

expert who also requested anonymity. "But it's specific to the spread of pests or diseases. We still have no criteria as to what a proper assessment is in regards to the risk from additives or toxins in foodstuffs."

Proper Assessment Defined

As in its earlier ruling, "EU Measures Concerning Meat and Meat Products" (AB-1997-4), which upheld a U.S. complaint regarding Europe's ban on hormone-treated beef, the key question addressed by the Appellate Body was whether Australia carried out a proper risk assessment as defined under Article 5.1 of the SPS.

At issue was Australia's 1996 Final Report, which concluded that imports of uncooked salmon should be prohibited to prevent the spread of exotic diseases in the country.

The Appellate Body first clarified that a risk assessment must meet the three conditions under Article 5.1, namely that it:

- identifies the disease that the country is seeking to control and its potential biological and economic consequences;
- evaluates the likelihood of entry and establishment of the disease, and;
- evaluates the likelihood of entry and establishment according to the control measure applied.

The Appellate Body noted that the original panel ruling seemed to suggest that the country itself must conduct the actual assessment, a conclusion it described as "mistaken." As

stated in the hormone-raised beef decision, Article 5.1 "only requires that the SPS measure be based on an assessment as appropriate for the circumstances ... The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization."

The Appellate Body also emphasized that the type of risk assessment required for the spread of pests or diseases is different from those concerning the risk to humans and animals from the presence of additives, contaminants, toxins or disease-causing organisms in foodstuffs.

Differing Risk Assessments

Contrary to arguments submitted by the European Union, "we do not believe that it is correct to diminish the substantial differences between these two types of risk assessment," the Appellate Body declared. "While the second requires the evaluation of the potential for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the likelihood of entry, establishment or spread of a disease and of the associated potential biological and economic consequences."

The Appellate Body went on to reject the original panel's conclusion that only some evaluation of the likelihood of a disease's spread was necessary in order for a risk assessment to qualify as valid under Article 5.1. It "is not sufficient that a risk assessment conclude that there is a possibility of entry,

WTO SALMON DECISION MAY UNDERMINE HEALTH

By Steve Charnovitz, Yale University

The World Trade Organization (WTO) in Geneva has issued a final decision in the case against the Australian law requiring heat treatment of imported salmon. The WTO Appellate Body sustained the judgment of the lower panel which held that the Australian law violates international trade rules. This is the first WTO decision to rule against a health law aimed at keeping out imports prone to carry a disease.

The lower panel report, issued in June, found that the Australian regulation was not based upon a risk assessment. Australia appealed this judgment, but the Appellate Body basically af-

firmed the lower panel. Given the strict requirements in the WTO Agreement on Sanitary and Phytosanitary Measures (SPM), that part of the Appellate Body judgment seems reasonable.

The lower panel also found that Australia violated Article 5.5 of the SPM. This Article, probably the most controversial new provision in world trade law, requires that governments not make arbitrary or unjustifiable distinctions in the risk levels considered appropriate in different situations, if such distinctions result in a disguised restriction on international trade.

Specifically, Australia was banning salmon imports while allowing imports of other fish (like eel) that might harbor the same diseases. In its appeal, Australia declared that the panel had reached unwarranted conclusions as to whether the Australian health measure was a "disguised restriction on trade." The Appel-

late Body disagreed and upheld the panel.

This landmark decision spells danger for national health protection. While regulatory consistency is certainly a good idea, mandating it from Geneva will undermine public support for the WTO. If Australia responds to the decision by harmonizing its salmon regulation downward, this will give credence to the critics of the WTO who argue that international trade leads to a downward harmonization of health and environment standards.

It is ironic that the WTO is so strict about inconsistent health policies when it is so lax about inconsistent trade policies. For example, countries can impose different tariffs on salmon and eel and that is fine with the WTO. Now that the Article 5.5 has been applied for the first time, governments should consider corrective amendments to the SPM.

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HIGHLIGHTS

NEWS

BRAZIL SPARKS CONTROVERSY by announcing a list of imported products subject to new sanitary and phytosanitary controls. Most upsetting to importers are operational directives accompanying the list, which state that the products now require prior approval of both the health and agriculture ministries before they can enter Brazil. (page 3)

HEALTH CANADA will investigate allegations that government scientists were pressured to approve recombinant bovine somatotropin (rBST), an artificial growth hormone used in dairy cows that some believe may cause human health problems. Federal Health Minister Allan Rock says the product will not be approved for use in Canada until the government is satisfied that it is safe and appropriate. (page 3)

JAPAN'S RIGOROUS TESTS of different varieties of imported agricultural products for health and safety reasons violate WTO rules, a dispute settlement panel says in a final ruling. Barring a successful appeal from Japan, the decision is expected to further open Japan's markets to U.S. exporters of apples, cherries, nectarines, and walnuts. (page 11)

CODEX ALIMENTARIUS will not oppose U.S. implementation of the Food Quality Protection Act, says Wim Van Eck, a top Netherlands health official who chairs the Codex Committee on Pesticide Residues. He says that although countries should align their standards with those of Codex, the international body will not block the stricter FQPA standards. (page 6)

JAPANESE FOOD LABELS would be revised to require information about ingredients, presence of genetically modified ingredients, and place of production under legislation to be submitted by the Agriculture Ministry to the next regular Diet session expected to be convened in late January. (page 10)

PORTUGAL'S BEEF EXPORTS are banned by the European Union in an effort to prevent the transmission of

FOUR ANTIBIOTICS would be banned by the European Union in animal feed out of concern that overuse of the drugs in animals creates resistant bacteria that threaten human health. (page 7)

THAILAND'S PRAWN FARMERS are taking the country's prime minister to court over a recent government decision to ban inland shrimp and prawn cultivation for environmental reasons. Shrimp and prawn farmers import brine from the coast to breed the seafood, one of Thailand's most profitable exports. (page 13)

THE EUROPEAN COMMISSION proposes new rules designed to defuse a controversial ban it previously proposed on the removal of so-called specified risk material from cattle in order to halt the spread of bovine spongiform encephalopathy. The proposal would allow regional exemptions to the ban for member states and nonmember countries that have never had a case of BSE. (page 7)

LEAD REPORT

With threats of trade retaliation and charges of illegal unilateralism, the United States and the European Union heat up a long-simmering battle over bananas during the month of November that shows few signs of cooling down as a deadline for action imposed by the World Trade Organization approaches. (page 19)

FOCUS

Adopting Appellate Body rulings on shrimp and salmon, the WTO's Dispute Settlement Body clarifies the circumstances in which countries may impose trade restrictions on foodstuffs for health and safety reasons. But the rulings raise a number of questions among all parties about the underlying reasoning that will affect similar disputes in the future. (page 21)

SPECIAL REPORT

A proposed food irradiation facility on the island of Hawaii touches off a community debate and a ballot initiative that results in a slim victory for supporters of the plant. Those seeking economic opportunity for the is-