THE JOURNAL OF COMMERCE

Slipping on salmon trade

BY STEVE CHARNOVITZ

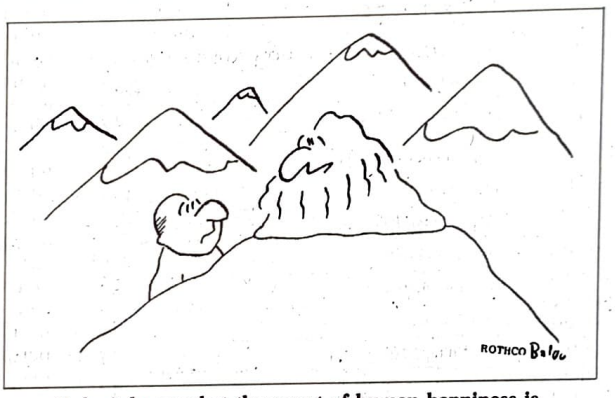
In June, an arbitral panel established by the World Trade Organization ruled against an Australian regulation prohibiting the importation of uncooked salmon. The case, lodged by the Canadian government, has been closely watched because of its implications for future lawsuits regarding fisheries, agriculture and food safety.

Although some parts of the panel's 197-page judgment are well reasoned, several key findings are problematic.

Exporters seeking to sell salmon to the Australian market have been blocked since 1975, when Australia first implemented its regulation on fresh, chilled and frozen salmon. As an island nation, Australia is vulnerable to exotic pathogens that could wreak havoc with its food supply. There are 24 diseases potentially borne by salmon.

The WTO Agreement on Sanitary and Phytosanitary Measures gives exporting countries a right to challenge health regulations that block trade. In 1995-96, Australia conducted a risk assessment of imported salmon in an effort to conform to new SPM rules. The assessment concluded that imported salmon pose a risk of disease transmission to domestic salmon populations via the water supply.

Displeased with this finding, Canada filed a complaint in March 1997.



"I don't know what the secret of human happiness is, but it sure ain't mountaintops."

The World Trade Organization panel held that Australia is violating three SPM rules. First, the salmon regulation is not based upon a risk assessment. Second, Australia seeks a higher level of health protection from imported salmon than it does from other imported fish. Third, in requiring heat treatment for imported salmon, Australia is not utilizing the least trade-restrictive approach.

The panel agreed that imported salmon could be dangerous, but found that Australia had insufficient evidence that heat treatment would be effective in killing pathogens. In the absence of such laboratory evidence, the import control could not meet the SPM test of being based on a risk assessment. This first finding by the panel seems justified.

The most controversial rule in the SPM Agreement requires national regulatory consistency. Specifically, governments must 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.

Canada charged that Australia was being inconsistent in banning imports of salmon while allowing imports of other fish — such as eel, herring and cod — that are as likely or more likely to harbor disease. The panel agreed and was on solid ground in doing so.

But the panel was not convincing in showing that these distinctions were a "disguised restriction" on trade. The panel claimed that revisions made to Australia's draft risk assessment report "might well have been inspired by domestic pressures."

The salmon panel is the first to enforce the SPM rule requiring a government to use the least trade-restrictive option to achieve its desired level of health protection.

The panel focused on the option of letting in uncooked, filleted salmon following inspection. As interpreted by the panel, once Canada shows that a less trade-restrictive option may be available, Australia acquires the burden to prove that option unsuitable.

This adjudicative approach is troubling because it penalizes Australia for not being able to prove that a regulation in force is better than a hypothetical regulation.

The panel was careful to say that it was not endorsing the option of allowing in uncooked salmon and was not implying that this would actually achieve Australia's health needs. Nevertheless, the panel held that Australia's failure to use this option violates WTO rules.

The SPM rules exemplify the way that economic globalization is deepening international law. These rules lie on the cutting edge of supervision of national lawmaking by international tribunals. The survival of this new regime will depend on public assessment of the fairness of the process. The salmon decision demonstrates problems both in the SPM and in the way it is being applied by the panel.

The biggest problem is the rule requiring regulatory consistency. According to the SPM, it is wrong for a government to tolerate greater risk for eel than it does for salmon if both carry the same disease. While doing so may be irrational, it is a giant leap to conclude that it should therefore be illegal. After all, national regulatory systems typically do not mandate such internal consistency. Why should international rules be more stringent?

It is especially ironic that the WTO would require consistent health policy when the WTO is so tolerant of inconsistent trade policy. Because SPM involves sensitive issues of public health, panels should give the defendant government the benefit of any doubt.

The salmon panel did not do so, however. It was quick to infer a protectionist motive by Australia based on the fact that draft recommendations were modified in a final report. Australia is appealing this decision to the WTO Appellate Body, which will be able to correct this error.

The SPM process will be most useful when it deals with legal issues, such as whether there is a record supporting a government regulation. It will be less useful, and more dangerous, when it overrides national health judgments on flimsy grounds.

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