

Case Notes

How Deep Should We Go? – Searching for an Appropriate Standard of Review in the SPS Cases

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*WTO Appellate Body Report, Australia – Apples*¹

Although the applicable standard of review under Articles 2.2/5.1 of the SPS Agreement is not de novo, an investigation of the WTO panel remains intrusive in terms of objectivity and coherence of risk assessment. Moreover, the panel's review does not end with a final conclusion reached by the WTO Member in the risk assessment. It also extends to the quality of the reasoning and the intermediate interferences that led to the conclusion. If a WTO Member exercises expert judgment in its risk assessment, this needs to be sufficiently transparent and well documented (author's headnote).

The obligations of Article 5.1 and 5.6 are distinctive and independent from each other. Therefore, a violation of the first provision does not imply infringement of the latter one (author's headnote).

I. Facts

The dispute concerned the legality of a number of phytosanitary measures imposed by Australia on the importation of apples from New Zealand. At least in theory, those measures were introduced to protect Australia against certain pests established in New Zealand (i.e. fire blight, apple leaf-curling midge (ALCM) and European canker) but not yet in Australia.

According to New Zealand, those measures were in conflict with certain obligations of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). In particular, New Zea-

land believed that they lacked sufficient scientific basis in the form of risk assessment (in violation of Articles 2.2 and 5.1–5.2 respectively) and consistency in applicable levels of protection (compared to other risk measures adopted by Australia) as required under Articles 2.3 and 5.5. New Zealand also argued that these measures were not the least trade-restrictive alternative to achieve the protective goals set by Australia (which is in contradiction to Article 5.6). Moreover, it took the Australian authorities almost 8 years to prepare the approval procedure for New Zealand apples, which should be regarded as undue delay and inconsistent with the requirements of Annex C(1)(a) and Article 8.

The panel was established at the beginning of 2008 and issued its report in August 2010. It found² that all measures identified by New Zealand were phytosanitary measures falling within the scope of the SPS Agreement. As to the substance of New Zealand's claims, the panel held among other things that Australia's measures were not based on an appropriate risk assessment. As a consequence, the measures were not

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1 *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, 29 November 2010 (adopted on 17 December 2010).

2 Panel Report, *Australia – Measures Affecting Importation of Apples from New Zealand*, WT/DS367/R, 9 August 2010 (adopted on 17 December 2010 as modified by the Appellate Body Report).

based on sufficient scientific evidence for all three pests. In addition, the panel found that some of the measures did not constitute the least trade-restrictive alternatives to achieve the level of protection targeted by Australia. On the other hand, the panel held that New Zealand failed to establish that Australia's contested SPS measures did not comply with the quasi-consistency requirement (Article 5.5 and by implication also Article 2.3). As far as the issue of undue delay was concerned, the panel held that this aspect fell outside of the terms of reference of the panel.³

Both parties appealed against the panel's decision. Australia disagreed with the panel findings made under Annex A(1) concerning the identification of relevant SPS measures, Articles 2.2, 5.1 to 5.2 and Article 5.6, but only with respect to ALCM and fire blight. It is worth noting that Australia did not contest the procedural aspects of the panel decision regarding the selection of the experts advising the panel. The appeal of New Zealand was less extensive, concerning only the panel's findings under Annex C(1)(a) and Article 8.

II. Judgment

The Appellate Body confirmed that all 16 measures constituted SPS measures and were covered by the SPS Agreement. Based on this, the Appellate Body proceeded to examine specific substantive issues raised in the appeal submissions.

First of all, it upheld the central part of the panel's decision relating to Articles 2.2 and 5.1 to 5.2. In this context, the Appellate Body disagreed with Australia's assertion that the panel applied an improper standard of review in the evaluation of its risk assessment (and corresponding scientific evidence). The Appellate Body confirmed the applicable standard of review was neither *de novo* review nor deferential. It also added that the panel's role under the SPS Agreement was limited and consisted only of reviewing a contested risk assessment, rather than carrying out this assessment all over again.⁴ At the same time, the Appellate Body distinguished between two applicable standards of review: one standard to evaluate the underlying scientific basis and one standard to assess the reasoning based on that science (i.e. whether the scientific evidence supports the conclusions of the risk assessment to a sufficient degree).⁵ According to the Appellate Body, the first one involves a deferential standard, while the second calls for a relatively profound examination. On this basis, it rejected Aus-

tralia's claim that the panel should only have evaluated whether "intermediate conclusions were 'within a range that could be considered legitimate' according to the standards of the scientific community."⁶ The Appellate Body also disagreed with Australia that the panel's review should be limited to the ultimate conclusion reached in the risk assessment of a WTO Member (and not extend to the quality of the reasoning and intermediate interferences leading up to the final conclusion).⁷ The Appellate Body made clear that the mandate of the panel does indeed extend to examination of the reasoning on which the conclusion is based.

The Appellate Body also concurred with the panel that Australia was obliged to demonstrate that the exercise of expert judgment in its risk assessment (used to compensate for missing scientific data or to address scientific uncertainties) was documented, transparent, and based on the relevant reliable scientific information.⁸ Regarding the use of expert judgments, the Appellate Body believed that the documentation and transparency requirement is "instrumental in the determination of whether the overall risk assessment, even when it is conducted in the face of some scientific uncertainty, relies on the available scientific evidence."⁹ The reference to standards of the International Plant Protection Convention reinforced this conclusion. These standards introduce transparency and documentation requirements to the entire risk assessment process (including treatment of uncertainties).¹⁰ Last but not least, the Appellate Body disagreed with Australia that the panel's role was limited to determining whether alleged flaws in the reasoning of its risk assessment were sufficiently serious to undermine "reasonable confidence" in the assessment as a whole. Again, the Appellate Body considered this standard too low.¹¹

3 For more detailed description of facts of the dispute, including specific claims made by New Zealand and legal determinations made by the panel, see A. Arcuri, L. Gruszczynski and A. Herwig, *Risky Apples Again? Australia – Measures Affecting the Importation of Apples from New Zealand*, 4 *European Journal of Risk Regulation* (2010), pp. 437–443.

4 Appellate Body Report, *Australia – Apples*, paras. 212–13.

5 *Ibidem*, para. 215.

6 *Ibidem*, para. 231.

7 *Ibidem*, para. 230.

8 *Ibidem*, para. 248.

9 *Ibidem*, para. 244.

10 *Ibidem*, para. 247.

11 *Ibidem*, paras. 259–60.

Second of all, the Appellate Body reversed the panel's finding that Australian SPS measures were inconsistent with Article 5.6 (the requirement of the least trade-restrictive alternative). In this context, the Appellate Body held that the panel's analytical approach used under Article 5.6 was incorrect. When assessing whether alternative measures met Australia's appropriate level of protection, the panel required the establishment of two elements. First, complainants must show that the risk assessment underlying the original measures was flawed in certain respects (i.e. in the violation of Article 5.1).¹² In other words, the panel intended to determine whether particular risk management measures adopted by Australia were necessary in the first place. After the necessity of the measures was determined, the panel would enquire (but only if the measures were found to be necessary) whether alternative measures identified by the complainant could sufficiently reduce the risk in question to a level that is equal or below standards set out by Australia.¹³

The Appellate Body disagreed. It held that the obligations of Article 5.1 and 5.6 are distinctive and independent from each other. Thus, the violation of the first provision does not imply infringement of the second one. In fact, a measure may fail to constitute the least trade restrictive alternative despite the fact that it is based on valid a risk assessment (there are frequently different available alternatives with various trade restrictive effects). The opposite is also true. A WTO Member may fail to meet the risk assessment

requirement (e.g. by not considering in its risk assessment potential economic consequences resulting from a measure) but comply with Article 5.6. In other words, the analysis under Article 5.6 needs to stand on its own feet.¹⁴ At the same time, the Appellate Body noted that some factual determinations made under one provision (here Article 5.1) may be relevant to the analysis under the other provision (here Article 5.6).¹⁵ This, however, does not mean that legal examination under Article 5.6 is consequential on the findings of the violation of Articles 5.1 and 2.2.

Although the Appellate Body reversed the panel's finding, it did not complete the legal analysis under Article 5.6 since it found the panel's factual determination insufficient for this purpose. In particular, the Appellate Body was unable to ascertain whether the alternatives identified by New Zealand provided a level of protection equivalent to Australia's level of acceptable risk.¹⁶

Thirdly, the Appellate Body also reversed the panel's findings on New Zealand's claims under Annex C (1)(a)¹⁷ and Article 8.¹⁸ The Appellate Body found that the panel confused two elements in its analysis – the measures at issue (i.e. measures that were contested by New Zealand) and the claims made by New Zealand (i.e. legal basis of the complaint). This confusion caused the panel to come to the conclusion that part of New Zealand's claim fell outside its term of reference. Since the factual determinations made by the panel were sufficient, the Appellate Body decided to complete the analysis. Nevertheless, the Appellate Body held that none of the measures identified by New Zealand were inconsistent with the above provisions. It was a risk assessment process that was unduly delayed, rather than the 16 specific SPS requirements identified by New Zealand. However, this was not a subject of the dispute.¹⁹

III. Comment

The *Australia – Apples* report is an important decision, providing additional clarifications (or at least attempts to do so) on the applicable standard of review in SPS disputes. It is also the first case that elaborates on the standards pronounced by the Appellate Body in the *US/Canada – Continued Suspension*.²⁰ In doing so, it contributes to the long lasting disagreement (both among scholars and WTO Members) on the proper role of international adjudicators in environmental and health related trade disputes.

12 *Ibidem*, para. 354 (in particular, the panel was required to “establish that the importing Member has, in its risk assessment, overestimated the risk associated with the imported product or has erred in concluding that SPS measures are necessary at all”).

13 *Cf.* Panel Report, *Australia – Apples*, para. 7.1144.

14 Appellate Body Report, *Australia – Apples*, para. 354.

15 *Ibidem*, para. 341.

16 *Ibidem*, paras. 385 and 402.

17 Annex C(1)(a) provides that “Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that: (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products.”

18 Article 8 provides that “Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.”

19 Appellate Body Report, *Australia – Apples*, para. 441.

20 Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (adopted 14 November 2008).

Initially, the SPS case law (e.g. Appellate Body Report, *EC – Hormones*) adopted a rather deferential standard that gave a considerable degree of deference to WTO Members. The subsequent case law, however, has gradually engaged in an increasingly intrusive assessment of scientific data that was provided as a justification for national measures. This standard of review allowed WTO panels to assess quality, persuasive force and correctness of the national scientific determinations, and substitute them with their own. In practice, this came really close to a *de novo* review (e.g. Panel Report, *EC – Biotech Products*, Panel Report, *US/Canada – Continued Suspension*).²¹ An important change came with the Appellate Body Report in *US/Canada – Continued Suspension*. Under the new standard, a panel was not expected to determine whether a risk assessment is correct. Instead, it should focus on whether the assessment is supported by coherent reasoning and respectable scientific evidence. The Appellate Body also identified specific steps that must be taken by a panel when performing its limited task. A panel must: (a) identify the scientific basis underlying the SPS measure, (b) verify that the scientific basis comes from a respected and qualified source, (c) assess whether the reasoning articulated on the basis of the scientific evidence is objective and coherent, and (d) determine whether the results of the risk assessment justify the SPS measure at issue.²² The standard of review proposed by the Appellate Body appeared to be quite deferential. Nevertheless, it remained unclear how the new general guidelines would be applied in practice.

The Appellate Body in *Australia – Apples* gives a somewhat ambiguous answer. On one hand, it accepts the panel's approach to concentrate on the methodology used to evaluate scientific data in Australia's risk assessment, which points in the direction of deferential standard. The same is true for the required treatment of scientific evidence.²³ The documentation and transparency requirements (i.e. how risk assessors reached the expert judgments made at intermediate steps of risk assessment) are also typical for a deferential approach that focuses on the risk assessment process, rather than its substance.

However, this conclusion is mitigated by the second set of interpretative decisions of the Appellate Body. First, it accepted that the investigation into the underlying methodology could be relatively intrusive. As correctly noted by Button, detailed methodological assessment may, however, actually come close to *de novo* review, which concentrates on the substance of the

evidence.²⁴ Second, it rejected Australia's argument that the panel should have focused only on whether intermediate conclusions and expert judgments in the risk assessment fell within a range of what could be considered legitimate by the standards of the scientific community (i.e. whether they hold a minimum epistemic status). As a consequence, the panel is entitled to conduct its own assessment and decide whether such expert judgments and conclusions are actually correct or not. Third, the Appellate Body saw the standard of a serious fault (i.e. a fault that undermines "reasonable confidence" in risk assessment) as being too low a threshold to examine a contested assessment. This leads to opportunities for the panel to make its own evaluation and enquiry into the substance of evidence, thus coming close to *de novo* review. The rejection of Australia's argument that the applicable standard of review requires a focus on final rather than intermediate conclusions reached by a risk-assessing WTO Member can be added to this.²⁵ Consequently, one gets the overall impression that the Appellate Body opted for a rather intrusive evaluation of science (to be more precise – of reasoning included in scientific risks assessment) that supports national measures.

There are at least two possible explanations of the approach taken by the Appellate Body in *Australia – Apples*. One may consider *US/Canada – Continued Suspension* as an anomaly in an otherwise rather consistent line of cases that subscribed to *de novo* review. However, it is also possible that the Appellate Body wants to apply a more deferential standard of review in human health related trade disputes (such as *Continued Suspension*), while in traditional phytosanitary cases the applicable standard will remain intrusive. Future reports should clarify this issue.

21 For the extensive discussion on the drawbacks of such an approach, see Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law. A Critical Analysis of the SPS Agreement* (Oxford: Oxford University Press, 2010), pp. 139–46.

22 Appellate Body Report, *Australia – Apples*, para. 591.

23 The Appellate Body noted, for example, that panel's role is limited when "reviewing whether the scientific basis constitutes 'legitimate science according to the standards of the relevant scientific community'" (*Ibidem*, para. 215).

24 Catherine Button, *Power to Protect. Trade, Health and World Trade Organization*, (Oxford and Portland: Hart Publishing, 2004), p. 186 (if a reviewing body goes into details of underlying methodology its task is not so different from the body that reviews substance of evidence, the only difference is that a body would concentrate on methodological issues rather than substantive).

25 As noted by the Appellate Body in reality "it is not possible to review the ultimate conclusions reached by the risk assessor in isolation from the reasoning and the intermediate conclusions that lead up to them" (Appellate Body, *Australia – Apples*, para. 226).