheless, there are fundamental differences between the two agreements. While the SPS Agreement is an explication of the general exception contained in Article XX(b) of the *General Agreement on Tariffs and Trade* (“GATT”) (or, legally speaking, an affirmative defense), the TBT Agreement is an explication of the obligations contained in GATT Article III. In other words, the SPS Agreement establishes the principles upon

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² See TBT Agreement, Article 1.5.



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which a Member might legitimately assert that its measures are “necessary to protect” human, animal or plant life or health from certain specified risks³. The TBT Agreement, on the other hand, is not a defense; it enumerates the particulars of the national treatment obligations that Members are under when they impose technical requirements or standards. This means that a measure that is not intended to address a particular health or safety risk is susceptible to challenge under either the GATT or the TBT Agreement, without any affirmative defense. A measure directed at a specified health or safety risk, however, would be adjudged under the SPS Agreement, which effectively incorporates the general exception of Article XX(b).

Second, the scope of the SPS Agreement is well-defined and relatively narrow⁴. As a result, it was possible for Uruguay Round negotiators to agree on certain objective standards of legitimacy for all SPS measures, and those standards were turned into binding disciplines. The coverage of the TBT Agreement, on the other hand, is extremely broad and diverse, and it was difficult to develop firm, objective disciplines that could apply to the entire range of measures covered. Consequently, the TBT Agreement contains few substantive obligations, and none that go substantially beyond those that are already spelled out under the GATT. Article 2.1 essentially repeats the national treatment obligation from GATT Article III. Article 2.2, the most important provision in the Agreement, requires Members to ensure that technical regulations are “not more trade restrictive than necessary to fulfill a legitimate objective”. This obligation is so general – of necessity because of the

³ See Annex A at para. 1.

⁴ See Annex A at para. 1.



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broad range of measures covered – that it is difficult to apply. It is a useful discipline only in the most egregious cases, and such cases could normally also be prosecuted under GATT Articles II (schedule of concessions), III (national treatment) or XI (elimination of quantitative restrictions).

As a result, the most important provisions of the TBT Agreement are those relating to procedural requirements, and that the Agreement’s principal (not insignificant) contribution to the international trading system has been to promote transparency and information exchange. There have been no dispute settlement findings based on the Agreement.⁵ Indeed, only once has a Member based arguments on the TBT Agreement in a panel proceeding (the United States in *European Communities – Measures Concerning Meat and Meat Products (Hormones)*), and in that case the Panel found that the Agreement was not applicable to the dispute.

Dispute Settlement under the SPS Agreement

On the other hand, Members were quick to put the SPS Agreement to the test. To date, three disputes have traveled the full course of panel and Appellate Body proceedings under the Dispute Settlement Understanding (“DSU”), and are now in the throes of implementation. The first, and certainly most highly-publicized, dispute was the United States and Canada’s parallel challenges to the EC’s ban on certain uses of growth promoting hormones in cattle (“*EC – Hormones*”).⁶ On its heels came Canada’s challenge to Australia’s import prohibition on fresh, chilled and frozen salmon (“*Australia –*

⁵ There were also no dispute settlement findings under the predecessor to the TBT Agreement, the Tokyo Round Agreement on Technical Barriers to Trade.



Salmon)”⁷, and most recently, the U.S. challenge to Japan’s requirements that fumigation treatments for fruit imports be approved on a variety-by-variety basis (“*Japan – Varietals*”).⁸ The measures at issue reflected the full scope of the SPS Agreement – protection of human health (*EC – Hormones*), animal health (*Australia – Salmon*), and plant health (*Japan – Varietals*). And inasmuch as a number of the legal claims arose under the same SPS Agreement provisions, they offered the panels and the Appellate Body an opportunity to elaborate on the meaning of those provisions.

Before reviewing these three cases and the doctrinal developments they fostered, however, it is also worth noting the frequency with which Members have turned to the DSU with SPS complaints, even where those disputes have not developed into full-fledged proceedings. In addition to the disputes noted above, the WTO Secretariat⁹ identifies two SPS disputes before “active panels,”¹⁰ two settled SPS disputes,¹¹ and some seven “pending consultations” regarding SPS measures.¹² Canada and the United States have been the most

⁶ *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 (complaint by United States), WT/DS48 (complaint by Canada).

⁷ *Australia – Measures Affecting Importation of Salmon*, WT/DS18 (complaint by Canada); *see also Australia – Measures Affecting the Importation of Salmonids*, WT/DS21 (complaint by United States) (challenging same measure, currently suspended pending conclusion of Article 21.5 arbitration in WT/DS18).

⁸ *Japan – Measures Affecting Agricultural Products*, WT/DS76 (complaint by United States).

⁹ *See* “Overview of the State-of-Play of WTO Disputes” (updated 26 November 1999) at <<<http://www.wto.org/wto/dispute/bulletin.htm>>>.

¹⁰ *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135 (complaint by Canada); *Australia – Salmonids*, WT/DS21 *supra* note 7.

¹¹ *Korea – Measures Concerning Bottled Water*, WT/DS20 (complaint by Canada); *Korea – Measures Concerning the Shelf-life of Products*, WT/DS5 (complaint by United States).

¹² *United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WT/DS144 (complaint by Canada); *European Communities – Measures Affecting Imports of Wood of Conifers from Canada*, WT/DS137 (complaint by Canada); *European Communities – Measures Affecting Import Duties on Rice*, WT/DS134 (complaint by India); *Slovak Republic – Measures Concerning the Importation of Dairy Products and the Transit of Cattle*, WT/DS133 (complaint by Switzerland); *United States – Measures Affecting Imports of Poultry Products*, WT/DS100 (complaint by EC); *Korea – Measures Concerning the Testing and Inspection of Animal Products*, WT/DS3 (complaint by United States); *Korea – Measures Concerning Inspection of Agricultural Products*, WT/DS41 (complaint by United States).



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active in wielding the DSU as an instrument of SPS trade policy, while their major trading partners (each other, the EC, and Japan) have been frequent targets. Korean SPS measures also attracted quite a bit of attention in the early years of the Agreement, but the disputes involving those practices were settled in the consultation phase, thus providing the first illustrations of the effectiveness of the new disciplines. In fact, in all of the tests to which it has been subjected, the SPS Agreement has to date proven to be relatively strong and resilient, despite several problems of interpretation that have emerged.

The strengths and weaknesses of the SPS Agreement have been apparent in the reports of the panels and, in particular, the Appellate Body in the three dispute settlement cases completed thus far. Below is a summary of some of the more significant issues that have emerged.

Articles 2.2 and 5.1: These two provisions – the core disciplines of the Agreement – have formed the basis for the findings in each of the three cases. The panel and Appellate Body decisions have been particularly useful in clarifying both the procedural requirements of Article 5.1 and the relationship between the two articles.

With respect to procedure, the Appellate Body rejected the *EC – Hormones* Panel’s efforts to establish strict or formal criteria for determining whether an SPS measure was “based on” a risk assessment within the meaning of Article 5.1. The Appellate Body disagreed with the Panel’s “procedural requirement” that the defending Member must in fact have “taken into account” the risk assessment in its decision to impose or maintain the SPS measure. In effect, the Appellate Body declined to exclude evidence that might



support an SPS measure, even if the Member never considered the evidence at all or even if that evidence emerged after the Member's decision to implement the measure.¹³

At the same time, from a substantive perspective, the Appellate Body found that Article 5.1 was in effect a specific application of the basic obligation, laid out in Article 2.2, to ensure that SPS measures are not maintained without sufficient scientific evidence. In doing so, they confirmed that the Article 5.1 discipline was substantive, not just procedural. Not only must a Member be able to cite a risk assessment related to the measure it has adopted, but that Member must also demonstrate that the measure is “sufficiently supported or reasonably warranted by the risk assessment”. It is the job of the panel to determine whether that is the case.¹⁴

In *EC – Hormones* the Panel and the Appellate Body declined to make a specific finding under Article 2.2 despite requests from the complaining parties that they do so. However, the Panel found that a violation of the more specific Article 5.1 could be “presumed to be a violation of the more general provisions of Article 2.2.” The Appellate Body agreed and used that interpretation to find a violation of Article 2.2 in the *Australia – Salmon* case. In the *Japan – Varietals* the Appellate Body broke with precedent and made a specific finding with respect to Article 2.2.

¹³ WT/DS26/AB/R at paras. 188-190.

¹⁴ WT/DS26/AB/R at para. 186.



Perhaps the most controversial aspect of the Appellate Body's findings with respect to these provisions is its treatment of minority scientific opinion. In *EC – Hormones* the Appellate Body makes clear that Members are not obliged in every case to base their SPS measures on the majority scientific view:

In most cases, responsible and representative governments tend to base their legislative and administrative measures on “mainstream” scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety.¹⁵

Some have read this statement as a significant weakening of the disciplines in Articles 2.2 and 5.1. Since it is nearly always possible, they argue, to find some scientist somewhere who will support your point of view, Members will have no trouble generating risk assessments that support the measures they put in place.

However, panels and the Appellate Body have also made clear that they believe they have a role under the Agreement as well as under the DSU to make an objective assessment of the facts of the case, and that such a determination may require them to judge the sufficiency of scientific evidence offered in support of a measure (see “*standard of review*” below). They have done so in each of the three cases adjudicated. Thus the “right” to base a measure on minority opinion is not an unqualified one; Members must be capable of defending their regulatory judgements in dispute settlement.

Standard of Review: In *EC – Hormones* the Appellate Body confirmed that panels' proper standard of review of Members' SPS measures was neither *de novo* nor completely



deferential; as specified in DSU Article 11, panels are to undertake an “objective assessment of the facts” of the matter.¹⁶ Perhaps more importantly, however, it was in these SPS cases that the Appellate Body gradually adopted a position that challenges based on claims that a panel failed to make such an “objective assessment” would be difficult to sustain. In the transition from *EC – Hormones* to *Japan – Varietals*, the Appellate Body has made increasingly clear that an allegation that a panel has not made an objective assessment is a very serious and weighty one, which can only be sustained by a showing of “deliberate disregard” or “willful distortion” of the evidence, or “egregious errors” that call into question the panel’s “good faith.”¹⁷ Because Members’ claims regarding the absence of an “objective assessment” tend to be vehicles by which to challenge panels’ factual determinations, this high standard also reinforces the Appellate Body’s proper role in limiting its review to alleged legal errors.

Article 5.7 and the Precautionary Principle: The EC invoked the precautionary principle in support of the claim that its hormone ban was based on a risk assessment, arguing that the precautionary principle was a customary rule of interpretation of international law. While neither the Panel nor the Appellate Body ruled explicitly on the status of the precautionary principle in international law, both asserted that elements of precaution were written into the Agreement – *e.g.*, in Articles 5.7 and 3.3. However, the Panel concluded, and the Appellate Body confirmed, that the EC could not invoke the

¹⁵ WT/DS26/AB/R at para. 194.

¹⁶ WT/DS26/AB/R at paras. 116-117. The Appellate Body also confirmed that the more deferential standard articulated in Article 17.6(i) of the Anti-Dumping Agreement was *not* applicable in the SPS context. *Id.* at paras. 112-114.



precautionary principle in order to escape the explicit obligation under Article 5.1 to base an SPS measure on a scientific risk assessment.¹⁸ The Appellate Body went a step further in *Japan – Varietals*, when it rejected Japan’s effort to invoke Article 5.7 in arguing it had satisfied the “sufficient scientific evidence” standard of Article 2.2.¹⁹ Japan maintained in effect that it provisionally prohibited the import of each variety because the “relevant scientific evidence [regarding the necessary fumigation treatment for each variety] [was] insufficient” in the absence of varietal testing. Interestingly, the Panel and the Appellate Body sidestepped the substantive aspects of Article 5.7 (*i.e.*, determining at what point available scientific information is “insufficient”), and held instead that Japan could not claim Article 5.7’s safe harbor because it had violated the provision’s procedural requirements. Because Japan had not sought to obtain additional information necessary to assess the risks of varietal variation, and had not reviewed the (putatively provisional) measure within a reasonable period of time, it had not acted consistently with the requirements of Article 5.7.²⁰ Accordingly, Japan could not rely on Article 5.7 to relieve it from the Panel and Appellate Body conclusion that the measure was maintained “without sufficient scientific evidence” in violation of Article 2.2.

It is possible to argue that neither of these findings tested the limits of the precautionary principle under the SPS Agreement, since both cases involved long-standing measures and well-developed bodies of scientific evidence. Nevertheless, these findings do

¹⁷ WT/DS26/AB/R at paras. 131-133; WT/DS18/AB/R (20 October 1998) at paras. 264-266 (“We therefore conclude that the Panel did not abuse its discretion in a manner which even comes close to attaining the level of gravity required for a claim under Article 11 of the DSU to prevail.”); WT/DS76/AB/R at paras. 141-142.

¹⁸ WT/DS26/AB/R at para. 124-125.

¹⁹ WT/DS76/AB/R (22 February 1999) at para. 81.



not bode well for the viability of the precautionary principle as a defense under the Agreement.

Article 5.5: Panels and the Appellate Body have not found it easy to apply Article 5.5, which establishes “the objective of achieving consistency in the application of the concept of appropriate level of sanitary and phytosanitary protection.” This is understandable; the Agreement itself implicitly recognizes the inadequacy of the text by mandating the development by the SPS Committee of “guidelines for the practical implementation of [the] provision.” Despite persistent efforts, the Committee has not been able to develop such guidelines. The issue of consistency is a delicate one; some Members believe a consistency requirement might impose unacceptable limits on their right to determine their appropriate level of protection.

Nevertheless, complaining parties have invoked the provision in two of the three dispute settlement cases. In *EC – Hormones*, the Panel interpreted Article 5.5 broadly (even more broadly than the arguments put forward by the complaining parties) and found the EC had violated its obligations under the provision.²¹ That finding, however, was overturned by the Appellate Body even with respect to the alleged violation that involved the narrowest interpretation of the provision.²² This ruling appeared to make it difficult to sustain a challenge under Article 5.5. However, in the *Australia – Salmon* case the Appellate Body upheld a similar panel finding, and its extremely detailed analysis makes

²⁰ WT/DS76/AB/R at paras. 91-94.

²¹ WT/DS26/R/USA at paras. 8.206, 8.218, 8.244, 8.266, and 8.269.

²² WT/DS26/AB/R at paras. 221, 225 and 235.



clear that the provision, while difficult to apply, does provide some discipline on a Member's right to choose of its appropriate level of protection.²³

Article 3 Architecture: In *EC – Hormones*, the Panel and the Appellate Body

differed markedly in their interpretation of the first three paragraphs of Article 3. The Panel stated that

Article 3.1 imposes an obligation on all Members to base their sanitary measures on international standards except as otherwise provided for in the Agreement, and in particular Article 3.3 thereof. In this sense, Article 3.3 provides an exception to the general obligation contained in Article 3.1. Article 3.2, in turn, specifies that the complaining party has the burden of overcoming a presumption of consistency with the SPS Agreement in the case of a measure based on international standards. It thereby suggests by implication that when a measure is not so based, the burden is on the respondent to show that the measure is justified under the exceptions provided for in Article 3.3.²⁴

The Appellate Body reversed the Panel's ruling, finding that Article 3.3 is *not* an "exception" to Article 3.1 in the sense of an affirmative defense for which the burden of proof would shift to the Member whose SPS measure is being challenged.²⁵ Article 3.3 is a distinct obligation amenable to violation independently of Article 3.1; that is, a failure to satisfy Article 3.3's conditions does not result *ipso facto* in a violation of Article 3.1.²⁶

Elaborating on this, the Appellate Body proceeded to set forth its own view of the structure of these three subsections: Article 3.1 required that Members' SPS measures be "based on" – that is, simply "buil[t] upon" or "supported by"²⁷ – international standards, in whole or in part. A measure merely "based on" an international standard per Article 3.1,

²³ WT/DS18/AB/R at para. 177.

²⁴ WT/DS26/R/USA

²⁵ WT/DS26/AB/R at paras. 103-104.

²⁶ WT/DS26/AB/R at paras. 157-158, 160, 253(h).

²⁷ WT/DS26/AB/R at paras. 162-164.



however, would *not* be automatically entitled to the safe harbor presumption of Article 3.2;²⁸ that presumption is reserved for measures that “conform to” – which the Appellate Body reads as “embody...completely” or “convert...into...municipal regulation”²⁹ – the international standards. Article 3.3, according to the Appellate Body, comes into play independently any time a Member chooses its own level of protection different from that embodied in the international standards.³⁰

The Appellate Body also took this opportunity to clarify that pursuant to the last sentence of Article 3.3, which states that any SPS measures that diverge from international standards of protection “shall not be inconsistent with any other provision of this Agreement,” requires that *all* SPS measures must comply with Article 5. Specifically, they must be based on a risk assessment pursuant to Articles 5.1 and 5.2 unless otherwise exempted by Article 5.7. While this apparently contradicts other wording in Article 3.3 suggesting that there could be a category of “scientifically justified” measures that were not required to be based on risk assessment, the Appellate Body nonetheless bowed to Article 3.3’s “involved and layered language [that] actually leaves us with no choice.”³¹

Although the differences between the interpretations of the Panel and the Appellate Body are fundamental, they are not likely to have under normal circumstances great practical significance. The Panel used its analysis to assign to the EC the burden of proof under Article 3.3. The Appellate Body’s different reading of the provision leads it to find that it is up to the complaining party to establish a *prima facie* case of inconsistency before

²⁸ WT/DS26/AB/R at para. 171.

²⁹ WT/DS26/AB/R at para. 170.

³⁰ WT/DS26/AB/R at paras. 172-173.



the burden shifts to the defending party. The establishment of a *prima facie* case is, however, a rather low threshold, one that complaining parties would routinely meet in their briefs regardless of where the original burden of proof lay. Indeed, despite the Appellate Body's thorough reworking of the Panel's interpretation of Article 3.1 through 3, the Appellate Body nevertheless upholds the Panel's finding under Article 3.3.

Burden of Proof: Indeed, the Appellate Body devoted considerable attention in the *EC – Hormones* case, and to a lesser extent in *Japan – Varietals*, to the proper allocation of the burden of proof. They determined that in all cases, not just with respect to Article 3, the complaining Member bears the burden of proof with respect to establishing a *prima facie* case for the challenged measure's inconsistency with each relevant provision of the SPS Agreement. This burden does not shift if the Agreement provides for an exception to a general rule,³² or even if it would require the complaining Member to establish a negative (the maintenance of a measure “without sufficient scientific evidence,” for example³³). Only once a *prima facie* case is made does the defending Member need to refute the claimed inconsistency.

Completing the Analysis / Judicial Economy: It is also in the SPS cases that the Appellate Body practice of “completing the analysis” – and the limits of that practice – have become clear. Upon finding that the *EC – Hormones* panel had erred in holding differences in the EC's regulation of hormones for growth versus veterinary purposes to be

³¹ WT/DS26/AB/R at paras. 174-177.

³² WT/DS26/AB/R at paras. 103-104.

³³ WT/DS76/AB/R at paras. 136-137. As a practical matter, this particular obstacle can be overcome under the SPS Agreement by invoking Article 5.8 to challenge a Member to provide “an explanation of the reasons



“unjustifiable” in violation of Article 5.5, the Appellate Body elected “to complete the Panel’s analysis” with respect to other elements of Article 5.5³⁴ – elements that the Panel, exercising judicial economy, had not seen necessary to consider in light of its finding of a violation on other grounds. The Appellate Body repeated that maneuver in *Japan – Varietals* where the Panel had “improperly applied the principle of judicial economy” and failed to reach the question of the measure’s compatibility with Article 5.1.³⁵

In *Australia – Salmon* the Appellate Body completed the analysis with respect to rather sweeping portions of the Panel’s report, because it had concluded that the Panel had based much of its assessment on an incorrect reading of the Australian SPS measure at issue.³⁶ At the same time, however, *Australia – Salmon* also forced the Appellate Body to face up to the limits of its ability to complete the analysis. Upon reversing the Panel’s analysis with respect to an element of Article 5.6, the Appellate Body found that it lacked sufficient factual findings on which to proceed with its own analysis of the measure.³⁷ As a result, it was left in the awkward position of reversing a Panel finding, while being “unable to come to a conclusion” on an alternative finding of its own.

The Appellate Body’s fondness for “completing the analysis” stems in part from an institutional feature of the DSU: the absence of any “remand” procedure that would permit the Panel to revisit the questions presented or develop additional facts following legal

for” its SPS measure; the failure of the challenged Member to furnish any evidence would help give rise to a prima facie case that the measure lacked “sufficient” scientific evidence.

³⁴ WT/DS26/AB/R at para. 222.

³⁵ WT/DS76/AB/R at paras. 111-113.

³⁶ WT/DS18/AB/R at paras. 115-118, 191-193.

³⁷ WT/DS18/AB/R at para. 213.



clarification by the Appellate Body. As a result, if the Appellate Body cannot “correct” a panel’s errors and answer the questions itself, the legal claims of the Members will be left hanging and unresolved – as they were in *Australia – Salmon*. The consequence for Members presenting cases is that a panel cannot risk resting on one of several alternative grounds for a particular ruling; if the Appellate Body disagrees with that ground, it could be left without the necessary foundation to consider the other alternative grounds.

Accordingly, a panel will often feel compelled to consider (and the Member should present arguments with respect to) each of several alternative grounds for a given ruling.

At the same time, this institutional incentive would appear to fly in the face of the countervailing principle of judicial economy – that panels should not consider issues that are not necessary to the resolution of the matter. While nominally supporting that principle, the Appellate Body has also been quick to chide SPS panels for invoking it improperly. Thus panels must address all legal claims that are relevant to bringing a measure into complete consistency with the SPS Agreement; if a measure can be found SPS-inconsistent on multiple discrete grounds, then all the grounds must be considered.³⁸ Similarly, they must reach conclusions with respect to all products covered by the terms of reference, even if the Members have failed to present evidence regarding some of them.³⁹ The SPS cases have revealed that judicial economy should only be invoked with caution.

Experts: Most SPS disputes are likely to involve measures of such scientific complexity as to prompt the panel to seek independent expert advice to assist in evaluating

³⁸ WT/DS18/AB/R at paras. 223-224 (objecting to “false judicial economy”).



the evidence and arguments advanced by the Members. Indeed, SPS Article 11.2 directs that in disputes involving scientific or technical issues, panels “should seek” the views of such experts. Contrary to the apparent expectations of those who drafted the fairly detailed provisions of DSU Appendix 4, however, panels have *not* opted to convene “Expert Review Groups.” Instead they have sought the input of individual experts on a somewhat more informal basis. The panel report in *EC – Hormones* suggests at least one reason why this may be the case: a formally constituted expert review group would have been required to reach a *consensus* position based on terms of reference from the panel.⁴⁰ SPS panels appear to prefer the relative freedom afforded by soliciting advice ad hoc. The Appellate Body has facilitated this practice by confirming that both SPS Article 11.2 and DSU Article 13.2 afford panels the discretion to decide whether or not to establish an expert group.⁴¹

Issues related to the dispute settlement process: Some observers have raised concerns related to the manner in which the Appellate Body has carried out its reviews of SPS decisions. In part, the problem relates to the compressed time period for Appellate Body action. SPS cases are invariably complex, and it is difficult even for the most knowledgeable Appellate Body member to absorb the information necessary to make judgements in such a short time frame. The Appellate Body has increased its own work load at times by drawing its mandate broadly with respect to reviewing the facts of the case and completing the analysis in areas where panels have not issued findings.

³⁹ WT/DS76/AB/R at para. 111; WT/DS18/AB/R at para. 225 (citing *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R for proposition that failure to address all products referred to in terms of reference is an error of law).

⁴⁰ WT/DS26/R at para 8.7.

⁴¹ WT/DS26/AB/R at para. 147.



Moreover, the Appellate Body has imposed on itself rules of procedure that add to the difficulty. They do not consult with the original panel members, who are thoroughly familiar with the subject matter by virtue of their work and their consultations with scientific experts. Nor do they have any contact with the WTO Secretariat staff members who are experts in SPS matters and who are involved in the panel process. This policy, which makes sense for normal appeals, has led to some questionable findings in SPS cases.

For example, the interpretation of Article 3.1 through 3.3 by the *EC –Hormones* Panel, which benefited from input from the Secretariat, was much closer to the original intent of the negotiators than the interpretation of the Appellate Body. The Appellate Body’s refusal to accept the Panel’s useful distinction between “risk assessment” and “risk management”⁴², while understandable based on the text of the agreement, was equally puzzling to those familiar with regulatory policy and SPS issues, who make the distinction routinely. In interpreting Article 5.5 in the *EC – Hormones* report, the Appellate Body said that the SPS Committee was to develop guidelines for implementation of the provision “bearing in mind, among other things, that ordinarily, people do not voluntarily expose themselves to health risks.”⁴³ The language of Article 5.5 actually makes the opposite point: that people do routinely and voluntarily expose themselves to risks, and that such behavior should be considered exceptional by the Committee as it drafts its guidelines. This is a familiar issue to those involved with the Agreement. The Appellate Body would have benefited from consulting SPS experts.

⁴² WT/DS26/AB/R at para. 181.



Effectiveness of the Agreement:

SPS issues are among the more sensitive matters dealt with under the WTO. The Agreement itself and the cases that have been brought under it, have been the subject of considerable controversy. Nevertheless, the Agreement has proven to be an effective tool for resolving trade disputes. The core disciplines, embodied in Articles 2.2 and 5.1, set identifiable standards for the application of SPS measures to imported products. The existence of these and associated disciplines should bring increased certainty to trade in agricultural products.

At the same time, panels and, especially the Appellate Body, have demonstrated a reluctance to make judgements about the application of those disciplines except in the most clear-cut cases, a tendency that should translate into considerable deference to regulatory authorities under normal circumstances. Moreover, the more peripheral disciplines – *e.g.*, Article 3 and Article 5.5 – have proven to be difficult to apply and much less forceful. As a result, it is becoming clear that the Agreement will be useful primarily against clear, easily demonstrable violations.

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⁴³ WT/DS26/AB/R at para. 213.