

WORLD TRADE ORGANIZATION

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AUSTRALIA – MEASURES AFFECTING IMPORTATION OF SALMON - RECOURSE TO ARTICLE 21.5 BY CANADA -

REPORT OF THE PANEL

The report of the Panel on Australia – Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada - is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 18 February 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

I. INTRODUCTION

1.1 On 6 November 1998, the Dispute Settlement Body (DSB) adopted the Appellate Body report on *Australia – Measures Affecting Importation of Salmon* (WT/DS18/AB/R) and the panel report (WT/DS18/R), as modified by the Appellate Body report, requesting that Australia bring its measures into conformity with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). On 23 February 1999, the Arbitrator, appointed in accordance with Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), decided that the reasonable period of time to implement the rulings and recommendations of the DSB in this case would expire on 6 July 1999.

1.2 On 15 July 1999, Canada announced its intention to request authorization from the DSB to suspend the application to Australia of tariff concessions and related obligations under the General Agreement on Tariffs and Trade 1994, pursuant to Article 22.2 of the DSU (WT/DS18/12).

1.3 At the meeting of the DSB held on 27 and 28 July 1999, Australia informed the DSB that it had fully implemented the DSB's recommendations through an Australian Quarantine and Inspection Service (AQIS) decision of 19 July 1999. At the same meeting, Canada requested the establishment of a panel pursuant to Article 21.5 of the DSU. The DSB agreed that the Article 21.5 request be referred to the original Panel. The DSB also agreed, at the request of Australia, that the matter would be referred to arbitration to determine the level of suspension of concessions, pursuant to Article 22.6 of the DSU. Canada and Australia agreed that the arbitration proceedings would be held in abeyance until after the circulation of the panel report under Article 21.5. If the Article 21.5 Panel found that Australia had acted inconsistently with its WTO obligations, then Australia and Canada would request the immediate resumption of the Article 22.6 arbitration, regardless of whether either party appealed the Article 21.5 panel report.

1.4 The European Communities, Norway and the United States reserved their third-party rights in the 21.5 panel proceedings.

A. TERMS OF REFERENCE

1.5 The following standard terms of reference applied to the work of the Panel:

"To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS18/14, the matter referred to the DSB by Canada in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

B. PANEL COMPOSITION

1.6 The Panel was composed as follows:

Chairman: Mr. Michael Cartland

Members: Mr. Kari Bergholm
Ms. Claudia Orozco

1.7 The Panel met with the parties, the third parties and the experts advising the Panel on 8-10 December 1999. The Panel submitted its report to the parties on 31 January 2000.

II. FACTUAL ASPECTS

A. GENERAL

1. Salmon

2.1 The product subject to the dispute is, as in the original case, fresh chilled and frozen salmon product, from Canada, destined for human consumption. Fresh chilled and frozen salmon comes within Codes 0302 to 0304 of the Harmonized System of tariff classification. Hereafter this product is referred to as "fresh chilled or frozen salmon".¹

2.2 In Canada, there are five sources of uncooked salmon for export²:

- (i) adult, wild, ocean-caught Pacific salmon;
- (ii) adult, wild, freshwater-caught Pacific salmon;
- (iii) adult, Pacific salmon cultured in seawater on the Pacific coast;
- (iv) adult, Atlantic salmon cultured in seawater on the Pacific coast; and
- (v) adult, Atlantic salmon cultured in seawater on the Atlantic coast.

2. Diseases of salmon

2.3 Australia has imposed restrictions on the importation of fresh chilled and frozen salmon from Canada since 1975, on the basis that importation of Canadian salmon could result in the introduction of exotic disease agents into Australia, with negative consequences for the health of fish in Australia. In the original dispute, Australia identified 24 disease agents of concern associated with the importation of Canadian salmon. On the basis of the 1999 Import Risk Analysis on Non-Viable Salmonids and Non-Salmonid Marine Finfish³ (hereafter the 1999 IRA), Australia identified six disease agents associated with Canadian salmon as requiring risk management measures in addition to evisceration (see paragraph 2.17)

2.4 With respect to international trade in fish, the OIE identifies three of the diseases of concern to Australia as "notifiable diseases" (infectious haematopoietic necrosis (IHN), viral haemorrhagic septicaemia (VHS), and *oncorhynchus masou* virus), and five others as "significant diseases" (bacterial kidney disease (BKD) or *Renibacterium salmoninarum* (*R. salmoninarum*); infectious pancreatic necrosis (IPN); infectious salmon anaemia (ISA); *Gyrodactylus salaris* and piscirickettsiosis (*Piscirickettsia salmonis*)). To avoid the introduction of these disease agents with the importation of fresh chilled or frozen fish, the OIE recommends that fish be eviscerated before importation.⁴

2.5 The disease agents at issue in this dispute are not of concern from a human health perspective.

¹ The importation of live salmonids is not at issue.

² Only adult salmon are harvested for export.

³ Import Risk Analysis on Non-Viable Salmonids and Non-Salmonid Marine Finfish, Australian Quarantine and Inspection Service, July 1999 ("1999 IRA"). When referring to the "1999 IRA" in this report, we mean the version that was submitted by Australia as Exhibit A to its first submission. We note that a later and final version was published in book form on 12 November 1999. At the request of the Panel, copies of the 12 November version were submitted to the Panel at our meeting with the parties on 10 December 1999.

⁴ OIE International Aquatic Animal Health Code; OIE Code (1997).

B. THE 1999 IMPORT RISK ANALYSES

2.6 Following the conclusions of the original dispute, AQIS undertook further import risk analyses with respect to fresh chilled and frozen salmon for human consumption ("non-viable salmonids"), other non-viable marine finfish, and, separately, live ornamental fish. Drafts of the various chapters of the 1999 IRA were published electronically and updated regularly on the AQIS home page. The complete 1999 IRA was published in July 1999, and version published in book form (also dated July 1999) was issued on 12 November 1999.

2.7 The 1999 IRA considers the animal health risks potentially associated with the importation into Australia of non viable salmonids and other marine finfish from any country. It is a generic import risk analysis, addressing all potential relevant pests and diseases, for all members of the family *Salmonidae*, as well as Ayu or sweetfish, and all other finfish species caught in marine or brackish waters.

2.8 The 1999 IRA drew on information contained in the previous salmon import risk analyses conducted by Australia⁵, as well as on the New Zealand salmon risk analyses of 1994-97.

2.9 The base products considered in the 1999 IRA are eviscerated salmonids and whole, not eviscerated (round) non-salmonid marine finfish. Whole, eviscerated salmonids are sold for human consumption; non-viable, not eviscerated non-salmonid marine finfish may be used for human consumption, as feed for fish, as fishing bait or for further processing (e.g. for pet food).

2.10 The 1999 IRA first identifies the disease agents of concern requiring further consideration. A disease agent is given specific consideration in the 1999 IRA if it is infectious, **and** either exotic to Australia or present in Australia but subject to official control, **and** if the disease agent is OIE-listed or would be expected to cause significant harm in Australia. On the basis of these criteria, the disease agents of concern are categorized into those whose consideration is of higher priority or lower priority.

2.11 For each of the 15 "higher priority" diseases (called Group 1 diseases), the 1999 IRA identifies the factors affecting the probability of a disease agent entering and becoming established in Australia – also called the release and exposure assessments. The factors enumerated in this respect are:

(a) The probability of the disease agent being present in the source country/region of the commodity, and if present, its prevalence. The 1999 IRA states that in examining the available data, account was taken of the extent of surveillance and monitoring by competent authorities in the exporting countries.

(b) The probability of the disease agent being present in an infective form in the commodity on entering Australia. This includes consideration of lifecycle stages (for example, the higher prevalence of disease agents in juvenile and/or sexually mature fish); the origin of the fish (i.e. wild vs. farmed); local dispersal of some disease agents, and time of the year, as well as of inspection and grading of fish. Washing, cold storage or other handling procedures may reduce some risks. Also relevant in this regard is the probability of a disease agent being present in the particular tissues imported, including the blood, skin, etc.

⁵ Draft Import Risk Analysis – Disease risks associated with the importation of uncooked, wild, ocean-caught Pacific salmon product from the USA and Canada, Australian Quarantine and Inspection Service, May 1995, (the "1995 Draft Report") and the Australian Salmon Import Risk Analysis, Australian Quarantine and Inspection Service, Australian Department of Primary Industries and Energy, December 1996, (the "1996 Final Report").

(c) The probability of the disease agent in an infective form entering the aquatic environment of Australia. This depends on the processing, end-use and disposal of the commodity and the capacity of the disease agent to persist, in an infective form, in the commodity after processing, use or disposal. The 1999 IRA details the possible pathways which might be followed by a product imported for human consumption eventually reaching the aquatic environment. With regard to salmon for human consumption, the 1999 IRA identifies as of greatest concern the risks associated with disposal of wastes from the further commercial processing of salmon within Australia.

(d) The probability of the disease agent, having entered the aquatic environment, establishing infection in susceptible hosts. This depends on the capacity of the disease agent to survive in the aquatic environment, in an infective form, and the ease of infection of susceptible hosts and subsequent transmission of infection to others within a population.

The 1999 IRA describes the probability of an event occurring as:

- high: event would be expected to occur
- moderate: less than an even chance of the event occurring
- low: event would be unlikely to occur
- very low: event would occur rarely
- extremely low: event would occur very rarely
- negligible: chance of event occurring is so small that it can be ignored in practical terms.

The 1999 IRA notes that these categories are not equidistant from each other, and that most fall into the range of being greater than zero but less than 50 per cent.

2.12 The 1999 IRA subsequently identifies the biological and consequential effects of the establishment of a new disease agent on the affected fishery industry and on the environment. In considering the "consequence assessment", the 1999 IRA indicates that the effects of a disease can generally be ameliorated by the adoption of methods for control or eradication, but that these measures have associated costs which must also be taken into consideration. The 1999 IRA notes that the biological effect of the establishment of disease is normally evaluated in terms of morbidity and mortality rates, and the costs associated with controlling or eradicating the disease. The economic effect of the establishment of disease is normally evaluated in terms of the costs arising from the biological effects and the commercial implications for domestic and international marketing of affected animals and products. The establishment of disease may also affect the environment in ways which are not easily evaluated in economic terms.

2.13 The key factors used in the 1999 IRA to classify the significance of the establishment of a disease are:

- (a) the biological effects on aquatic species;
- (b) the availability, cost and effectiveness of methods for control or eradication;
- (c) the economic effects at the enterprise, industry or national level, including the effects on the marketing of the product; and
- (d) the effects on native species and the environment, including any loss of social amenity.

The level of significance of the establishment of a disease is categorized as:

- catastrophic: significant economic harm at the national level or serious, irreversible harm to the environment
- high: high mortality or morbidity rates for a prolonged period, not amenable to control, with significant economic harm at the industry level or serious harm to the environment
- moderate: significant economic harm at enterprise or regional level; diseases may be amenable to control or of temporary effects
- low: mild biological consequences, amenable to control; economic harm limited to enterprise or regional level; minor or temporary environmental effects
- negligible: no significant biological consequences or transient.

2.14 The 1999 IRA presents the release and exposure assessments, and the consequence assessments, in a risk evaluation matrix. According to the 1999 IRA, initially the risk is determined on the basis of no risk management, that is, the unrestricted estimate of risk. The 1999 IRA states that seven of the 15 "higher priority" diseases represent risks that are not acceptable to Australia without the application of further risk management measures, that is, measures in addition to evisceration. For these seven diseases, the 1999 IRA identifies various risk management measures which it considers could reduce the risk to the level considered appropriate.

2.15 After this consideration of the "higher priority" diseases (called the Group 1 diseases), the 1999 IRA reviews the "lower priority" diseases (called the Group 2 diseases). The 1999 IRA concludes that with the implementation of measures required for Group 1 diseases, the risks associated with the Group 2 diseases will also meet Australia's appropriate level of protection and that no additional measures are required to address risk related to Group 2 diseases.

2.16 The 1999 IRA also indicates that as the seven diseases of concern are either not reported in New Zealand or (for whirling disease) occur at extremely low prevalence in New Zealand Pacific salmon, the selected measures will not apply to Pacific salmon from New Zealand.

2.17 The 1999 IRA concludes that there are seven disease agents requiring risk management measures beyond evisceration:

- Infectious haematopoietic necrosis virus (IHNV);
- Infectious salmon anaemia virus (ISAV) (for Atlantic salmon);
- Aeromonas salmonicida* (not for wild, ocean-caught Pacific salmon);
- Renibacterium salmoninarum*;
- Infectious pancreatic necrosis virus (IPNV) (for juvenile salmonids only);
- Yersinia ruckeri* (for juvenile salmonids only); and
- Myxobolus cerebralis* (whirling disease) (for rainbow trout and all juvenile salmonids).

The seventh disease agent, whirling disease, is not known to occur in Canada and is thus not at issue here. The further measures imposed on imports from Canada are those described below.

C. MEASURES REGARDING IMPORTS OF FRESH CHILLED OR FROZEN SALMON FROM CANADA

2.18 Specific import restrictions on salmonid products were introduced by Quarantine Proclamation No 86A of 21 February 1975. This and all other Quarantine Proclamations were revoked by the Quarantine Proclamation 1998, on 7 July 1998. Section 43 of Quarantine Proclamation 1998 deals with the importation of fish of the *Salmonidae* family. This Section was

subsequently amended in May 1999 and in September 1999.⁶ With effect as of 28 September 1999, Section 43 now reads as follows:

- "43 Importation of fish of family Salmonidae or Plecoglossidae
- (1) The importation into Australia of fish of the family Salmonidae or Plecoglossidae, or any part of such a fish, in any form (including canned fish, dried fish, processed fish and fish meal) is prohibited.
- (2) The importation into Australia of the roe or caviar of fish of the family Salmonidae or Plecoglossidae is prohibited.
- (3) However, subsections (1) and (2) are not taken to prohibit the importation of:
- (a) canned fish, roe or caviar of fish of those families; or
 - (b) smoked fish of those families:
 - (i) accompanied into Australia by the person wishing to import it; and
 - (ii) in an amount of up to 5 kilograms; and
 - (iii) produced by a manufacturer approved by a Director of Quarantine; or
 - (c) salmon oil, for the personal consumption or use of the person wishing to import it, in a quantity of no more than 3 months' supply for that use.
- (4) Also, subsections (1) and (2) are not taken to prohibit the importation of products of fish of those families otherwise permitted under item 1, 2 or 5 of table 13.
- (5) Also, subsections (1) and (2) are not taken to prohibit the importation by a person of fish, fish parts, roe or caviar of those families if a Director of Quarantine has granted the person a permit to import the fish, fish parts, roe or caviar into Australia."

Quarantine Proclamation 1998 is implemented through various Animal Quarantine Policy Memoranda (AQPM), as described below.

1. Animal Quarantine Policy Memorandum 1999/51 (AQPM 1999/51) Final Reports of Import Risk Analyses on Non-Viable Salmonid Products, Non-Viable Marine Finfish Products and Live Ornamental Finfish and Adoption of New Policies

2.19 AQPM 1999/51, published and effective as of 19 July 1999, contains the outcomes of the risk analyses and the criteria to be used when deciding whether to grant import permits. Policies regarding salmonids as they apply to Canada are detailed in attachment 1 of AQPM 1999/51:

"Where delegates grant permits, under sub-section 43 of the Quarantine Proclamation 1998, to import non-viable uncanned salmonid finfish, they should apply the following policies:

⁶ Quarantine Amendment Proclamation 1999, gazetted on 4 May 1999, and Quarantine Amendment Proclamation 1999 (No.2), gazetted on 28 September 1999, respectively.

- the fish should be eviscerated;
- the fish should not be derived from a population slaughtered as an official disease control measure;
- the fish should not be juvenile salmonids or sexually mature adults/spawners;
- the fish should be processed in premises under the control of a competent authority;
- the head and gills should be removed and internal and external surfaces thoroughly washed;
- the fish should be subjected to an inspection and grading system supervised by a competent authority;
- in addition, for farmed fish, the fish should be derived from a population for which there is a documented system of health monitoring and surveillance administered by a competent authority;
- consignments exported to Australia should be accompanied by official certification confirming that the exported fish fully meet Australia's import conditions (as specified on an import permit issued by AQIS).

In recognition of the health status of New Zealand, salmonids other than rainbow trout would be permitted import under the above policies, except that it would not be required that the head and gills be removed.

Product from countries other than New Zealand derived from non-viable salmonids meeting these policies will be released from quarantine if imported in consumer-ready form. For the purpose of these policies, consumer ready product is product that is ready for the householder to cook/consume, such as cutlets, fillets (without skin), skin-on fillets if less than 450g weight and headless fish of 'pan-size' (i.e. less than 450g weight). Product that has been cooked for human consumption (eg canned, hot smoked, flash fried) is also regarded as consumer-ready product. Imported head-off, gilled and gutted salmonids of greater than 450g weight (i.e. not consumer ready) should be processed to consumer-ready form in premises approved by AQIS before release from quarantine."

2.20 The conditions to be applied to processing plants were outlined in the 1999 IRA. This indicates that AQIS would address applications for approval of premises on a case-by-case basis. Commercial processing would not be permitted in regions where there are economically significant populations of salmonid fish. AQIS would accept discharge of liquid waste into a municipal sewage system, or treatment of waste on site, providing that processing and dilution was judged to be sufficient to reduce risk to an acceptable level. Premises approved for the further processing of imported salmonids would have to be located so as to allow quarantine inspectors and auditors regular access. In addition, AQIS would take into account, *inter alia*, the nature of imported product, the intended processing and the volume and type of waste that would be produced; control of scavengers and pests around the plant; competency of management and availability of competent personnel to supervise quarantine-approved processes; and systems of maintenance for appropriate records of the processing of imported product and waste disposal. Individual plants wishing to process imported product to consumer-ready stage or beyond must enter into a compliance agreement with AQIS. Comments on proposed compliance agreements were solicited on 2 August 1999, and a compliance manual for incorporation into a compliance agreement was finalized and made publicly available on 30 September 1999. To date, AQIS has not received any requests from premises for approval to further process imported head-off, gilled and gutted salmonids to consumer-ready form.

2. Animal Quarantine Policy Memorandum 1999/69 (AQPM 1999/69) Importation of Uncanned Salmonid Product

2.21 AQPM 1999/69, of 20 October 1999, clarifies the conditions announced in AQPM 1999/51 with respect to documentation, recognition of competent authorities, definition of "consumer-ready" product, verification and other requirements. Importers must obtain an import permit from the Director of Animal and Plant Quarantine before beginning importation. The application for an import permit must detail the salmonid species to be imported, the country of export and of origin of the salmonid fish, and the product presentation/form.

2.22 Section 1.4 of AQPM 1999/69 states:

"Salmonid product imported into Australia will normally be released from quarantine on arrival in Australia, if it is accompanied by the appropriate documentation and is in consumer-ready form.

For the purpose of this policy, consumer ready product is product that is ready for the householder to cook/consume, including:

- cutlets - including central bone and external skin but excluding fins - of less than 450 g in weight;
- skinless fillets - excluding the belly flap and all bone except the pin bones - of any weight;
- skin-on fillets – excluding the belly flap and all bone except the pin bones – of less than 450 g in weight;
- eviscerated, headless "pan-size" fish of less than 450 g in weight; and
- product that is processed further than the stages described above.

Salmonid product that is not in consumer-ready form (such as head-off, gilled, eviscerated fish of greater than 450 g in weight) must be processed to a consumer-ready stage at an AQIS-approved processing plant before release from quarantine. Information on approved processing plants can be obtained from the Biologicals Unit, AQIS ..."

2.23 Section 1.6 of AQPM 1999/69 states: "Equivalent approaches to managing risk may be accepted generally or on a case by case basis. Exporting countries seeking to use alternative risk reduction measures should provide a submission for consideration by AQIS; such proposals should include supporting scientific data that clearly establish equivalence."

2.24 With respect to documentation, Section 2.4 of AQPM 1999/69 indicates:

"Consignments exported to Australia must be accompanied by an official certificate, in English and, where appropriate, the language of the exporting country, confirming that:

- the fish were derived from a population for which there is a documented system of health surveillance and monitoring administered by the Competent Authority;
- the fish were not derived from a population slaughtered as an official disease control measure;
- the fish have been eviscerated;
- the heads and gills have been removed and internal and external surfaces thoroughly washed;

- the fish are not juvenile salmonids⁷ or sexually mature adults/spawners⁸;
- the fish were processed in premises approved by and under the control of a Competent Authority;
- the fish were subjected to an inspection and grading system supervised by a Competent Authority;
- for Atlantic salmon: the fish for export to Australia did not come from a farm known or officially suspected of being affected by an outbreak of infectious salmon anaemia (ISA); and
- the product is free from visible lesions associated with infectious disease and fit for human consumption."

D. MEASURES REGARDING IMPORTS OF NON-VIABLE, NON-SALMONID FINFISH

2.25 After 6 July 1999, Australia also adopted a number of measures for imports of non-salmonid finfish. AQPM 1999/51 contains import policies for these fish imports. AQPM 1999/64 lists a series of cases where no import permit is required, which is clarified by AQPM 1999/79.

1. Animal Quarantine Policy Memorandum 1999/51 (AQPM 1999/51) Final Reports of Import Risk Analyses on Non-Viable Salmonid Products, Non-Viable Marine Finfish Products and Live Ornamental Finfish and Adoption of New Policies

2.26 For non-salmonids, AQPM 1999/51 indicates "under transitional arrangements, existing policies for the importation of ... non-viable non-salmonid marine finfish product, and live ornamental finfish will continue to apply. AQIS will specify the time-limit for the transitional arrangements after consultation with relevant stakeholders." Attachment 2 describes the following policies for the importation of non-viable, non-salmonid marine finfish product from any country:

"EITHER

- the fish should be processed in a premises under the control of a competent authority;
- the fish should be eviscerated;
- the fish should be subjected to an inspection and grading system supervised by a competent authority;
- the head and gills should be removed and internal and external surfaces thoroughly washed;
- consignments exported to Australia should be accompanied by official certification confirming that the exported fish meet Australia's import conditions in full;

OR

- for product that has been further processed (beyond that described above) to a consumer-ready state, AQIS will not require an official health certificate."

⁷ Defined as fish that weigh less than 200g in head-off, gilled and gutted presentation.

⁸ Defined as fish with developed gonads.

2. Animal Quarantine Policy Memorandum 1999/64 (AQPM 1999/64) Implementation of New Quarantine Requirements for the Importation of Non-Viable, Non-Salmonid Marine and Freshwater Finfish and Their Products

2.27 AQPM 1999/64, published 22 September 1999, indicates that the new quarantine requirements for the non-salmonid fish will take effect on 1 December 1999. Appendix 1 specifies that no import permit is required for:

(1) Consumer-ready product from all countries (the definition of consumer ready product is a for salmonids, above), with a provision that "Consignments of consumer-ready product should be packaged to facilitate import inspection and will be subject to periodic inspection at the border to confirm that the product is free from lesions associated with infectious disease. As with other imported products, in the event that an imported consignment fails to meet quarantine requirements AQIS would normally detain the consignment at the border, pending a decision to order re-export, further processing or destruction of the product.";

(2) Product of New Zealand origin that is accompanied by a MAF certificate. Product may be partially processed (e.g. head-off, gilled and gutted) or unprocessed (whole, round fish).

(3) Head-off, gilled and gutted fish from countries other than New Zealand, if the fish meet the following conditions:

- "the fish were processed in a premises under the control of a competent authority;
- the fish were eviscerated;
- the fish were subjected to an inspection system supervised by a competent authority;
- the product is free from visible lesions associated with infectious disease;
- the head and gills have been removed and internal and external surfaces thoroughly washed; and
- consignments exported to Australia are accompanied by a health certificate from the competent authority of the exporting country confirming that the exported fish meet Australia's import conditions in full."

All other non-salmonid fish require an import permit. This measure also contains a list of specified finfish species which are normally susceptible to diseases of quarantine concern (Appendix 2).

3. Animal Quarantine Policy Memorandum 1999/79 (AQPM 1999/79) Implementation of New Quarantine Policies for the Importation of Non-Viable, Non-Salmonid Marine and Freshwater Finfish and Their Products

2.28 AQPM 1999/79, published 16 November 1999, clarifies the administrative arrangements for the importation of non-salmonid marine and fresh water finfish product as provided in AQPM 1999/64. The requirements came into effect on 1 December 1999. It contains further specification on the conditions and required documentation for the importation of: (a) non-salmonid finfish product in consumer-ready form; (b) non-salmonid finfish product from New Zealand; (c) eviscerated, head-off non-salmonid finfish product in a consignment accompanied by an official health certificate; (d) other non-salmonid finfish product; and (e) quarantine conditions for the importation of non-viable, non-salmonid marine and freshwater finfish and their products.

E. MEASURES REGARDING IMPORTS OF LIVE ORNAMENTAL FINFISH

2.29 A separate import risk analysis was undertaken with respect to live ornamental finfish (hereafter "the ornamental fish IRA").⁹ After 6 July 1999, Australia also identified certain measures regarding imports of live ornamental finfish. AQPM 1999/51 sets out a number of requirements, to which AQPM 1999/77 provides more detail.

1. Animal Quarantine Policy Memorandum 1999/51 (AQPM 1999/51) Final Reports of Import Risk Analyses on Non-Viable Salmonid Products, Non-Viable Marine Finfish Products and Live Ornamental Finfish and Adoption of New Policies

2.30 As noted in paragraph 2.26, for non-salmonids including live ornamental finfish, AQPM 1999/51 indicates "under transitional arrangements, existing policies for the importation of ... live ornamental finfish will continue to apply. AQIS will specify the time-limit for the transitional arrangements after consultation with relevant stakeholders." Attachment 3 to AQPM 1999/51 lists the following requirements for ornamental finfish:

"Policy for all ornamental finfish are that each consignment be accompanied by:

- an animal health certificate from a competent authority attesting to the health of the fish in the consignment and the health status of the premises of export;
- certification from a competent authority that the premises of export are currently approved for export to Australia; and
- certification from a competent authority that the fish had not shared water with food-fish aquaculture premises.

It is policy that each consignment be subject to post-arrival quarantine detention for a minimum period in approved private facilities under quality assurance arrangements approved by AQIS. It is anticipated that the minimum period of quarantine would be 3 weeks for goldfish and 1 week for all other Schedule 6 listed finfish."

In addition, attachment 3 indicates that "...delegates will have regard to the following risk management measures singly or in combination, as appropriate to the pathogens of concern, to the importation of ornamental finfish to address specific disease concerns ..." and identifies further additional risk management measures.

2. Animal Quarantine Policy Memorandum 1999/77(AQPM 1999/77) Importation of Ornamental Finfish

2.31 AQPM 1999/77, of 17 November 1999, provides detailed import conditions for ornamental finfish in accordance with the policies announced in AQPM 1999/51. It lists conditions regarding documentation, quarantine, export premises approval, health certification requirements, standards for handling and packaging ornamental finfish, and disinfection procedures. Established quarantine periods are 21 days for goldfish, 14 days for gouramis and cichlids, and 7 days for other ornamental finfish. AQPM 1999/77 states that:

"Implementation of the new requirements will be staged to help facilitate their orderly introduction. From 1 December 1999, importers will require an import permit for marine ornamental finfish. This is an existing requirement for freshwater fish.

All new requirements relating to overseas exporters and Competent Authorities of exporting countries will be implemented from 1 February 2000. ...

⁹ Import risk analysis on live ornamental finfish, Australian Quarantine and Inspection Service, July 1999.

From 1 May 2000, all importers must fully comply with new post-arrival quarantine requirements. ...

...

The new conditions require health certification to accompany all shipments of imported goldfish, including a statement of freedom from specified disease agents. Statements of freedom must ordinarily be based on a testing programme that demonstrates absence of the disease agents in the source population over a period of at least two years. In order to facilitate trade in goldfish in the interim, AQIS will require that goldfish health certification from 1 February 1999 [sic] is based on the following testing regimens: ... All health certification from 1 January 2002 must fully comply with testing as detailed in the attached conditions."

F. TASMANIA'S RESTRICTIONS ON SALMONID IMPORTS

2.32 On 20 October 1999, the Government of Tasmania declared a large part of Tasmania to be a protected area for the purpose of preventing the introduction into the area of "whirling disease" (*Myxobolus cerebralis*). The Tasmanian Government Gazette stated that "fish from the family *Salmonidae* must not be moved in the protected area", unless an inspector issued an import permit and any conditions specified in that permit were complied with. To date, no import permits have been issued by the Tasmanian Government. The 20 October measure was subsequently revoked on 18 November 1999, and replaced by a measure published in the Tasmanian Government Gazette on 24 November 1999. This new measure prohibits the importation of fresh chilled or frozen salmon unless it is demonstrated to the satisfaction of the Chief Veterinary Officer (of Tasmania) that the salmon has been derived from fish grown in an area free from six specified diseases, or alternatively has been heat-treated in a hermetically sealed container so as not to require refrigeration or freezing. The six diseases identified in the declaration are:

- Infectious haematopoietic necrosis (IHN);
- Infectious salmon anaemia (ISA);
- *Aeromonas salmonicida* ("furunculosis");
- *Renibacterium salmoninarum* ("bacterial kidney disease");
- Infectious pancreatic necrosis (IPNV); and
- *Myxobolus cerebralis* ("whirling disease").

III. CLAIMS OF THE PARTIES

3.1 **Canada** claims that (a) Australia has failed to take the measures necessary to comply with the recommendations and rulings of the DSB; and that (b) new policies that Australia announced on 19 July 1999, but has not fully implemented, are inconsistent with numerous provisions of the SPS Agreement. Accordingly, both the existence and consistency of Australia's measures are at issue in this dispute. More specifically, Canada claims that on the basis of Australia's actions - and inactions - as of the current date, it cannot reasonably be said that Australia has implemented measures to comply with the recommendations and rulings of the DSB. The necessary measures do not exist.

3.2 Canada further claims that even if Australia has implemented some measures purporting to comply with the recommendations and rulings of the DSB by implementing the policies set out first in AQPM 1999/51 and now in AQPM 1999/69, those measures are inconsistent with numerous provisions of the SPS Agreement. The measures would not remedy Australia's violation of Articles 5.1, 2.2, 5.5 and 2.3 of the SPS Agreement. They are also inconsistent with Articles 5.6, 8 and Annex C.1(c).

3.3 **Australia** claims that the measures it announced on 19 July 1999, bring it into full compliance with the recommendations and rulings of the DSB. The measures respond in full to the recommendations and rulings of the Dispute Settlement Body (DSB). In product scope they go beyond measures applied to fresh, chilled or frozen salmon from Canada, as well as going beyond the measures relevant to the findings under Article 5.5 of the SPS Agreement (whole frozen herring for use as bait and live ornamental finfish). The transparency of the process and techniques, together with the scientific and analytical rigour employed, resulted in the least trade restrictive measures whilst achieving Australia's appropriate level of protection (ALOP).

3.4 With respect to the finding that the quarantine import prohibition on fresh chilled or frozen salmon was being maintained without a proper risk assessment (Article 5.1 and by implication Article 2.2), a risk assessment was undertaken on fresh chilled or frozen salmon from Canada as part of a generic Import Risk Analysis (IRA) on non-viable salmonid products and other non-viable marine finfish.

3.5 With respect to the finding that there were arbitrary or unjustifiable distinctions in the levels of protection considered to be appropriate in different situations (between fresh chilled or frozen salmon on the one hand and on the other hand whole frozen herring for use as bait and live ornamental finfish) which resulted in a disguised restriction on international trade (Article 5.5 and second sentence Article 2.3), in addition to the measures applying to the salmon product based on a risk assessment, risk assessments were undertaken, *inter alia*, on the disease risks associated with whole frozen herring for use as bait and on the disease risks associated with live ornamental finfish.

3.6 Therefore, Australia argues, it is clear that Australia has implemented. The measures applying to salmon and other non-viable marine finfish are in force. A certificate for the import of Canadian salmon has been approved and an import permit granted. This certificate is irrefutable evidence that Australia has removed the import prohibition on fresh chilled or frozen salmon from Canada and that the measures as described are being applied to fresh chilled or frozen salmon from Canada. The additional measures applying to live ornamental finfish were progressively introduced from 1 December 1999.

[Parties' arguments in Sections IV and V and consultation with experts in Section VI deleted from this version]

VII. FINDINGS

A. CLAIMS OF THE PARTIES

7.1 Canada claims, firstly, that Australia has failed to take the measures necessary to comply with the recommendations and rulings of the DSB in the original dispute. In Canada's view, it cannot reasonably be said that Australia has implemented measures to comply with the recommendations and rulings of the DSB. For Canada, the necessary measures do not exist.

7.2 Canada claims, secondly, that even if Australia has implemented some measures purporting to comply with the recommendations and rulings of the DSB, those new measures are inconsistent with several provisions of the SPS Agreement. More specifically, Canada claims that the new measures would not remedy Australia's violation of Articles 5.1, 2.2, 5.5 and 2.3 of the SPS Agreement and are also inconsistent with Articles 5.6, 8 and Annex C, paragraph 1(c), of that Agreement.

7.3 Accordingly, both the existence and consistency of Australia's new measures are at issue in this dispute.

7.4 Australia claims that the measures it took to comply with the DSB recommendations and rulings in the original dispute exist and are being applied. According to Australia, these measures comply with the DSB recommendations and rulings in relation to Articles 5.1, 2.2, 5.5 and 2.3 of the SPS Agreement. In Australia's view, the measures taken to comply do not give rise to any new claimed inconsistencies in respect of Articles 5.6, 2.3, first sentence, Article 8 or Annex C, paragraph 1(c), of the SPS Agreement.

B. PRELIMINARY ISSUES

1. Third party rights

7.5 On 22 November 1999, the Panel made the following ruling in response to a letter received from the EC, third party to these proceedings:

In response to your letter of 18 November 1999 requesting clarification on the Panel's Working Procedures "so as to ensure that the EC receives all written submissions of the parties and the experts' replies before the meeting of the Panel", we have ruled as follows.

Article 10.3 of the DSU reads:

"Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel".

Our Working Procedures do not further specify third party rights in this respect.

In normal panel proceedings, two substantive meetings with the parties are held pursuant to Appendix 3 of the DSU. Before each of these meetings submissions are filed. Article 10.3 of the DSU explicitly limits the right of third parties to receive only the first round of submissions, i.e. the parties' submissions to the first meeting. Third parties under Article 10.3 do not have a right to receive the second round of submissions, i.e. the rebuttal submissions made to the second substantive meeting. Panel practice shows that only in exceptional circumstances have third parties received such extended third party rights.

Due to the expedited nature of Article 21.5 procedures, our timetable in this proceeding only provides for one meeting with the parties. Before that meeting

parties were requested to make both first and rebuttal submissions. We also obtained expert advice before the meeting. In addition, we already received written third party submissions and have invited third parties for a special third party session to be held after the meeting with the parties.

Given the practice under Article 10.3 of the DSU to send copies only of the first round of submissions to the third parties -- not the rebuttal submissions -- we consider it appropriate in this case too to limit the right of third parties under Article 10.3 "to receive the submissions of the parties to the dispute to the first meeting" to copies of the first submissions of the parties and the supplements thereto including any additional evidence submitted up to but not including the rebuttal submission.

We note that the EC did not request any extended third party rights other than those referred to in Article 10.3 and see, indeed, no special reason why the EC, or any other third party to this case, would need special third party rights.

Moreover, in respect of the experts' replies we note that Article 10.3 of the DSU only refers to submissions "of the parties"; not to any other submissions. As was the case in the original dispute, we do not consider that Article 10.3 requires us to provide these expert replies to the third parties.

As to the meeting with third parties, we expect -- as is the case in normal DSU procedures -- to receive the third parties' oral views on this dispute in light of the first round of submissions. Nothing in the DSU prompts us to expect otherwise.

On that basis, and considering the elements of the first round of submissions that third parties have already received, we attach the following document:

Supplement of 4 November to the First Submission of Canada
Concerning Tasmania's Ban on Salmonid Imports.

We recall, however, that nothing prevents the disputing parties in this dispute from also sending copies to the third parties of any of the other submissions they have made or plan to make to the Panel.

7.6 We confirm the above ruling. We recall further that none of the third parties to this dispute requested extended third party rights at the outset of this proceeding.¹³² Consequently, the Panel adopted and maintained standard working procedures following which third parties only receive the parties' first submissions before the date for filing their third party submissions. Thereafter, the Panel received rebuttal submissions, dealing mostly with the advice received from the experts advising the Panel, advice that is, for the reasons stated above, not covered as a third party right pursuant to Article 10.3 of the DSU.

2. "Government Confidential Information"

7.7 On 23 November 1999, the Panel made the following ruling -- which we confirm here -- in response to an Australian request to adopt additional procedures to ensure the confidentiality of what Australia referred to as "Government Confidential Information" which Australia had been asked to submit:

¹³² The EC only did so *after* it filed its third party submission and after we received the expert replies to the Panel's questions.

In response to Australia's request of 17 November to adopt additional procedures to ensure the strict confidentiality of certain scientific information and in the light of Canada's reply of 18 November objecting to the timing and justification of this Australian request, Canada's subsequent letter of 19 November and Australia's letter of 22 November, the Panel has decided as follows.

The Panel appreciates Australia's willingness to submit the scientific information referred to by Canada. It is in the Panel's and the parties' interest that we are informed as much as possible before making a ruling in this highly complex matter. It is also beneficial for the WTO dispute settlement system more generally that parties are forthcoming in submitting evidence requested by panels.

The Panel takes note of the confidentiality concerns expressed by Australia as well as the additional procedures it proposes. We realize that previous panels have adopted additional procedures to maintain the confidentiality of sensitive business information. We are cognizant also of the Appellate Body's refusal to take additional steps in this respect in the case on *Canada – Measures Affecting the Export of Civilian Aircraft* (WT/DS70/AB/R, paras. 141-147).

In this dispute we are not faced with sensitive business information that could leak to private competitors through WTO dispute settlement. Instead, we are faced with reports that are only open to the Australian government and a risk of publication of these reports by the Panel, Secretariat staff or Canadian representatives. No direct business interests are involved. The matter is one mainly of government to government relationships.

In our view, these circumstances plead for a careful examination of already existing confidentiality rules applicable to our proceedings.

First, Article 18.2 of the DSU reads:

"Written submissions to the panel ... shall be treated as confidential, but shall be made available to the parties to the dispute ... Members shall treat as confidential information submitted by another Member to the panel ... which that Member has designated as confidential".

Second, Rule 2 of our Working Procedures¹³³ provides:

"The deliberations of the Panel and the documents submitted to it shall be kept confidential. For the duration of the Panel proceeding, the parties to the dispute are requested not to release any papers or make any statements in public regarding the dispute, except as provided for in paragraph 3 of Appendix 3 ...".

Third, in respect of Panel Members and their Secretariat staff, Article VII.1 of the Rules of Conduct for the DSU states:

"Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential".

Given, in particular, the government to government relationship of the matter before us, we consider that in principle the existing rules provide sufficient confidentiality

¹³³ Attached as Annex 2 to our Report.

protection for the information Australia is planning to submit. The existing rules oblige both disputing parties, third parties, the Panel and its staff to treat all written submissions and documents submitted to the Panel as confidential, in particular information submitted to the Panel which a Member designates as confidential. As was the Appellate Body in *Canada – Aircraft*, we as well

"are confident that the participants and the third participants in this [Panel] will *fully respect* their obligations under the DSU, recognizing that a Member's obligation to maintain the confidentiality of these proceedings extends also to the individuals whom that Member selects to act as its representatives, counsel and consultants" (WT/DS70/AB/R, paragraph 141, emphasis in the original).

We see only two remaining areas that may require clarification. First, the risk that the Panel may, in its public report, quote from the confidential information or refer to the author of such information when using it in support of either party. Second, the risk of leaks occurring subsequent to the completion of DSU proceedings. To address these risks, the Panel has decided to add the following two rules to its Working Procedures¹³⁴:

"TREATMENT OF INFORMATION DESIGNATED AS CONFIDENTIAL

19. Any information that has been designated as confidential by the party submitting it and that is not otherwise available in the public domain shall not be disclosed in the report of the Panel. However, the Panel may make statements of conclusion drawn from such information without referring to the author of the information.

20. After the circulation of the Panel report or, in case of an appeal, after the circulation of the Appellate Body report, the Panel, Secretariat staff, parties and third parties shall return any information that has been designated as confidential to the party that submitted it, unless the latter party agrees otherwise".¹³⁵

Having adopted these additional safeguards, we request Australia to submit the remaining information provided by the scientific reviewers, whatever form it may take, by 23 November 1999.

In reply to Canada's request of 19 November, once we receive this information from Australia within the set deadline we will consider it as part of our proceedings and validly submitted to us under Rule 5 of our Working Procedures.

3. Non-requested information submitted to the Panel

7.8 On 29 November 1999 the Panel sent the following letter to the parties:

On 25 November 1999, the Panel received a letter from "Concerned Fishermen and Processors" in South Australia. The letter addresses the treatment by Australia of, on the one hand, imports of pilchards for use as bait or fish feed and, on the other

¹³⁴ See Annex 2 of our report.

¹³⁵ At our meeting with the experts advising the Panel, we made clear that Rule 20 also applies to the experts (Transcript, para. 8).

hand, imports of salmon. The Panel considered the information submitted in the letter as relevant to its procedures and has accepted this information as part of the record. It did so pursuant to the authority granted to the Panel under Article 13.1 of the DSU.

7.9 We confirm this ruling recalling, in particular, that the information submitted in the letter has a direct bearing on a claim that was already raised by Canada, namely inconsistency in the sense of Article 5.5 of the SPS Agreement in the treatment by Australia of pilchard *versus* salmon imports. We refer in this respect to the Appellate Body report on *US – Import Prohibition of Certain Shrimp and Shrimp Products*¹³⁶, in particular, where it states that a panel's

"authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not ...* The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*".¹³⁷

4. Terms of Reference

7.10 On 6 December 1999, two days before the meeting of the Panel with the parties and experts and after having received the parties first submissions as well as their rebuttal submissions, the Panel made a series of preliminary rulings in respect of its terms of reference. We confirm these rulings here, slightly modified as follows:

1. In its first written submission of 7 October 1999 Australia requested the Panel to make a number of preliminary rulings. Now that Canada has had the opportunity to respond to those requests in its rebuttal submission, the Panel rules as follows.

(i) *The Measures at Issue*

2. First, in paragraph 73 of its first submission, Australia requested

"an immediate ruling that the measures at issue on which the Panel will make its findings are the measures applying to fresh chilled or frozen salmon from Canada, forming part of the measure described in paragraph 28 of this submission".

3. Canada has not objected to this request. Given the product scope of the measure examined by the original Panel (set out in paragraph 8.20 of the Panel Report), the clarifications provided in this respect by the Appellate Body (paragraphs 90-105) and the fact that no change or further specification in respect of product scope was made in the request by Canada for this Article 21.5 compliance Panel, we grant Australia's request.

4. We thus rule that the measures at issue on which the Panel will make its findings are the measures applying to fresh chilled or frozen salmon from Canada, forming part of the measure described in paragraph 28 of Australia's first submission.¹³⁸ We should add, though, that this ruling will not prevent us from also taking into account, where appropriate under the relevant provisions of the SPS Agreement, the way Australia treats products other than fresh chilled or frozen

¹³⁶ Adopted 6 November 1998, WT/DS58/AB/R, paras. 99-110.

¹³⁷ *Ibid.*, para. 108, emphasis in the original.

¹³⁸ See Section II.C of our Report.

salmon from Canada. However, as was the case in the original procedure, the legal findings we will make on that basis shall apply only to measures applying to fresh chilled or frozen salmon from Canada.

(ii) *Legal Claims -- and their Product Scope -- within the Panel's Terms of Reference*

5. Second, in paragraph 91 of its first submission, Australia requested

"that the Panel make an immediate ruling that:

a. Article 2.3, first sentence does not come within the Panel's terms of reference, which are limited to the consistency of the implementing measures applied to fresh chilled or frozen salmon from Canada.

b. the legal scope of the Panel's examination under Article 2.3 first sentence and Article 5.5 does not extend to claims of discrimination in the sense of either Article.

c. the product scope of the Panel's examination of the consistency of Article 5.5 is limited to fresh chilled or frozen salmon from Canada, whole frozen herring for use as bait and live ornamental finfish".

6. All three requested rulings relate to the mandate of an Article 21.5 compliance panel and our specific terms of reference. They relate more particularly to the legal claims -- and, under the third request, their product scope -- that fall within our mandate.

7. Two benchmarks apply when defining our terms of reference. First, Article 21.5 of the DSU pursuant to which this Panel was established. Second, our specific terms of reference set out in document WT/DS18/15, a document that refers, in turn, to the matter and relevant provisions of the covered agreements referred to by Canada in its request for this Panel (document WT/DS18/14).

8. We note that Article 21.5 itself refers to two types of disagreements, namely disagreements as to "the existence or consistency with a covered agreement of measures taken to comply with [DSB] recommendations and rulings" (emphasis added). Australia's requests for preliminary rulings pertain to the second type of disagreements, those on the "consistency with a covered agreement of measures taken to comply with [DSB] recommendations and rulings" (emphasis added).

9. The reference to "disagreement as to the ... consistency with a covered agreement" of certain measures, implies that an Article 21.5 compliance panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in the light of any provision of any of the covered agreements. Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original panel; nor to consistency with specific WTO provisions under which the original panel found violations. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement". The *rationale* behind this is obvious: a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered

agreement is breaching, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU.

10. On that basis, we agree with the Article 21.5 compliance panel in *EC – Bananas III* (requested by Ecuador) when it stated that "[t]here is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered" (WT/DS27/RW/ECU, paragraph 6.8).

11. We recall, however, that there is a second benchmark to be looked at in setting our terms of reference, namely Canada's request for this Panel (document WT/DS18/14). In that request, Canada explicitly included claims under Article 2.3 and Article 5.5 of the SPS Agreement, claims which Australia would want us to exclude, in whole or in part, from our mandate. Canada claimed, more particularly, that Australia's implementing measures

"(iii) arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between New Zealand and Canada and between Australia and Canada, and are applied in a manner that constitutes a disguised restriction on international trade, contrary to Article 2.3 of the SPS Agreement;

(iv) when considered against the measures outlined in AQPM 1999/51 for non-viable marine finfish products other than salmonids and live ornamental finfish, they reflect arbitrary or unjustifiable distinctions in Australia's appropriate level of protection in different situations, resulting in discrimination or a disguised restriction on international trade, contrary to Article 5.5 of the SPS Agreement" (WT/DS18/14, page 2).

12. Without, at this stage, addressing the entirely separate question of whether these Canadian claims are valid on their merits, we thus rule – with reference, first, to the general language of Article 21.5 and, second, to the claims explicitly listed in Canada's panel request – that none of the limitations referred to in any of the three preliminary rulings requested by Australia apply.

13. In respect of the first ruling requested by Australia, we stress that we do not now need to decide the substantive question of whether the first sentence of Article 2.3 of the SPS Agreement, considered independently from Article 5.5, covers only discrimination in respect of the same product or also discrimination between different products.

14. As to the second ruling requested by Australia, we recall that even assuming that no finding of discrimination under Articles 2.3 or 5.5 was made in the original dispute – a matter contested by Canada -- the fact that no such claim may have been dealt with in the original dispute does not prevent an Article 21.5 compliance panel from doing so. Nowhere in the DSU can we trace the requirement referred to by Australia that Article 21.5 compliance panels can only reconsider WTO provisions dealt with by the original panel in case of a "change in circumstances". If, indeed, no "change in circumstances" occurred, as a matter of substance, one could expect that a compliance panel would simply confirm the finding made by the original panel. This issue is, however, a matter of substantive compliance with WTO rules, not one of terms of reference.

15. Finally, considering the third ruling requested by Australia, we recall that already in the original dispute more comparisons were referred to by Canada than

those between salmon, on the one hand, and whole frozen herring for use as bait and live ornamental finfish, on the other. To limit our mandate to comparisons with the latter two categories only would thus even go a step further than limiting Article 21.5 to claims or arguments made before the original panel, a limitation not even Australia accepts.¹³⁹ Only claims or arguments under which an actual violation was found by the original panel would then be subject to Article 21.5 scrutiny. Again, nowhere in the DSU can we find such limitation. Given the broad language of Article 21.5 and of Canada's claims under Article 5.5 set out in the request for this Panel, we find that all comparisons made by Canada in its first round of submissions to this Panel fall within our terms of reference.¹⁴⁰

(iii) *The Tasmanian Import Ban*¹⁴¹

16. We now turn to the question of whether the import ban on salmonids imposed by the Government of Tasmania on 20 October 1999 falls within our terms of reference. This measure was brought to our attention in a letter received from Canada on 27 October 1999. In that letter Canada requested authorization from the Panel to file a second supplement to its first submission dealing specifically with this newly imposed Tasmanian ban. In reply, the Secretary to the Panel sent the following message on 28 October:

"The Panel has taken note of Canada's letter of 27 October regarding Tasmania's import prohibition on salmon. Even though *this letter seems to indicate that the import prohibition allegedly imposed by the Government of Tasmania is not one "taken to comply with the recommendations and rulings" in the sense of Article 21.5, nor one in respect of which the Panel can make a ruling of consistency pursuant to its terms of reference*, the Panel grants the Canadian request to submit an additional brief ... on the grounds that it may shed further light on the conformity of the measures that are subject to the Panel's scrutiny ... Australia may submit its comments on this brief ... as well as comments on whether the measure has been taken to comply with the rulings adopted by the DSB. Note, however, that *the Panel's views expressed in this letter are preliminary only, based solely on the information reflected in the Canadian letter, and conveyed to the parties with the sole intention to set some parameters for their further submissions*" (emphasis added).

17. Having considered since then the submissions we received in this respect, first, from Canada on 4 November, second, from Australia on 17 November and, third, the parties' rebuttals filed on 25 November, we come to a conclusion different from the preliminary view tentatively expressed in the letter of 28 October.

18. In its supplement of 4 November, Canada did not ask the Panel to rule on the SPS consistency of the Tasmanian ban as such, but asked us to "consider the consequences of Tasmania's ban for Australia's non-compliance with the recommendations and rulings of the DSB" (paragraph 5) arguing that "Tasmania's ban on salmonid imports has negated, in part of Australia, even limited access for Canadian salmon products ... In so doing, the Tasmanian ban has exacerbated Australia's non-compliance" (paragraph 14). In our view, we cannot rule on the so-called exacerbation of Australia's non-compliance without examining also the SPS consistency of the Tasmanian ban itself. If the Tasmanian ban is consistent with the SPS Agreement, it cannot, as Canada put it, negate market access derived from new federal import requirements inconsistently with the SPS Agreement. Only if the ban

¹³⁹ Australia, first submission, para. 81.

¹⁴⁰ Canada did not refer to any other comparisons in its subsequent submissions to the Panel.

is inconsistent with the SPS Agreement can it negatively affect Australia's compliance.

19. In its rebuttal submission, however, Canada also claimed¹⁴² that the Tasmanian ban as such is inconsistent with Articles 5.1, 2.2, 5.6 and 8 of the SPS Agreement.

20. Australia submits that the Tasmanian ban is not a "measure taken to comply" in the sense of Article 21.5, is outside the Panel's terms of reference and cannot be adduced as evidence that the new federal import requirements themselves are inconsistent with the SPS Agreement.

21. Two issues arise when considering whether the Tasmanian ban falls within our mandate. First, is the ban a "measure taken to comply with [DSB] recommendations and rulings"? Since Article 21.5 exclusively refers to disagreements as to "measures taken to comply", any other measures fall outside the scope of a compliance panel. Second, is the Tasmanian ban sufficiently specified in Canada's panel request consistently with the requirements of Article 6.2 of the DSU so as to fall within our terms of reference?

22. In respect of the first issue, we note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply". Without attempting to give a precise definition of "measures taken to comply" that should apply in all cases, we are of the view that in the context of this dispute at least any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute – and within a more or less limited period of time thereafter -- that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply". The Tasmanian ban, introduced on 20 October 1999, imposes an import prohibition on all imports of salmonids into part of Australia on quarantine grounds. We thus find that it is a measure taken to comply in the sense of Article 21.5.¹⁴³

23. The question of whether a measure is one in the direction of WTO conformity or, on the contrary, maintains the original violation or aggravates it, can, in our view, not determine whether a measure is one "taken to comply". If this were

¹⁴¹ Australia, in a subsequent letter of 9 December 1999, raised questions in respect of the use of the word "ban". We note that the Tasmanian measure, as published on 20 October 1999 in the Tasmanian Government Gazette, states that "fish of the family *Salmonidae*, and animal material of or derived from fish of the family *Salmonidae*, must not be moved in the protected area" -- the latter area being a large part of Tasmania -- unless a permit is issued and any conditions specified in that permit are complied with. Since, on the basis of the evidence on record, no such permits were issued, nor were any conditions published for product to be able to enter Tasmania under the 20 October 1999 measure, it is clear to us that the measure is in effect an import ban applying also to the product at issue here, namely fresh chilled or frozen salmon from Canada. That is why we referred to the measure as a "ban".

¹⁴² In the original version of these preliminary rulings we mistakenly used the word "argued" instead of "claimed". In our view, paragraphs 19-21 of Canada's rebuttal submission do, indeed, include legal claims, not only arguments when stating (at para. 21) that "at a minimum, the additional certification requirement is not based on a risk assessment, contrary to Article 5.1 of the SPS Agreement and, by implication, is also inconsistent with Article 2.2; it is an unnecessary information requirement, contrary to Article 8 and Annex C.1(c) of the SPS Agreement; and by Australia's express admission, it is more trade restrictive than required to achieve Australia's appropriate level of protection contrary to Article 5.6 of the SPS Agreement".

¹⁴³ The fact that the measure is one taken by Australia, albeit not Australia's central government authorities, is further discussed in para. 27 of these preliminary rulings and para. 7.11 of our Report.

so, one would be faced with an absurd situation: if the implementing Member introduces a "better" measure -- in the direction of WTO conformity -- it would be subject to an expedited Article 21.5 procedure; if it introduces a "worse" measure -- maintaining or aggravating the violation -- it would have a right to a completely new WTO procedure. Our interpretation of "measures taken to comply" is further supported by the practical difficulty of making a distinction between "better" and "worse" measures. Had parts of the new banana regime subject to the Article 21.5 panel requested by Ecuador in *EC – Bananas III* been "worse" than the original regime, would this have been a reason for the panel to decide that the new regime, or parts thereof, were outside its terms of reference? In our view, it would not, as the *Bananas III* compliance panel implicitly decided by accepting all elements of the measures brought to its attention.

24. In respect of the second issue – the coverage of Canada's Panel request as far as implementing measures are concerned – several elements have prompted us to decide that the Panel request does, indeed, cover the Tasmanian ban even though the ban was only introduced subsequent to this Panel's establishment and therefore not *expressis verbis* mentioned in Canada's Panel request.

25. Canada's Panel request refers to the following measures:

"Canada requests that the panel find that Australia has not taken measures to comply with the 6 November 1999 recommendations and rulings of the DSB.

Canada further requests that the panel find that even if Australia has taken or does take measures to comply with the recommendations and rulings of the DSB by implementing the policies for non-viable salmonids products outlined in AQPM 1999/51, those measures are not, or would not be, consistent with the SPS Agreement" (emphasis added).

26. Previous panels have examined measures not explicitly mentioned in the panel request on the ground that they were implementing, subsidiary or so closely related to measures that were specifically mentioned, that the responding party could reasonably be found to have received adequate notice of the scope of the claims asserted by the complainant.¹⁴⁴ In this case, only AQPM 1999/51 of 19 July 1999 was explicitly identified in the Panel request. However, the Panel request also specifies measures that Australia "has taken or does take" to implement AQPM 1999/51, thereby potentially also covering certain future measures. The Panel request also identifies more generally "measures taken to comply" as part of the matter referred to this compliance Panel. None of the parties contest, for these reasons, that AQPM 1999/64, 66, 69, 70, 77 and 79 – all taken subsequent to the Panel's establishment and thus not specifically mentioned in the Panel request -- can be considered by this Panel.

27. For similar reasons, we are of the view that the Tasmanian ban also falls within our mandate. The ban falls within the category of measures specified in the Panel request, namely "measures to comply with the recommendations and rulings of the DSB" that "Australia has taken or does take" or, at least, is so closely related to these measures that Australia can reasonably be found to have received adequate

¹⁴⁴ Panel and Appellate Body Report on *European Communities - Bananas III*, respectively at para. 7.27 and para. 140; Panel Report on *Japan - Measures Affecting Consumer Photographic Film and Paper*, adopted 22 April 1998, WT/DS/44/R para. 10.8; Appellate Body Report on *Australia – Measures Affecting the Importation of Salmon*, adopted 6 November 1998, WT/DS18/AB/R, para. 121 (hereafter "*Australia – Salmon*"), paras. 90-105; and Panel Report on *Argentina – Safeguard Measures on Imports of Footwear*, adopted 12 January 2000, WT/DS121/R, paras. 8.23-8.46.

notice of the scope of Canada's claims: first, because of the definition of "measures taken to comply" provided above in paragraphs 22-23; second, because of the often ongoing or continuous character that the matter of implementation – as identified in the Panel request -- takes. What is referred to this Article 21.5 Panel is basically a disagreement as to implementation. One measure was explicitly identified, with the knowledge, however, that further measures might be taken. To exclude such further measures from our mandate once we have found that they are "measures taken to comply", would go against the objective of "prompt compliance" set out in Articles 3.3 and 21.1 of the DSU. To rule that such measures fall within our mandate would not, in our view, deprive Australia of its right to adequate notice under Article 6.2. On the basis of the Panel request Australia should have reasonably expected that any further measures it would take to comply, could be scrutinized by the Panel. We are faced here not with an Australian measure that was unexpectedly included by Canada in its claims, but with a measure taken during our proceedings by Australia, or in this case one of its territorial subdivisions for the acts of which it is in principle responsible under international law, and as part of Australia's implementation process to which Canada subsequently referred. Arguably, the surprise or lack of notice may, indeed, be more real for Canada than for Australia.

28. We do not consider that measures taken subsequently to the establishment of an Article 21.5 compliance panel should *per force* be excluded from its mandate. Even before an original panel such measures were found to fall within the panel's mandate because, in that specific case, the new measures did not alter the substance – only the legal form -- of the original measure that was explicitly mentioned in the request.¹⁴⁵ In compliance panels we are of the view that there may be different and, arguably, even more compelling reasons to examine measures introduced during the proceedings. As noted earlier, compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measures taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to. Especially under the first leg of Article 21.5 when it comes to disagreements on the existence of measures taken to comply, one can hardly expect that all such measures – when there is no clarity on their very existence – be explicitly mentioned up-front in the panel request.

29. On these grounds, we find that the Tasmanian import ban falls within our mandate.

7.11 In a subsequent letter dated 9 December 1999, Australia commented on these preliminary rulings. We address those comments that, in our view, need clarification in footnotes 141, 142 and 143 above.

7.12 As stated there, as well as in paragraph 27 of our preliminary rulings, we are of the view that the Tasmanian ban is to be regarded as a measure taken by Australia, in the sense that it is a measure for which Australia, under both general international law and relevant WTO provisions, is responsible.¹⁴⁶ We note also that the Tasmanian measure is a sanitary measure applied within the

¹⁴⁵ Panel Report on *Argentina – Safeguard Measures on Imports of Footwear*, op. cit., paras. 8.40-8.46.

¹⁴⁶ In respect of general international law, see Article 27 of the Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty") and Article 6 of the Draft Articles on State Responsibility of the International Law Commission ("The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State", Yearbook of the ILC, 1996, Chapter III).

territory of Australia that directly affects international trade and thus, pursuant to Annex A, paragraph 1, and Article 1.1 of the SPS Agreement, is subject to the SPS Agreement.

7.13 As recognized by Australia in its letter of 9 December 1999, the Tasmanian measures "could be characterized as ... measures taken by 'other than a central government body' in the sense of Article 13 of the SPS Agreement, and would constitute measures 'taken by a regional government' within Australia's territory, in the sense of Article 22.9 of the DSU". Article 13 of the SPS Agreement provides unambiguously that: (1) "Members are fully responsible under [the SPS] Agreement for the observance of all obligations set forth herein"; and (2) "Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies". Reading these two obligations together, in light of Article 1.1 of the SPS Agreement referred to earlier, we consider that sanitary measures taken by the Government of Tasmania, being an "other than central government" body as recognized by Australia, are subject to the SPS Agreement and fall under the responsibility of Australia as WTO Member when it comes to their observance of SPS obligations. In addition, Article 22.9 of the DSU states clearly that "[t]he dispute settlement provisions of the covered agreements [including the DSU itself] may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member", including, as acknowledged by Australia, the measures taken by Tasmania at issue here. As a Panel acting under these dispute settlement provisions, we are thus entitled to consider whether the Tasmanian measures observe the SPS Agreement.¹⁴⁷

7.14 At the meeting with the parties on 10 December 1999, Australia notified the Panel – in a letter dated 9 December 1999 -- that the Tasmanian import prohibition of 20 October 1999 was no longer in force and had been replaced with a measure published on 24 November 1999.

7.15 The new measure of 24 November 1999 prohibits the importation of fresh chilled or frozen salmon unless it is demonstrated that the salmon has been derived from fish grown in an area free of six specified diseases. Since Canada is not free from all of these diseases, the new measure effectively bans imports of Canadian fresh chilled or frozen salmon.

7.16 Canada, in a letter dated 16 December 1999, "maintains its position that Tasmania's new measure nullifies even such measures as Australia has taken to comply" and claims that "Tasmania's measure -- whether the original ban or the new measure -- nullifies Australia's own measures taken to comply". Canada refers back to the claims and arguments it made in respect of the original, 20 October 1999, Tasmanian measure. Canada also argues in this letter that it need not seek an independent ruling on the SPS consistency of the new Tasmanian measure, submitting that this measure can be considered "in the context of Australia's compliance". To the extent that this means that there is no need to start new DSU proceedings for the Panel to address also the Tasmanian measures, we agree for the reasons explained in paragraphs 21-28 of our preliminary rulings above. However, to the extent Canada's position implies that, to rule on Canada's claims, the Panel need not decide on the SPS consistency of the ban as such, we disagree for the reasons set out in paragraph 18 of the preliminary rulings above. It is, indeed, impossible to judge the effect of the Tasmanian measure on Australia's federal measures and their compliance with DSB recommendations, without knowing whether the Tasmanian measure is SPS consistent or not.

¹⁴⁷ The main issue that arises from Tasmania, and not the federal authorities, introducing the measure is one of enforcement of DSB recommendations within Australia and Australia's obligations in respect of this enforcement by Tasmania, set out in the second sentence of Article 13 of the SPS Agreement and the second and third sentence of Article 22.9 of the DSU. However, in this dispute, our task in respect of the Tasmanian measure is to decide on the application of, and consistency with, the SPS Agreement, not on the enforcement or compliance by Australia with any findings of inconsistency of the Tasmanian measure that we may make below.

7.17 At this stage -- where we decide on the Panel's terms of reference -- we need to consider only whether Canada's claims in respect of the new, 24 November 1999, Tasmanian measure fall within our mandate. The reasons set out in our preliminary rulings above lead us to rule that they do.¹⁴⁸

7.18 An additional issue arises, however, from the fact that the replacement of the 20 October measure by that of 24 November, was only notified by Australia to the Panel and Canada at the meeting with the parties on 10 December, and Canada only challenged that measure in a letter dated 16 December 1999. Although these Canadian claims fall within our mandate, this raises the question of whether it is appropriate to examine them in this case.

7.19 On the one hand, we consider that Australia could have notified the Panel and Canada of this change in the Tasmanian measure at an earlier stage in our proceedings. After all, the revocation of the old measure occurred on 18 November and was published, together with the new measure, on 24 November, both dates falling before the due date for the parties' rebuttal submissions (25 November) and well before the Panel's meetings with the parties (8-10 December). In contrast, Australia only notified the new measure on the last day of our meetings with the parties, 10 December. A Panel decision that the new measure cannot be looked at since it was challenged too late, may thus inappropriately benefit Australia.

7.20 On the other hand, it is true that the new measure was challenged late in our proceedings, i.e. after our meetings with the parties. To decide on its SPS consistency without giving Australia the opportunity to defend itself would go against due process. We note, however, that in its letter of 9 December 1999, notifying the new measure, Australia already elaborated on this measure, stating even that "Australian Commonwealth Ministers are on the public record in objecting to such action [both the old and the new Tasmanian measure]". In addition, on 16 December 1999, Australia made another submission "on Tasmanian measures", addressing also the new measure.

7.21 For the reasons stated above, we find that Canada's claims in respect of the new Tasmanian measure fall within our mandate, and shall examine those claims below. To do otherwise would, in our view, go against the principle of prompt settlement of disputes¹⁴⁹ and could hamper implementation of both DSB recommendations in the original dispute and our findings in this case.¹⁵⁰ To make absolutely sure that Australia's due process rights are respected, by letter of 6 January 2000 we gave Australia another opportunity to comment on Canada's challenge of the new Tasmanian measure. Australia submitted those comments on 17 January 2000.

7.22 Since we decided that we can examine both the old and the new Tasmanian measure and the old one is no longer in force, below we limit our substantive examination to the new, 24 November, Tasmanian measure.

C. "THE EXISTENCE ... OF MEASURES TAKEN TO COMPLY WITH THE RECOMMENDATIONS AND RULINGS" OF THE DSB IN THE SENSE OF ARTICLE 21.5 OF THE DSU

7.23 Canada claims that Australia has not implemented all of the measures required for it to comply with the recommendations and rulings of the DSB. On that ground, Canada submits that no measures to implement the recommendations and rulings of the DSB "exist" in the sense of Article 21.5 of the DSU.

7.24 At the DSB meeting of 27-28 July 1999, Australia announced that its "Quarantine and Inspections Service Decision of 19 July had brought Australia into full conformity with its WTO

¹⁴⁸ See paras. 17-28 of our preliminary rulings.

¹⁴⁹ See Articles 3.3 and 21.1 of the DSU.

¹⁵⁰ See Appellate Body report on *Australia – Salmon*, op. cit., para. 223.

obligations".¹⁵¹ The decision referred to is AQPM 1999/51.¹⁵² This decision sets out new policies in respect of salmonids, non-salmonids and live ornamental finfish.

7.25 Subsequent to the 19 July 1999 decision, seven additional AQPM's were published. These additional AQPM's set out in more detail the new policies announced in AQPM 1999/51.

7.26 Canada contests that this series of new measures are consistent with the SPS Agreement. Australia, in contrast, is of the view that they ensure full implementation of the DSB recommendations and rulings and are fully consistent with the SPS Agreement.

7.27 We do not, at this stage, need to examine questions of consistency. Of importance here, is whether the new measures – according to Australia fully implementing DSB recommendations and rulings -- "exist".

7.28 In our view, a new regime of implementing measures can be said to "exist" when this regime sets out all requirements and criteria under which the product concerned *can* enter the market of the implementing Member. For products to be able to enter the market, the new measures setting out these requirements and criteria also have to be in force. We do not consider a framework regulation setting out the basic – but not all – requirements and criteria to be sufficient for a new regime to "exist". On the other hand, we do not consider it necessary that product has actually entered the market. In our view, of decisive importance is whether under the new regime trade *opportunities effectively exist*; not whether they will occur in the future, nor whether they have actually given rise to specific transactions in the past.

7.29 Examining the measures at issue here, we find that taken together they define all requirements and criteria for relevant product to be able to enter the Australian market under the new quarantine regime.¹⁵³

7.30 However, the date of entry into force of the new measures varies according to the products covered. In all cases, the entry into force – and thus the "existence" of the measures taken to comply – occurred *subsequent* to 6 July 1999, the date of expiry of the reasonable period of time given to Australia to implement the DSB recommendations and rulings. Since, in this case, Australia was under an obligation to implement the DSB recommendations and rulings by the end of the reasonable period of time¹⁵⁴, we find that for the period of time that the new measures did not and will not apply subsequent to 6 July 1999, no measures taken to comply existed or will exist in the sense of Article 21.5.

7.31 For salmonids, including fresh chilled or frozen salmon from Canada at issue here, the basic framework was laid down on 19 July 1999 (AQPM 1999/51). The necessary supplements to this basic framework -- "conditions which clarify arrangements for the importation of uncanned salmonid product in accordance with the policies announced in AQPM 1999/51" -- were published on

¹⁵¹ Document WT/DSB/M66, p. 1.

¹⁵² See paras. 2.19, 2.26 and 2.30 of our Report.

¹⁵³ In this respect, we refer, in particular, to the publication of criteria for granting approval to facilities operating in Australia to further process imported salmonids to a stage that is "consumer-ready" as defined in APQM 1999/69 (Exhibit P to Australia's rebuttal submission, see para. 2.21). The specification of these criteria was, in our view, a prerequisite for certain salmonid imports – i.e. those that require further processing – to be able to enter the market. Without them, certain of the trade opportunities offered in the new regime would not effectively exist.

¹⁵⁴ Since Australia and Canada could so far not agree on compensation as a temporary measure pursuant to Article 22.1 of the DSU, Australia was under an obligation to comply with DSB recommendations and rulings by the end of the reasonable period of time. If it did not do so, Australia could face suspension of concessions or other obligations under Article 22.6 of the DSU.

20 October 1999.¹⁵⁵ Thus, only on 20 October 1999 -- almost three and a half months late -- did measures taken to comply in respect of Canadian fresh chilled or frozen salmon "exist".

7.32 For non-salmonids -- including herring for use as bait which was one of the situations compared to Canadian salmon under Article 5.5 in the original dispute -- the new measures entered into force on 1 December 1999.¹⁵⁶ Thus, the inconsistency with Article 5.5 found in the original dispute in respect of Canadian salmon vis-à-vis herring for use as bait was maintained, at least in part, until 1 December 1999, i.e. until almost five months after the end of the reasonable period of time.

7.33 Finally, for live ornamental finfish -- the other situation compared to Canadian salmon under Article 5.5 in the original dispute -- implementation of new requirements will be staged over a period of time.¹⁵⁷ On 1 December 1999, the requirements relating to import permits entered into force. From 1 February 2000, all new requirements relating to exporters and exporting countries will apply. From 1 May 2000, all importers must fully comply with new post-arrival quarantine requirements. Thus, although the inconsistency with Article 5.5 found in the original dispute in respect of Canadian salmon vis-à-vis live ornamental finfish may be gradually alleviated, all requirements and criteria for product to enter Australia under the new regime -- a regime that according to Australia will achieve compliance -- will only apply from 1 May 2000. This particular inconsistency with Article 5.5 will thus -- as Australian quarantine policy now stands -- be maintained, at least in part, for almost 10 months subsequent to the expiry of the reasonable period of time.

7.34 In its oral statement, Canada also refers to 1 January 2002 as the date of entry into force of certain disease testing requirements that apply to imports of goldfish. We note, however, that the requirement referred to relates to statements of freedom from specified disease agents based on a testing programme that demonstrates absence of the disease agents in the source population over a period of at least two years. The very nature of this requirement makes it difficult to impose the requirement immediately. If this were done, imports from countries where so far no testing programmes were carried out would be banned for two years. On that ground, a staged implementation of disease testing requirements, as the one imposed by Australia, is, in our view, justifiable and does, we believe, not prevent the new regime on live ornamental finfish from "existing" in the sense referred to earlier.¹⁵⁸

7.35 Consequently, for the periods of time specified above, no measures taken to comply "existed" in the sense of Article 21.5. As a result, during those periods of time, Australia failed to bring its measure into compliance with the SPS Agreement as called for in the DSB recommendation, in the sense referred to in Article 22.6 of the DSU.

7.36 Under its claim that Australia has not taken measures to comply, Canada also submits that "not all of the requirements Australia imposes are necessarily listed in the AQPMs".¹⁵⁹ Canada refers, in particular, to a requirement imposed on Canada in order to obtain a health certificate that "fish do not come from waters within 10 kilometers or one tidal interchange of an [ISA] infected farm, whichever is greater". Canada argues that this requirement is specified neither in the AQPMs nor mentioned in the 1999 Report. However, since Canada does not make any claim of inconsistency with the SPS Agreement, nor provided any documentary evidence, in respect of this requirement, we are not called upon, nor in a position, to make any findings on this requirement.

¹⁵⁵ AQPM 1999/69, p. 1, referred to above in paras. 2.21-2.24 of our Report.

¹⁵⁶ AQPM 1999/64, dated 22 September 1999, and AQPM 1999/79, dated 16 November 1999, referred to above in paras. 2.27 and 2.28 of our Report.

¹⁵⁷ AQPM 1999/77, dated 17 November 1999, referred to above in para. 2.31 of our Report.

¹⁵⁸ See para. 7.27.

¹⁵⁹ Para. 16 of Canada's Oral Statement at the meeting with the parties.

D. SANITARY MEASURES BASED ON A RISK ASSESSMENT PURSUANT TO ARTICLE 5.1 OF THE SPS AGREEMENT

7.37 The previous section of our Report addresses the existence of certain measures. We now turn to the second part of Canada's claims, those relating to the consistency of the new measures with certain provisions of the SPS Agreement. We note, generally, that Australia has, indeed, lifted the import prohibition on Canadian fresh chilled or frozen salmon and taken steps to facilitate access of Canadian product, albeit subject to certain conditions. We recall also that the burden of proof rests on Canada to demonstrate that these conditions are inconsistent with the provisions of the SPS Agreement.

7.38 We start our examination with Canada's claims under Article 5.1.

Article 5.1 reads as follows:

"Members shall ensure that their sanitary ... measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations".

7.39 An examination of whether sanitary measures are based on a risk assessment in accordance with Article 5.1 involves two steps:

- (1) does the study put forward as a risk assessment meet the requirements of a risk assessment set forth in Article 5.1 and Annex A of the SPS Agreement?;
- (2) if so, are the sanitary measures finally selected *based on* this risk assessment as required in Article 5.1?

1. The three requirements of a risk assessment in accordance with the SPS Agreement

7.40 Risk assessment for purposes of the SPS Agreement and, in particular, Article 5.1 thereof, is defined in paragraph 4 of Annex A as

"The evaluation of the likelihood of entry, establishment or spread of a ... disease within the territory of an importing Member according to the sanitary ... measures which might be applied, and of the associated potential biological and economic consequences".

7.41 This definition contains a three-pronged test. Consequently, the 1999 IRA¹⁶⁰, the only study Australia puts forward as a risk assessment in support of its measures, needs to

- "(1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
- (2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and

¹⁶⁰ Import Risk Analysis on Non-Viable Salmonids and Non-Salmonid Marine Fish, Australian Quarantine and Inspection Service, July 1999 ("1999 IRA"). When referring to "the 1999 IRA" in this report, we mean the version that was submitted by Australia as Exhibit A to its first submission. We note that a later version was published in book form on 12 November 1999. This version was only submitted to the Panel during our meeting with the parties on 10 December 1999. See, in this respect, paras. 7.73 ff. below.

- (3) evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied".¹⁶¹

7.42 Canada does not contest that the 1999 IRA meets the first requirement. At issue here is whether the 1999 IRA evaluates the likelihood of entry, establishment or spread of the diseases identified by Australia (second requirement) and whether it does so according to the sanitary measures which might be applied (third requirement).

7.43 The definition of risk assessment in Annex A is to be read and applied in the context of the general obligation in Article 5.1 to base sanitary measures on a risk assessment as well as in light of the specific factors a risk assessment has to take into account pursuant to Article 5.1¹⁶², Article 5.2¹⁶³ and Article 5.3.¹⁶⁴ Finally, also the basic obligations in Article 2.2 impart meaning to the definition of risk assessment.¹⁶⁵

- (a) The second requirement: "The evaluation of the likelihood of entry, establishment or spread of ... disease"

7.44 The context we referred to in the previous paragraph is of particular importance when examining Canada's claim that the 1999 IRA does not *adequately* evaluate likelihood and evaluates likelihood in a *highly subjective* way.

7.45 In the original dispute Canada claimed, and the Appellate Body agreed¹⁶⁶, that the 1996 Final Report¹⁶⁷ evaluated *possibility* -- instead of *likelihood* or *probability* -- of disease entry, establishment or spread. On that basis, the Appellate Body found that the 1996 Final Report did not meet the second requirement of a risk assessment. "Some" evaluation of the likelihood -- on the basis of which the original panel had continued its examination without making a finding on the issue¹⁶⁸ -- was found to be insufficient. What is required, according to the Appellate Body, is "the evaluation of the likelihood", without there being a need for this evaluation to be done quantitatively.¹⁶⁹

7.46 In this case Canada agrees that the 1999 IRA constitutes progress vis-à-vis the 1996 Final Report and addresses likelihood or probability. However, Canada is of the view that the 1999 IRA does not appropriately, adequately or objectively *evaluate* such likelihood in accordance with the second requirement of risk assessment. Although Canada submits in its answer to a Panel Question that the 1999 IRA "cannot be said to have taken [the factors referred to in Articles 5.1 to 5.3] into

¹⁶¹ Appellate Body reports on *Australia – Salmon*, op. cit., para. 121 and *Japan – Measures Affecting Agricultural Products*, adopted 19 March 1999, WT/DS76/AB/R, para. 112 (hereafter "*Japan – Varietals*"). See, originally, Panel report on *Australia – Salmon*, adopted 6 November 1998, WT/DS18/R, para. 8.72.

¹⁶² Article 5.1 refers to "risk assessment techniques developed by the relevant international organizations".

¹⁶³ Article 5.2 refers to: "available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment".

¹⁶⁴ Article 5.3 refers to: "the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks".

¹⁶⁵ Article 2.2 reads: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5".

¹⁶⁶ Appellate Body report on *Australia – Salmon*, op. cit., para. 135.

¹⁶⁷ *Salmon Import Risk Analysis*, Final Report, published by the Department of Primary Industries and Energy, December 1996. The 1996 Final Report was the study referred to by Australia as a risk assessment in support of the measure examined in the original dispute.

¹⁶⁸ Panel report, op. cit., para. 8.83.

¹⁶⁹ Appellate Body report, para. 124: "The likelihood may be expressed either quantitatively or qualitatively".

account in an appropriate manner"¹⁷⁰, Canada does not make any specific claims of inconsistency in this respect.

7.47 Canada's claim raises the question of where to put the threshold of an *evaluation of likelihood* consistent with the SPS Agreement. On the one hand, we find it difficult to read into the summary definition of risk assessment set out in paragraph 4 of Annex A – which only refers to "the evaluation of the likelihood"¹⁷¹ – specific requirements such that minor flaws or misconceptions at a detailed level would preclude a study from falling within the SPS definition of risk assessment.¹⁷² As agreed by all parties and experts involved in this dispute, risk assessment, in particular a qualitative risk assessment like the 1999 IRA, inevitably includes subjective elements.¹⁷³ On the other hand, we realize that there may be studies that are flawed or biased to such extent that they cannot be said to meet any standard of objectivity. We do not think that such studies should pass the test of a risk assessment in accordance with the SPS Agreement.

7.48 In the absence of an explicit, textual threshold in paragraph 4 of Annex A itself, we turn to the context outlined in paragraph 7.43 above. The reference made there to a series of objective factors such as "risk assessment techniques developed by the relevant international organizations"¹⁷⁴, "available scientific evidence"¹⁷⁵, "scientific principles" and "sufficient scientific evidence"¹⁷⁶, strengthens our view that the evaluation of likelihood needs to achieve a certain level of objectivity.

7.49 We find further support in Article 5.7 of the SPS Agreement. This provision allows Members to take provisional sanitary measures when relevant scientific evidence is insufficient pending a search for the additional information "necessary for a *more objective* assessment of risk" (emphasis added). This implies that except for provisional measures – not at issue here – a risk assessment has to meet a certain level of objectivity.¹⁷⁷

7.50 We also considered Section 1.4 of the 1997 OIE International Aquatic Animal Health Code on "Import Risk Analysis" which includes techniques that a risk assessment in the area of aquatic animal health must take into account pursuant to Article 5.1. This OIE Code states that "[t]he principal aim of import risk analysis is to provide importing countries with an *objective and defensible method* of assessing the disease risks associated with the importation of aquatic animals ... Import risk analysis is preferable to a zero-risk approach because it provides a *more objective decision*"

¹⁷⁰ Canada's answer to Panel Question 34.

¹⁷¹ The one criterion further specified in paragraph 4 of Annex A itself is that the evaluation needs to be "according to the sanitary ... measures which may be applied". However, this is the third requirement of risk assessment examined below. The Appellate Body statement that not "some evaluation" but "the evaluation" of the likelihood is required does not provide further guidance on this issue either.

¹⁷² For that reason, we find it difficult to agree with Dr. Wooldridge's statement implying that the SPS Agreement legally requires "the highest standards of risk assessment that we possibly can reach" (Transcript, para. 50, see also Transcript, para. 45). For example, although risk assessment techniques developed in the OIE have to be taken into account pursuant to Article 5.1, they are not legally binding in the WTO context. In our view, the fact that Dr. Wooldridge concludes that the 1999 IRA is *not* a risk assessment in accordance with the SPS Agreement does, in part, stem from the very high benchmark she admittedly applied.

¹⁷³ See, in particular, Dr. Wooldridge's statement at the meeting with experts, Transcript, para. 122: "It is impossible to avoid subjectivity in a qualitative risk assessment". She, nevertheless, agrees that a risk assessment may be either quantitative or qualitative (Transcript, para. 42).

¹⁷⁴ Article 5.1.

¹⁷⁵ Article 5.2.

¹⁷⁶ Article 2.2.

¹⁷⁷ The Appellate Body's reference to risk assessment as "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting facts and opinions" in its report on *EC – Measures Affecting Meat and Meat Products (Hormones)* (adopted 13 February 1998, WT/DS26/AB/R, para. 187, hereafter "*EC – Hormones*") also supports the view that the evaluation of likelihood needs to achieve a certain level of objectivity.

(emphasis added).¹⁷⁸ This, as well, supports the view that the evaluation of likelihood needs to achieve a certain level of objectivity.

7.51 With this in mind, we hold the view that the level of objectivity to be achieved in a risk assessment must be such that one can have reasonable confidence in the evaluation made, in particular in the levels of risk assigned.

7.52 Applying this standard to the 1999 IRA, and after careful consideration of all the arguments and evidence submitted to us by the parties and the experts advising the Panel, we are of the view that the 1999 IRA meets the required level of objectivity.

7.53 The 1999 IRA first identifies the diseases of concern to Australia in respect of salmonids, applying certain criteria, e.g. whether the disease is infectious, exotic, OIE listed, etc. It sub-divides diseases of concern into "higher priority" and "lower priority" diseases.

7.54 For each of the 15 "higher priority" diseases of concern, it then determines the probability of the disease entering and becoming established in Australia through imports of eviscerated salmonids, making separate release and exposure assessments. For each of these diseases it also determines the expected impact or significance of disease establishment (consequence assessment). To each of these two elements, a qualitative scale is then attributed specifying, respectively, the probability of the disease becoming established (ranging from high, moderate, low, very low, extremely low to negligible) and the severity of the impact (ranging from catastrophic, high, moderate, low to negligible). This is done, again, disease-by-disease.

7.55 Following a standard risk evaluation matrix that applies in respect of all diseases, it is then determined whether, for each disease, the risk of disease establishment and its impact, related to imports of eviscerated salmonids, is acceptable in light of Australia's appropriate level of protection (ALOP). For example, a high probability of establishment with negligible consequences is tolerated, whereas a moderate risk of establishment with low consequences is not. On that basis seven of the 15 "high priority" diseases are found to represent a risk that is *not* acceptable.¹⁷⁹

7.56 We note that two of the three experts we appointed – Drs. Brückner and McVicar – are of the view that the 1999 IRA does appropriately evaluate the likelihood of entry, establishment and spread of diseases into Australia. The third expert – Dr. Wooldridge – concludes the opposite on the basis of certain flaws she detected in the 1999 IRA.¹⁸⁰ These flaws – also referred to by Canada -- centre

¹⁷⁸ OIE Code, Article 1.4.1.1, Introduction, p. 29. A similar statement can be found in the new 1999 OIE International Animal Health Code (adopted in May 1999, but not yet entered into force), Article 1.4.1.1, Introduction, p. 18. The 1999 OIE Code further states that Chapter 1.4.2 (Guidelines for Risk Assessment) "provides guidelines and principles for conducting *transparent, objective and defensible* risk analyses for international trade" (emphasis added). In respect of OIE standards, we note that Drs Brückner and McVicar, like Australia, are of the view that the 1999 IRA meets OIE standards, whereas Dr. Wooldridge concluded, like Canada, that it does not (see answers to Panel Questions 1, 2 and 35 to the experts, Dr. Wooldridge's statement at the meeting, Transcript, para. 84, and Canada's answer to Panel Question 38).

¹⁷⁹ One of these seven diseases is not known to occur in Canada, see para. 2.17 above.

¹⁸⁰ Expert answers to Panel Questions 1 and 2 and statements at the meeting with experts by Drs. Brückner, McVicar and Wooldridge, Transcript, paras. 19, 156 and 40-42 respectively. Since we are faced here with divergent scientific opinions – with a majority of two to one holding the view that the second requirement of risk assessment is met -- it may be useful to recall the following statement by the Appellate Body in *EC – Hormones*, op. cit.:

"Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. ... 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 a divergent

around the exposure assessment not taking fully into account all information available, the possibility of bias in the release assessment due to the way certain information was presented and the complexity of the qualitative terms used.¹⁸¹

7.57 Neither Canada nor the experts advising us, refers to scientific or other information that was *not* taken into account in the 1999 IRA. Moreover, whereas Canada and Dr. Wooldridge do point out certain methodological flaws and alleged inconsistencies in the 1999 IRA that – if absent – *might have led* to a lower level of assessed risk, we have not been convinced that this *would be so*, at least not to such extent that we would no longer have reasonable confidence in the levels of risk currently assigned in the 1999 IRA. In summary, we believe that the flaws identified are not so serious as to prevent us from having reasonable confidence in the evaluation made and the levels of risk assigned.¹⁸²

7.58 Recalling that Canada bears the burden of demonstrating that the 1999 IRA does *not* fulfil the requirements of risk assessment, we thus conclude that the 1999 IRA evaluates the likelihood of disease entry, establishment or spread in accordance with the second requirement of a risk assessment.

(b) The third requirement: "The evaluation of the likelihood ... according to the sanitary ... measures that might be applied"

7.59 The one specific criterion that is textually referred to in paragraph 4 of Annex A for an "evaluation of the likelihood" to be consistent with the SPS Agreement is contained in the third requirement of the definition of risk assessment: the evaluation of the likelihood of entry, establishment or spread has to be made "according to the sanitary ... measures that might be applied".

7.60 In the original dispute, the Appellate Body found that the 1996 Final Report does not meet this third requirement, considering, again, that "*some* evaluation of the likelihood is not enough".¹⁸³ It did so on the basis of factual findings made by the original panel¹⁸⁴:

"132. ... We note that the Panel observed that the 1996 Final Report examines a large number of different risk reduction factors for each of the 24 diseases of concern, and we note that the Panel came to the following factual finding:

For most of these risk reduction factors, the 1996 Final Report provides *some* evaluation of the extent to which these factors could reduce risk. (emphasis added)

133. With regard to the quarantine policy options considered to reduce the *total* risk associated with all diseases of concern, the Panel, arrived at these factual findings:

opinion coming from qualified and respected sources" (para. 194; see also *Japan – Varietals*, op. cit., para. 77).

¹⁸¹ In this respect, we recall that Dr. Wooldridge applied the "highest standards" to the 1999 IRA. See her statement at the meeting with experts, already referred to in footnote 172 above, Transcript, para. 45: "when I assess something like a risk assessment, I work on the basis of the highest standards that I can. So I'm assessing this risk assessment trying to look at it in terms of the best quality risk assessment that I would like to see".

¹⁸² See Dr. McVicar's statement at the meeting with experts, Transcript, para.158: "Inevitably for such a major piece of work [as the 1999 IRA], which has been produced in a very short time, there are areas which could be improved, but I have not detected problems which I believe could affect the main conclusions".

¹⁸³ Appellate Body report, op. cit., para. 134.

¹⁸⁴ On the basis of these factual findings the original panel continued its examination without making a finding on the issue.

... that the 1996 Final Report does not substantively *evaluate* the relative risks associated with these different options. Even though the definition of risk assessment requires an 'evaluation ... according to the sanitary ... measures which might be applied', *the 1996 Final Report identifies such measures but does not, in any substantial way, evaluate or assess their relative effectiveness in reducing the overall disease risk.* (emphasis added)".¹⁸⁵

7.61 In this case we have to examine whether the 1999 IRA meets the test which the 1996 Final Report failed. For the reasons explained below, we are of the view that it does.

7.62 Having identified the seven "higher priority" diseases in respect of which imports of eviscerated salmonids would *not* meet Australia's ALOP, the 1999 IRA next considers whether so-called risk management or risk reduction measures could be implemented to reduce the risk to a level that would meet Australia's ALOP.

7.63 The 1999 IRA first identifies available quarantine measures, both pre-export requirements applying to the country of origin and post-import measures applying in Australia. Thereafter, for each of the seven diseases found to represent a risk that is not acceptable, "Key Risk Factors" are pointed out, such as the kind of control measures in case of disease establishment, the type of salmon with the highest prevalence, most infected tissues, survival rate and risk related to waste.

7.64 Subsequently, for each disease – not only for *some* diseases as in the 1996 Final Report -- a series of "Risk Management Measures" that might be applied and that would reduce the risk associated with the particular disease are identified *and* discussed, such as control of health status through health surveillance and monitoring, restrictions as to the age of the fish, inspection and grading, processing, export certification and controls on waste disposal.

7.65 Critically -- and contrary to what was done in the 1996 Final Report -- the discussion provided in the 1999 IRA for each of the "Risk Management Measures" is made *in light of the effect these measures would have on the "Key Risk Factors" previously identified.* On the basis of these discussions – which we consider to be evaluations -- certain conclusions are made and a list of pre-export and/or post-import requirements is adopted for each specific disease in order to achieve Australia's ALOP.¹⁸⁶

7.66 On the basis of this disease-by-disease assessment, the 1999 IRA concludes that importation of eviscerated salmonids from any country should be permitted subject to a series of measures – a combination of all "Risk Management Measures" identified for the seven diseases – that would have the effect of reducing the overall risk related to imports of salmonids to a level that is acceptable to Australia.¹⁸⁷

¹⁸⁵ Appellate Body report, op. cit., paras. 132-133.

¹⁸⁶ Sometimes the "Risk Management Measures" selected do not apply to certain types of salmonids, e.g. not to wild, ocean-caught Pacific salmon (measures against the disease *A. salmonicida*) or only to Atlantic salmon (measures against Infectious Salmon Anaemia or ISA), juveniles (measures against the disease *Y. Ruckeri*) or rainbow trout and juveniles (measures against whirling disease). This selective approach is, in our view, another indicator that a more detailed evaluation of risk and risk reduction factors preceded the final selection of measures in the 1999 IRA than in the 1996 Final Report.

¹⁸⁷ The 1999 IRA also found that as the seven diseases of concern are either not reported in New Zealand or (for whirling disease) occur at extremely low prevalence in New Zealand Pacific salmon, the selected measures would not apply to Pacific salmon from New Zealand (1999 IRA, p. 230). After this evaluation of "higher priority" diseases (so-called group 1 diseases), the 1999 IRA assessed the "lower priority" diseases (so-called group 2 diseases) to ensure that with the implementation of measures required for group 1 diseases, risks associated with the group 2 diseases would also meet Australia's ALOP. As a result of this assessment, it was found that no additional measures were required to address risk related to group 2 diseases.

7.67 We note that two of the three experts advising the Panel – Drs. Brückner and McVicar -- are of the view that the 1999 IRA evaluates the likelihood of disease entry, establishment or spread according to the sanitary measures that might be applied.¹⁸⁸ Dr. Wooldridge, in contrast, is "unable to find any indication that the probability of any individual (or indeed any combination) of measures has actually been assessed *specifically with regard to the likelihood of bringing the assessed risk below Australia's ALOP*" (emphasis added).¹⁸⁹ She does agree, however, that "[f]or each disease which does not meet the ALOP criteria, risk factors have been identified, and a list of possible risk management measures described. In addition, the particular risk factor which each measure would address is indicated".¹⁹⁰

7.68 Canada's claim, as well as Dr. Wooldridge's opinion, raises the question of whether the definition of risk assessment *as such*, requiring Members to assess risk "according to the [sanitary] measures which might be applied", can be construed so as to include the obligation to make the link between the assessment, the measures *finally selected* and the necessity to use these measures in order to achieve the ALOP. We find it difficult to read such a requirement into paragraph 4 of Annex A.

7.69 In our view, the rights and obligations in respect of these linkages are set out *not* in the definition of risk assessment itself – which logically *precedes* the selection of measures -- but, *inter alia*, in the obligation to *base* sanitary measures *on* a risk assessment in Article 5.1 and to ensure that sanitary measures are not more trade-restrictive than required to achieve the ALOP in the sense of Article 5.6. To examine these questions of relationship between the risk assessment, the measures selected and the ALOP under the definition of risk assessment – as Canada and Dr. Wooldridge seem to do -- would, in our view, run the risk of adding to or diminishing the more specific rights and obligations of Members set out in other SPS obligations, contrary to Article 19.2 of the DSU.

7.70 We examine these questions of relationship between the measures at issue and the risk assessment below.¹⁹¹ Even if we were to find there that some of the Australian measures in question are not *based on* the 1999 IRA on the ground, for example, that the 1999 IRA does *not* explain or assess these measures, we would not be precluded from finding here that the 1999 IRA meets the definition of risk assessment. Indeed, the fact that the 1999 IRA would not evaluate the likelihood according to *all* sanitary measures which may be applied, including some of those that were actually selected, does not, in our view, preclude that the 1999 IRA taken separately meets the definition of risk assessment. Paragraph 4 of Annex A refers to an evaluation "according to the sanitary ... measures which might be applied" *tout court*. It does not require that *all possible* measures (of which there could be a very great number) be evaluated nor specify precisely which measures need to be evaluated. In any event, we prefer to address this question of relationship between the measures selected and the risk assessment under the obligation to *base* measures *on* a risk assessment pursuant to Article 5.1 rather than under the very definition of risk assessment referred to in the same provision.

7.71 For all the reasons above, after careful examination of all the arguments and evidence submitted to us by the parties and the experts advising the Panel and recalling that Canada bears the burden of demonstrating that the 1999 IRA does *not* fulfil the requirements of a risk assessment, we conclude that the 1999 IRA evaluates the likelihood of disease entry, establishment or spread "according to the sanitary ... measures which might be applied" consistently with the third requirement of a risk assessment.

¹⁸⁸ See their answers to Panel Questions 1, 2 and 6.

¹⁸⁹ Answer to Panel Question 1, para. 6.26.

¹⁹⁰ *Ibid.*

¹⁹¹ See paras. 7.72 ff. and 7.115 ff.

2. Sanitary measures *based on* a risk assessment

7.72 Regarding the requirement in Article 5.1 that sanitary measures be *based on* a risk assessment, the Appellate Body in *EC - Hormones* stated the following:

"We believe that Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that *the results of the risk assessment must sufficiently warrant - that is to say, reasonably support -- the SPS measure at stake*. The requirement that an SPS measure be 'based on' a risk assessment is a substantive requirement that there be a *rational relationship between the measure and the risk assessment*" (emphasis added).¹⁹²

7.73 As noted earlier, whereas the definition of risk assessment *as such* does not, in our view, call for an examination of the link between the risk assessment and the sanitary measure finally selected¹⁹³, the obligation to base sanitary measures on a risk assessment requires that there be a rational *relationship* between the risk assessment and the measures selected.

7.74 Canada claims that the new measures applying to salmonids set out in AQPM 1999/51 of 19 July 1999 and AQPM 1999/69 of 20 October 1999 cannot be said to be *based on* the 1999 IRA, first of all, because the 1999 IRA was only issued in its final form on 12 November 1999, i.e. *after* the publication of the new measures.

7.75 In response to an Australian objection against considering the 1995 Draft Report on the ground that it was only a draft risk assessment not representing official government policy, we noted in the original panel report that

"to the extent [reports] constitute relevant available scientific information which was submitted to the Panel, we consider it our task to take this evidence into account. We consider that, for purposes of our examination, the scientific and technical content of these reports and studies is relevant, not their administrative status (i.e. whether they are official government reports or not)".¹⁹⁴

7.76 We hold the same view in respect of the 1999 IRA that was published in July 1999. We note that the final form of the 1999 IRA, though only edited and published in book form on 12 November 1999, is still dated July 1999 and that, according to AQPM 1999/80 – entitled "Publication of the Final Report of the Import Risk Analyses on Non-Viable Salmonids and Non-Salmonid Marine Finfish" -- and the concordance table it sets forth, the amendments made in the final 1999 IRA "do not alter the substance or the conclusions of the report as announced on 19 July".

7.77 On these grounds, we find that the fact that the 1999 IRA was only published in final form subsequent to the date the new sanitary measures were taken, does not, in this case, preclude the measures from being *based on* the 1999 IRA. All substantive elements of the risk assessment we looked at earlier were already included in the draft 1999 IRA of July 1999, i.e. *before* the new measures were taken.¹⁹⁵

7.78 Canada further claims that there is no rational relationship between the 1999 IRA and the Australian requirements that salmonids may not be released from quarantine unless they are "consumer-ready". AQPM 1999/69 clarifies that under Australia's new regime

¹⁹² Appellate Body report on *EC – Hormones*, op. cit., para. 193.

¹⁹³ See paras. 7.67 and 7.68.

¹⁹⁴ Op. cit., para. 8.136.

¹⁹⁵ As stated in footnote 160, when we refer to the 1999 IRA in this Report we mean the July 1999 version attached as Exhibit A to Australia's first submission, not the 1999 IRA published in book form on 12 November 1999 and submitted to us only on 10 December 1999.

"consumer-ready product is product that is ready for the householder to cook/consume, including:

- cutlets – including central bone and external skin but excluding fins – of less than 450 g in weight;
- skinless fillets – excluding the belly flap and all bone except the pin bones – of any weight;
- skin-on fillets – excluding the belly flap and all bone except the pin bones – of less than 450 g in weight;
- eviscerated, headless 'pan-size' fish of less than 450 g in weight; and
- product that is processed further than the stage described above.

Salmonid product that is not in consumer-ready form (such as head-off, gilled, eviscerated fish of greater than 450 g in weight) must be processed to a consumer-ready stage at an AQIS-approved processing plant before release from quarantine".¹⁹⁶

The same definition of "consumer-ready" product is also reproduced at the end of the 1999 IRA on salmonids.¹⁹⁷

7.79 None of the experts advising the Panel is able to find a justification in the 1999 IRA for this requirement that salmonids be "consumer-ready" in the sense defined above before they can be released from quarantine (hereafter the "consumer-ready requirements").¹⁹⁸

7.80 We note that in the disease-by-disease evaluation of "Key Risk Factors" and "Risk Management Measures" for the seven "higher priority" diseases that would not achieve Australia's ALOP, reference is made to disease agents that can be found in the viscera, head, gills, brain, skin mucus, blood and remnants of the anterior kidney on the skeleton. Each time, however, it is stated that evisceration, removal of head and gills and thorough cleaning and washing of external and internal surfaces to remove skin mucus and visceral remnants, respectively, would significantly reduce risk. At the end of each disease-specific assessment -- in the series of "Risk Management Measures" proposed in addition to evisceration against the specific disease -- the removal of head and gills and thorough washing of external and/or internal surfaces (among other measures) is, therefore, suggested.

7.81 In five of the seven disease-specific assessments reference is made also to the risk related to *commercial processing* of imported salmonids in Australia. This risk is stated to be associated mainly, if not exclusively, with waste disposal of the salmon parts just mentioned. Even though the "Risk Management Measures" referred to in the previous paragraph (removal of head and gills and thorough washing) would seem to effectively exclude the importation of those parts of the salmonid, two additional "Risk Management Measures" are proposed in five of the seven disease-specific assessments in order to address the risk related to commercial processing and waste disposal of these salmonid parts: first, to permit only approved premises – subject to controls on waste disposal -- to commercially process imported salmonids in Australia; and, second, to permit release from quarantine of only what is referred to as "consumer-ready product", i.e. product that is not likely to be further commercially processed. No explanation is provided as to why these additional requirements are needed in light of the fact that most, if not all, of the salmon parts of concern in respect of commercial processing already have to be removed under other "Risk Management Measures"; nor is

¹⁹⁶ AQPM 1999/69, Attachment 1, pp. 1-2.

¹⁹⁷ 1999 IRA, pp. 230-231.

¹⁹⁸ Expert Answers to Panel Questions 7, 8 and 17 and statements by Drs. Brückner, McVicar and Wooldridge at the meeting with experts, Transcript, paras. 21, 140 and 137 respectively. We will address the explanation given by Australia in its submissions before this Panel -- an explanation not to be found in the 1999 IRA -- when we examine Canada's claims under Article 5.6. For present purposes, the relationship we have to examine is that between the consumer-ready requirement and the 1999 IRA.

it explained, in any of the disease-specific assessments, what should be considered as "consumer-ready product", on what basis and for what reasons.

7.82 Only in the overall conclusion on the totality of measures to be imposed on salmonid imports is the definition of "consumer-ready product", as quoted above, provided. This definition refers, for the first time in the 1999 IRA, to criteria such as removal of certain bones, fins, belly flap and external skin for product of more than 450 g in weight. Nowhere in the 1999 IRA could we find further reference, explanation or assessment of any of these criteria.¹⁹⁹ In particular, nowhere in the 1999 IRA could we find the *rationale* for the 450 g weight limitation for skin-on salmon.

7.83 On these grounds, we find that there is no rational relationship between, on the one hand, the consumer-ready requirements and, on the other hand, the 1999 IRA. Since the 1999 IRA is the only risk assessment referred to by Australia in support of its new measures, we thus find that the consumer-ready requirements are not *based on* a risk assessment, contrary to Article 5.1.

3. The Panel's conclusion under Article 5.1

7.84 On the basis of our considerations and findings above, we conclude that:

- (1) the 1999 IRA meets the three requirements of a risk assessment in the sense of Article 5.1 and paragraph 4 of Annex A;
- (2) the fact that the 1999 IRA was only published in final form subsequent to the date the new sanitary measures were taken does not, in this case, preclude the measures from being *based on* the 1999 IRA; and
- (3) AQPM 1999/51 and 1999/69 -- to the extent they set forth the consumer-ready requirements specified above -- are not *based on* a risk assessment, contrary to Article 5.1.

7.85 Moreover, by maintaining sanitary measures, *in casu* the consumer-ready requirements, in violation of the specific requirement to base such measures on a risk assessment set forth in Article 5.1, we find that Australia has, by implication, also acted inconsistently with its more general obligation in Article 2.2 to "ensure that any sanitary ... measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5".

E. ARBITRARY OR UNJUSTIFIABLE DISTINCTIONS IN APPROPRIATE LEVELS OF PROTECTION IN THE SENSE OF ARTICLE 5.5 OF THE SPS AGREEMENT

7.86 We next examine Canada's claim under Article 5.5. In the original panel report we stated²⁰⁰, and the Appellate Body agreed²⁰¹, that

"three elements are required in order for a Member to act inconsistently with Article 5.5:

- the Member concerned adopts different appropriate levels of sanitary protection in several 'different situations';

¹⁹⁹ We refer, in addition, to our examination below under Article 5.6 (paras. 7.115 ff.) of the explanation given by Australia in its submissions before this Panel – an explanation not to be found in the 1999 IRA – that would justify the consumer-ready requirements and our conclusion there that these requirements are more trade-restrictive than required to achieve Australia's ALOP, contrary to Article 5.6.

²⁰⁰ Op. cit., para. 8.108.

²⁰¹ Op. cit., para. 140.

- those levels of protection exhibit differences which are 'arbitrary or unjustifiable'; and
- the measure embodying those differences results in 'discrimination or a disguised restriction on international trade' ".

7.87 Canada makes two general comparisons under Article 5.5: firstly, Australia's treatment of imported, dead salmonids as compared to Australia's treatment of imported, dead non-salmonids and live ornamental fish; secondly, Australia's treatment of imported, dead salmonids as compared to its treatment of dead domestic fish, both salmonids and non-salmonids.

7.88 We recall that Canada bears the burden of demonstrating that the comparisons it refers to meet all three elements under Article 5.5.

1. The first element of Article 5.5

7.89 For the reasons set out in the Panel and Appellate Body reports in the original dispute, we confirm that we can compare the different fish categories referred to by Canada as "different situations" in the sense of the first element of Article 5.5.²⁰² Australia does not contest this. It is not contested, more particularly, that the situations referred to by Canada under Article 5.5 – i.e. fresh chilled or frozen salmon from Canada, on the one hand, and imports of non-salmonids, live ornamental fish and dead Australian fish, on the other hand – involve a risk of entry, establishment or spread of the same or a similar disease, *or* a risk of the same or similar associated potential biological and economic consequences. As a result, these situations have some common elements sufficient to render them comparable under Article 5.5. Whether or not Australia adopts different ALOP's in respect of these "different situations" is an issue we address under the second element of Article 5.5.

2. The second element of Article 5.5

7.90 In respect of the second element of Article 5.5 – arbitrary or unjustifiable distinctions in ALOP's -- we note that the arguments and evidence submitted by Canada remain general with the exception of one specific comparison, imports of salmonids compared to imports of pilchards, to which we revert later. Canada compares imports of salmonids at issue here to entire categories of fish – imports of non-salmonids, live ornamental fish and dead Australian fish – that include not only a wide variety of different fish but also of different diseases. Canada basically refers to the difference in *measures* Australia applies to these different categories of fish and, on that ground, requires *Australia* to justify the differential treatment. Whereas this approach may have been appropriate in the original dispute -- where certain rather substantial differences in treatment existed without apparent justification -- the circumstances in this case have changed.

7.91 We recall that as a result of DSB recommendations and rulings in the original dispute, Australia now has a risk assessment not only on salmonids but also on non-salmonids and live ornamental fish in support of the new measures it imposes.²⁰³ On that basis, Australia not only imposed a less trade restrictive import regime in respect of salmonids at issue here, but also tightened, or will tighten, the import restrictions for non-salmonids, including in particular herring for use as bait²⁰⁴ and live ornamental finfish²⁰⁵ referred to in the original dispute.

²⁰² Panel report, paras. 8.115-8.122, confirmed in the Appellate Body report, paras. 143-153.

²⁰³ With this reference to Australian risk assessments other than the one for salmonids we do not in any way decide the question of whether or not these latter risk assessments are consistent with the SPS Agreement or whether these risk assessments justify the measures finally selected for these categories of fish other than salmon, in terms of Australia's obligations under the SPS Agreement. These questions fall outside our mandate.

²⁰⁴ See AQPM 1999/79 which identifies herring (*Culpea ssp.*) as a "specified finfish species" that will not generally be permitted for importation unless in consumer-ready form (under Part A) or eviscerated, head-off in a consignment accompanied by an official health certificate (under Part C) or head-off, gilled and gutted,

7.92 Two of the three experts advising the Panel are of the view that Australia's treatment of, on the one hand, imports of salmonids and, on the other hand, imports of non-salmonids and live ornamental finfish, achieves the same or similar levels of protection. They also consider that the differential treatment accorded by Australia to these different categories of fish is scientifically justified.²⁰⁶

7.93 Even though no stricter controls have been imposed on the internal movement of dead Australian fish as a result of the adoption of DSB recommendations, we note Australia's explanation that the risk related to the internal movement of Australian fish is different, and of a lesser magnitude, than that related to imports of salmonids. For one thing, the diseases associated with the movement of fish within Australia are *per force* already present (i.e. endemic) in Australia. Even if certain diseases are only present in some parts of Australia, the presence of internal waterways may make it difficult to contain these diseases. Since the diseases of concern in respect of imports of salmonids are, in contrast, *not* present in (i.e. exotic to) Australia, they are *per definition* different from those associated with Australian fish and may be – and, according to Australia, are – of more concern both in terms of risk of introduction of the disease and its potential impact.²⁰⁷

7.94 Referring thus to: (1) the generality of Canada's arguments and evidence; (2) the increased convergence in the treatment provided by Australia to the different categories of fish referred to by Canada; and (3) the apparent justification for this differential treatment put forward by Australia, we find that – with the exception further examined below -- Canada has not met its burden of demonstrating that in this case the second element under Article 5.5 is met.

7.95 The only comparison referred to by Canada that, we believe, warrants further examination is that between imports of salmonids at issue here and imports of whole, uneviscerated pilchards for use as bait or fish feed. There, Canada did refer to a specific fish species and specific diseases of concern, and further substantiated its claim.

7.96 Two of the three experts advising the Panel are of the view that the differential treatment accorded by Australia to salmonid imports as opposed to imports of pilchards is scientifically justified.²⁰⁸

7.97 Canada is correct when it points out that the import restrictions applied to salmonids for human consumption are stricter than those applied to pilchards for use as bait or fish feed²⁰⁹ even though, in general terms, one would expect that more risk arises from imports of whole fish introduced directly into waterways as bait or fish feed, than from eviscerated salmonids for human consumption. However, when focusing on the specific risks related to pilchard imports, it becomes

further processed or intended for further processing at designated premises in Australia prior to distribution (under Part D).

²⁰⁵ See AQPM 1999/77.

²⁰⁶ See answers by Drs. Brückner and, in particular, McVicar to Panel Questions 10, 11 and 15. Dr. Wooldridge, acknowledging that she is not a fish disease expert, states (answering Panel Question 10) that "[t]here might be genuine differences in the overall risk of disease establishment associated with different fish species (requiring different safeguards) even when exposure pathways were the same". However, answering Panel Question 15, she is of the view that, in this case, "the need for different (or any specific) measures is far from clear" (para. 6.108).

²⁰⁷ For evidence in support, see Dr. McVicar's answer to Panel Question 22. Dr. McVicar was the only one of the three experts that advised the Panel on the issue of internal *versus* border control against diseases.

²⁰⁸ See answers by Drs. Brückner and McVicar to Panel Questions 18 and 19 and their statements at the meeting with the experts, Transcript, paras. 59 and 56 and 95 respectively. Dr. Wooldridge, in contrast, in her answer to Panel Question 18 was of the view that Canada's submission did "indicate a substantial difference in levels of sanitary protection for the two products under consideration, for which scientific justification was not immediately apparent". At the meeting with experts she further clarified that she was not saying that there was *no* scientific justification, but that she had not been convinced that there was (Transcript, para. 83).

²⁰⁹ See APQM 1999/79, Part D, non-specified finfish species.

apparent that as compared to the 15 "higher priority" diseases identified in the 1999 IRA for salmonids, only two diseases are, according to Canada, associated with pilchards: herpes virus and *Viral Haemorrhagic Septicaemia Virus* (VHSV).

7.98 Herpes virus is *not* a disease associated with salmonids. Moreover, it is, according to Australia, already present in (i.e. *endemic* to) all marine waters of Australia where pilchards are found and unique to Australian and New Zealand marine waters.²¹⁰

7.99 VHSV, on the other hand, is associated with pilchards *and* salmonids and is one of the 15 "higher priority" diseases identified in the 1999 IRA. It is not one of the seven diseases, though, that, according to the 1999 IRA, requires measures additional to evisceration for Australia's ALOP in respect of salmonids to be met. Australia submits that since VHSV is associated with colder water temperatures and Australia normally sources its Pacific pilchards from warmer southern waters where VHSV is not reported, less risk of VHSV is associated with pilchards than with salmonids.²¹¹ Australia further points out that there is no evidence of transmission of VHSV from pilchards to salmonids. We note also that the 1999 IRA considers the consequences of the establishment of marine European strains of VHSV and all strains of VHSV from North America to be "low" due primarily to the limited impact that these strains of VHSV would have on salmonids and other finfish species in Australia.²¹²

7.100 We note, in addition, that some import restrictions do apply also for imports of pilchards. They can only be imported with an import permit and a health certificate, even though the conditions linked thereto are more lenient than those in respect of salmonid imports.

7.101 For the reasons stated above and after careful consideration of all arguments and evidence submitted to us by the parties and the experts advising the Panel, we find that Canada has not convinced us that the differential treatment accorded by Australia to salmonids and pilchards -- and any difference in ALOP that may result therefrom -- is "arbitrary or unjustifiable" in the sense of the second element of Article 5.5.

3. The third element of Article 5.5

7.102 Even though we found earlier that the second element of Article 5.5 is *not* met -- and given the cumulative nature of Article 5.5 no violation of Article 5.5 can thus be found -- in order to complete the analysis of Article 5.5 we turn now to the third element of Article 5.5. Before a violation of Article 5.5 arises, any arbitrary or unjustifiable distinction in ALOP needs to result in "discrimination or a disguised restriction on international trade".

7.103 In this respect, we note that all but one of the three "warning signals" and both "additional factors" retained by the Appellate Body in the original dispute that led to its finding that the third element of Article 5.5 was met, are no longer present or at least of less importance here. We have not been convinced in this case that Australia maintains "arbitrary or unjustifiable" distinctions in ALOP's -- the first warning signal in the original case -- nor *a priori* that any such distinctions were "rather substantial" -- the second warning signal in the original case.

7.104 Also the first "additional factor" -- the substantial, but unexplained change in conclusion between the 1995 Draft Report (recommending to allow importation under certain conditions) and the

²¹⁰ The question remains, however, whether it has been introduced locally or through imports. In this respect, see also the parties' answers to Panel Question 29 and Dr. McVicar's statement at the meeting with experts, Transcript, para. 56.

²¹¹ Australia's rebuttal submission, para. 84. That VHSV is associated with colder water temperatures is also referred to in the 1999 IRA, at pp. 133-134. We did not receive documentary evidence in support of Australia's contention that it normally sources its Pacific pilchards from warmer waters where VHSV is not reported. Canada does not, however, contest this contention.

²¹² 1999 IRA, p. 137.

1996 Final Report (recommending to continue the import prohibition) - has lost most of its weight here. The difference between the 1995 Draft Report and the 1999 IRA - both allowing importation under certain, albeit sometimes different, conditions -- is no longer that substantial nor completely unexplained.²¹³ Finally, also the second "additional factor" - the absence of controls on the internal movement of salmon products within Australia compared to the treatment given to imports of salmon - has lost most of the little weight it was assigned by the Appellate Body.²¹⁴ This is so because: (1) the import prohibition on salmonids is now replaced by a regime where imports are allowed under certain conditions; and (2) of our finding above that the differential treatment between the internal movement of salmon and imports of salmon does not appear to be arbitrary or unjustifiable.²¹⁵

7.105 Accordingly, only the third "warning signal" referred to by the panel and the Appellate Body in the original case is maintained, namely the fact that some of the measures at issue here are also not based on a risk assessment, in breach of Articles 5.1 and 2.2 of the SPS Agreement. We believe, however, that these violations of Articles 5.1 and 2.2, in and of themselves, are not sufficient for us to find that the third element under *another* provision, Article 5.5, is met.

7.106 We note, finally, that Australia submits some positive evidence that indicates that its new regime on imports of salmonids does *not* result in discrimination or a disguised restriction on international trade inspired to avoid import competition, but is rather a quarantine measure to protect Australia against diseases. Salmon from New Zealand is generally considered to be amongst the most competitive in the Australian market. Nevertheless, given the low disease status of New Zealand that is similar to that of Australia, imports of salmonids from New Zealand are subject to less restrictions than any other salmonid imports. We realize that, as Canada argues, there may also be other reasons that explain the greater access offered to New Zealand salmon.²¹⁶ However, without ruling on the relevance of these other reasons, New Zealand's low disease status -- in this case prevailing over the competitiveness of New Zealand salmon -- seems to us, on the basis of the evidence on record, to be crucial.

7.107 For the reasons stated above we find that Canada has not met its burden of demonstrating that in this case the third element of Article 5.5. is met.

4. The Panel's conclusion under Article 5.5

7.108 On the basis of our findings above, we conclude that Canada has not met its burden of demonstrating that either the second or the third element of Article 5.5 are present. We thus find that Australia has not acted inconsistently with Article 5.5.

F. DISCRIMINATION IN THE SENSE OF ARTICLE 2.3, FIRST SENTENCE, OF THE SPS AGREEMENT

7.109 Canada claims that Australia's import requirements for salmonids from Canada, on the one hand, and the absence of internal control measures imposed on the internal movement of dead, Australian fish, on the other hand, constitute discrimination between Canada and Australia in the sense of Article 2.3, first sentence.

7.110 The first sentence of Article 2.3 provides:

"Members shall ensure that their sanitary ... measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members".

²¹³ See, however, our findings of violation under Articles 5.1 and 5.6.

²¹⁴ Appellate Body report, *op. cit.*, para. 177.

²¹⁵ See paras. 7.92-7.93.

²¹⁶ Canada submits, for example, that the Australian salmon industry is interested in exporting whole salmon to New Zealand and that New Zealand may consider it a *quid pro quo* that its salmon be permitted into Australia in the same form.

7.111 In our view, three elements, cumulative in nature, are required for a violation of this provision:

- (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;
- (2) the discrimination is arbitrary or unjustifiable; and
- (3) identical or similar conditions prevail in the territory of the Members compared.

7.112 In respect of the first element we only note the following. Given: (1) the Panel and Appellate Body finding²¹⁷ in the original dispute that discrimination contrary to Article 5.5 by implication entails discrimination contrary to Article 2.3, first sentence; and (2) that under Article 5.5 different situations including *different* products can be compared²¹⁸, we are of the view that – contrary to what Australia argues -- discrimination in the sense of Article 2.3, first sentence, may also include discrimination between *different* products, e.g. not only discrimination between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; but also discrimination between Canadian salmon and Australian fish including non-salmonids, as referred to by Canada in this case.

7.113 However, on the basis of our examination above of the differential treatment accorded by Australia to imports of salmonids and dead fish moving within Australian borders – where we found that Canada had not convinced us that this differential treatment resulted in arbitrary or unjustifiable distinctions in ALOP's²¹⁹ – we find that Canada has not met its burden of demonstrating that any discrimination made by Australia between these two categories of fish is "arbitrary or unjustifiable" in the sense of the second element of Article 2.3, first sentence. For the reasons mentioned there, we also harbour doubts as to whether "identical or similar conditions" in the sense of the third element of Article 2.3, first sentence, prevail in the territories of both Canada and Australia in respect of the situations compared. We note, for example, the substantial difference in disease status between Canada and Australia.

7.114 We thus find that Australia has not acted inconsistently with Article 2.3, first sentence.

G. SANITARY MEASURES SHALL NOT BE "MORE TRADE-RESTRICTIVE THAN REQUIRED" IN THE SENSE OF ARTICLE 5.6 OF THE SPS AGREEMENT

7.115 We next examine Canada's claim that there are other, less trade-restrictive measures available that meet all three elements of Article 5.6. As we found in the original dispute²²⁰, a sanitary measure is "more trade-restrictive than required", contrary to Article 5.6, if there is another measure which:

- (1) is "reasonably available taking into account technical and economic feasibility";
- (2) "achieves [Australia's] appropriate level of sanitary ... protection"; and
- (3) is "significantly less restrictive to trade" than the sanitary measure contested.

²¹⁷ Panel report, op. cit., paras. 8.109 and 8.160 and Appellate Body report, op. cit., paras. 178 and 252.

²¹⁸ As long as they have a risk of entry, establishment or spread of the same or a similar disease, *or* a risk of the same or similar associated potential biological and economic in common, *different* products can be compared under Article 5.5. See para. 7.89 above.

²¹⁹ See paras. 7.92-7.93 and 7.103.

²²⁰ Panel report, op. cit., para. 8.167 and Appellate Body report, op. cit., para. 179.

7.116 The three elements of Article 5.6 are cumulative in nature and it is for Canada to demonstrate that they are met in this case.

7.117 Referring to the Appellate Body report on *Japan – Varietals*, it is for Canada "to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6".²²¹ Pursuant to the same report, a panel is "entitled to seek information and advice from experts and from any other relevant source it chooses ... to help understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party".²²²

7.118 In its reports on *Canada – Aircraft*²²³ and *India – Quantitative Restrictions*²²⁴, the Appellate Body specified, however, that a panel is *not* precluded from considering expert advice or evidence submitted by the defending party until the complaining party has established a *prima facie* case. As noted in *Canada – Aircraft*, "[a] panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence".²²⁵

7.119 In this case, Canada has referred to a number of options that, in its view, would meet the three elements under Article 5.6.

7.120 First, Canada argues that any one or several of the measures now applied might suffice. Canada refers to options such as evisceration, inspection and grading or restriction of imports to non-spawning, adult salmonids.²²⁶ Canada submits, in particular, that evisceration, thorough washing both inside and outside to remove residual tissues and mucus on the skin, thorough bleeding of the salmon and removal of the gills combined with inspection and grading – according to Canada, the selection and primary processing undertaken by Canada in the ordinary course of processing salmon for human consumption -- would be an option fulfilling the three elements of Article 5.6.²²⁷

7.121 Second, Canada argues that the measures recommended in the 1995 Draft Report, allowing the importation of salmon under less stringent conditions than the current ones -- e.g. not prohibiting the importation of whole fish with the viscera, head, fins and tail removed nor prohibiting the importation of skin-on fillets and steaks of 450 grams or more -- would fulfil the three elements of Article 5.6.²²⁸

7.122 Third, Canada refers to the measures Australia applies domestically in respect of the internal movement of Australian fish (i.e. no restrictions at all unless for live fish), arguing that these measures would be valid options under Article 5.6.²²⁹

7.123 Fourth, Canada argues that, instead of imposing the current consumer-ready requirements, it would be significantly less trade restrictive and technically and economically feasible to ensure that imported salmon product imported in any form for further processing is only processed in facilities

²²¹ Op. cit., para. 126.

²²² *Ibid.*, para. 129.

²²³ Appellate Body Report on *Canada – Measures Affecting the Export of Civilian Aircraft*, adopted 20 August 1999, WT/DS70/AB/R, paras. 192-194.

²²⁴ Appellate Body Report on *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, adopted 22 September 1999, paras. 149-151.

²²⁵ Op. cit., para. 192.

²²⁶ Canada's first submission, para. 124.

²²⁷ Canada's oral statement, paras. 78-81 and Canada's Comments on Australia's Response to the Panel's Question Regarding Paragraph 82 of Canada's Oral Statement, para. 19.

²²⁸ Canada's first submission, paras. 126-128.

²²⁹ Canada's first submission, paras. 129-132.

that do not discharge untreated waste.²³⁰ In this respect, Canada considers that New Zealand's packaging requirements – allowing imports without an import permit for salmon packaged for retail sale or sale to the hotel, restaurant or institutional (HRI) trade including whole, eviscerated salmon of any size if individually wrapped -- although still more trade-restrictive than required, would nevertheless be significantly less trade restrictive than Australia's current measures.²³¹

7.124 Considering the arguments and evidence submitted by Canada under all four options, in particular the fourth one relating to the need for consumer-ready requirements, in light of the expert advice we received, we find that Canada has established a *prima facie* case that there are other measures that meet all three elements of Article 5.6.

7.125 Given our finding above that Australia's new measures are, indeed, based on a risk assessment (the 1999 IRA) except for the consumer-ready requirements, we shall focus our examination on the fourth option Canada puts forward. More specifically, we shall examine whether the option of not imposing the consumer-ready requirements or imposing a different definition of "consumer-ready product", would meet the three elements of Article 5.6.

7.126 We recall that Australia does not allow the release from quarantine of product that is not "consumer-ready" and that this type of product is defined as follows:

"consumer-ready product is product that is ready for the householder to cook/consume, including:

- cutlets – including central bone and external skin but excluding fins – of less than 450 g in weight;
- skinless fillets – excluding the belly flap and all bone except the pin bones – of any weight;
- skin-on fillets – excluding the belly flap and all bone except the pin bones – of less than 450 g in weight;
- eviscerated, headless 'pan-size' fish of less than 450 g in weight; and
- product that is processed further than the stage described above.

Salmonid product that is not in consumer-ready form (such as head-off, gilled, eviscerated fish of greater than 450 g in weight) must be processed to a consumer-ready stage at an AQIS-approved processing plant before release from quarantine".²³²

7.127 We next examine the three elements of Article 5.6, starting with the most controversial one, namely the question of whether any other measures would meet Australia's ALOP.

1. Is there another measure that "achieves [Australia's] appropriate level of sanitary ... protection"?

7.128 We note that our examination of whether there are other measures that achieve Australia's ALOP in the sense of Article 5.6 is hampered in two respects.

7.129 First, although, according to the Appellate Body²³³, Australia determined its ALOP with sufficient precision to apply Article 5.6, we find it rather difficult to evaluate whether any of the options before us would also meet Australia's somewhat vaguely determined level of "a high or very

²³⁰ Canada's oral statement, paras. 82-83 and Canada's Comments on Australia's Response to the Panel's Question Regarding Paragraph 82 of Canada's Oral Statement, para. 20.

²³¹ Canada's answer to Panel Question 1.

²³² AQPM 1999/69, Attachment 1, pp. 1-2.

²³³ Op. cit., para. 207.

conservative level of protection aimed at reducing risk to very low levels, while not based on a zero-risk approach".²³⁴ We are of the view, however, that this should not prevent us from carrying out the task. As noted by the Appellate Body, "[o]therwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection – with sufficient precision – would allow it to escape its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6".²³⁵ We note, parenthetically, that a more explicit and in particular a quantitative expression of a Member's ALOP would greatly facilitate the consideration of compliance with not only Article 5.6 but with other provisions of the SPS Agreement as well.

7.130 Second, we recall that the 1999 IRA only provides the definition of "consumer-ready product", as quoted above, in the overall conclusion on the totality of measures to be imposed on salmonid imports. As noted earlier, this definition refers, for the first time in the 1999 IRA, to criteria such as removal of certain bones, fins, belly flap and external skin for product of more than 450 g in weight. However, the 1999 IRA does not indicate the *rationale* for these criteria nor does it explain or assess these criteria. We note that, in addition, the 1999 IRA does not identify or assess any other possible definitions of "consumer-ready product".

7.131 On the one hand, this lack of assessment and evidence in the 1999 IRA indicates that the consumer-ready requirements may be without scientific or other objective justification and may actually not further reduce risk. On the other hand, this lack of assessment and evidence also means that the 1999 IRA is not particularly helpful in arriving at a decision as to whether other definitions of "consumer-ready product" would meet Australia's ALOP. Nevertheless, on the basis of other factual elements provided to us by the parties and the experts advising the Panel, we have been able to complete our examination under Article 5.6 in accordance with the objectivity standard set out in Article 11 of the DSU.

(a) No consumer-ready requirements

7.132 We examine, first, whether the current regime *without any* consumer-ready requirements would also achieve Australia's ALOP of "a high or very conservative level of protection aimed at reducing risk to very low levels, while not based on a zero-risk approach".

7.133 According to Australia, the primary reason for imposing the consumer-ready requirements is "the pest/disease risk presented by the creation of *substantial concentrations* of waste material (skin, fins, flaps, bones, etc) from *commercial processing* of imported salmon".²³⁶ Answering Panel Question 20, Australia further explains the imposition of the consumer-ready requirements as follows:

"To control risk associated with commercial processing, AQIS applies controls over commercial plants processing imported salmonid products with regard to location, waste disposal and related matters. *To ensure that imported salmonids were not commercially processed in non-approved premises, only consumer-ready product will be permitted to be released from quarantine*" (emphasis added).

7.134 We note that -- as Canada submits under the first option referred to above²³⁷ -- evisceration, thorough washing both inside and outside to remove residual tissues and mucus on the skin, thorough bleeding of the salmon and removal of the gills combined with inspection and grading – without the additional consumer-ready requirements -- would already significantly reduce risk. As mentioned earlier, the 1999 IRA itself refers only to disease agents to be found in the viscera, head, gills, brain, skin mucus, blood and remnants of the anterior kidney on the skeleton. Indeed, for each disease, the

²³⁴ Australia's first submission, para. 147, referring to AQPM 1999/26.

²³⁵ *Op. cit.*, para. 207.

²³⁶ Australia's response to Panel Questions at the oral hearing (second emphasis added). See also para.

7.80 above.

²³⁷ See para. 7.119.

1999 IRA itself states that evisceration, removal of head and gills and thorough cleaning and washing of external and internal surfaces to remove skin mucus and visceral remnants, respectively, would significantly reduce risk.

7.135 We further recall that none of the experts advising the Panel is able to find a justification in the 1999 IRA for these consumer-ready requirements.²³⁸

7.136 In respect of the specific requirement that skin-on product over 450 g may not be released from quarantine because of the risk associated with significant quantities of waste products, *in casu*, salmon skin, that may result from further *commercial processing* of such product, we note the following statement by Dr. McVicar:

"Washing of carcasses is a requirement to decrease surface levels of infection in product, and this will undoubtedly remove much of the [skin] mucus with associated infection. However, the extent to which this reduction is achieved under normal factory conditions has not been quantified. As salmonid skin is not a blood rich organ and its actual tissues are not recognised as a significant site of infection of the diseases of concern to Australia, it is unlikely that salmonid skin or washed skin surfaces are important areas of infection risk in gutted carcasses.

...

It is my view, based on current knowledge on the diseases of concern to Australia, that the removal of skin from Canadian salmon is unlikely to make a significant contribution to risk reduction".²³⁹

7.137 There is thus evidence before us that salmon product certified and processed in a way that meets all Australian requirements other than the consumer-ready requirements may not represent risk, or only a negligible degree of risk, *even if such product is commercially processed in Australia*. As a result, it may be that *not* imposing consumer-ready requirements at all would also meet Australia's ALOP of "a high or very conservative level of protection aimed at reducing risk to very low levels, while not based on a zero-risk approach". Although we take no final position on this specific question, we do consider that the evidence referred to above is crucial for our finding below that there are other measures that would meet Australia's ALOP.

(b) Different consumer-ready requirements

7.138 Assuming, therefore, that -- contrary to the evidence referred to above -- commercial processing of salmonid imports *does* represent a risk exceeding Australia's ALOP and that such risk would be appropriately reduced by only releasing "consumer-ready product" from quarantine, we need to examine next whether any of the other approaches or definitions of "consumer-ready product" referred to by Canada would achieve the same objective as the current regime does.

7.139 In other words, we examine, secondly, whether the current regime with *different* consumer-ready requirements than those imposed now, would also achieve Australia's ALOP of "a high or very conservative level of protection aimed at reducing risk to very low levels, while not based on a zero-risk approach".

7.140 We note that this examination does not involve the weighing of scientific evidence in the narrow sense. What we are basically examining here is whether there would be other ways to identify product that is most likely to be directly sold to consumers without further commercial processing.²⁴⁰

²³⁸ See para. 7.79 and footnote 198 thereto.

²³⁹ Dr. McVicar's answer to Panel Question 7. See also his statement at the meeting with experts, Transcript, paras. 115-116.

²⁴⁰ As Australia acknowledges, the definition of "consumer-ready product" in this context, is a "commercial matter" (Transcript of the meeting with experts, para. 147).

To release from quarantine only skin-on product weighing *less than 450 g*, as Australia now does, may be one way of ensuring that no further commercial processing of imports takes place. However, after careful examination of all evidence and arguments on record in respect of consumption patterns of salmon, we consider that there are other, less trade restrictive, measures available to achieve the same objective.

7.141 We have, indeed, been convinced that also a significant share of skin-on product weighing *more than 450 g* is likely to be directly consumed – without further commercial processing -- by households and, in particular, the hotel, restaurant and institutional sector.²⁴¹ We realize, at the same time, that another share of such product may be commercially processed. We are of the view, however, that there are ways to keep out that share or, at least, to ensure that it be commercially processed in a controlled manner.

7.142 First, as Canada pointed out by reference to current New Zealand requirements under the fourth option outlined above²⁴², instead of imposing weight limitations, Australia could restrict release from quarantine to salmon product that has been individually and commercially packaged in a way that makes it unattractive for commercial processors to further process the product. In our view, it is, indeed, very unlikely that commercial processors will prefer to buy individually and commercially packaged salmon, unwrap the package and process it, instead of, for example, importing salmon in bulk form and further process it following restrictions on waste disposal.

7.143 Second, Australia could condition the issuance of an import permit on the specific end-use of the salmon product. For example, only if proof is given that the product will be imported for retail sale, not for further commercial processing, could an import permit be issued and product be released from quarantine. In contrast, if product is to be imported for further processing, the current Australian requirement that such further processing take places in certified facilities before release from quarantine, could apply. As noted by Canada under the fourth option set out above²⁴³, Australia could ensure more generally that salmon product imported *in any form* for further processing is only processed in facilities that do not discharge untreated waste.²⁴⁴

7.144 We referred above to several options without deciding that one of these would necessarily meet Australia's ALOP. We have been convinced, however, that there are other measures available, be it the options discussed above taken separately or a combination thereof, that would meet Australia's ALOP. We leave it up to Australia, preferably in close cooperation with Canada and other trading partners, to select and identify the details of such other measure(s).

7.145 For all the reasons stated above, we thus find that the first element of Article 5.6 is met.

2. Is there another measure that is "reasonably available taking into account technical and economic feasibility"?

7.146 We agree with Canada that since one can assume that current Australian requirements are "reasonably available taking into account technical and economic feasibility", also a regime *without* the consumer-ready requirements – as referred to in paragraphs 7.134-7.137 above -- would be so.

²⁴¹ As noted in the ABARE Report in Progress on Salmon Imports into Australia: Potential Market Penetration, p. 8: "Around half of farmed salmon production is sold as whole fresh fish which are gutted and gilled. The remainder is sold as a range of value added products such as smoked salmon and bulk packs of fillets and steaks". Dr. McVicar, at the meeting with experts, also stated that most trade occur in whole fish, not pieces of fish (Transcript, para. 65).

²⁴² See para. 7.122.

²⁴³ *Ibid.*

²⁴⁴ Doing so could arguably achieve an even higher ALOP than the current measures do since under the current regime it is possible, at least in theory, that product meeting Australia's consumer-ready requirements is, nevertheless, commercially processed in Australia without the restrictions on waste control applying, given that these restrictions only apply to non-consumer-ready product.

Given that inspection and control to release from quarantine only product that meets the consumer-ready requirements would no longer be necessary, a regime without the consumer-ready requirements would be even more reasonably available in the sense of Article 5.6.

7.147 We also consider that to require individual and commercial packaging before release from quarantine -- as referred to above under *different* consumer-ready requirements²⁴⁵ -- would be reasonably available in the sense of Article 5.6. The fact that New Zealand imposes similar requirements is evidence in support thereof.

7.148 To condition import permits and release from quarantine on the end-use of the product²⁴⁶ could raise a problem of control, i.e. how to ensure that the product once released from quarantine is actually used as specified in the import permit. We note that the current requirement of only releasing product that has been processed in certified facilities may give rise to similar concerns, i.e. how to ensure that the product is not diverted and processed in other, non-certified facilities. In addition, to condition import permits or health certificates on origin, as Australia does, may not be that different in terms of control from conditioning it on end-use. In any event, to avoid the imposition of costly and technically difficult control measures to fully ensure appropriate end-use, this alternative could be combined with other measures that, in combination, would meet Australia's ALOP.

7.149 For the reasons stated above, we thus find that the second element of Article 5.6 is met. In this respect paragraph 7.143 applies *mutatis mutandis*.

3. Is there another measure that is "significantly less restrictive to trade"?

7.150 We note, first, that all options referred to above would result in significantly more salmon product being allowed for direct release from quarantine, e.g. also skin-on salmon *weighing more than 450 g* that is individually and commercially packaged and/or stated in the import permit to be imported for direct retail sale. Secondly, on the basis of arguments and evidence on record, we consider that there is an Australian demand for such product, in particular skin-on salmon weighing more than 450 g for use in the hotel, restaurant and institutional sector.²⁴⁷ We consider also that households, in particular families of three or more, may prefer to buy one larger piece or whole salmon instead of individual pieces weighing less than 450 grams²⁴⁸ Canada also pointed out that, in other export markets, its principal salmon exports are whole, eviscerated salmon.

7.151 The increased market access that would result under the alternatives outlined above would be significant and, in our view, warrants the search for other measures by Australia. There may, indeed, be some truth in the statement by Mr. Vaile, Australia's Trade Minister, of 20 July 1999 that

"... the requirements that AQIS is going to put on any product being imported it [*sic*] may make it unviable for countries like Canada to export salmon to Australia and uncompetitive against the Australian product".²⁴⁹

7.152 For the reasons stated above, we find that the third element of Article 5.6 is also met. In this respect paragraph 7.143 applies *mutatis mutandis*.

²⁴⁵ See para. 7.141.

²⁴⁶ See para. 7.142.

²⁴⁷ See para. 7.140 and footnote 241 of this report, and paras. 29-30 of Canada's letter of 16 December 1999.

²⁴⁸ In this respect we note the statement by Norway, third party in these proceedings, that "a normal person, for a normal dinner, would require 250-300 grams of skin-on fish fillet. There is, under the Australian requirement, no way that a dinner for two or a normal family dinner can take place without buying many different portions instead of one bigger piece as in the rest of the world" (Norway's answer to Question 2 from Australia, see also para. 5.219 of the descriptive part of our Report).

²⁴⁹ Salmon producers demand disease guarantee, ABC News Online, PM – Tuesday, 20 July 1999, p. 2, Exhibit A to Canada's first submission.

4. The Panel's conclusion under Article 5.6

7.153 On the basis of our findings above, we conclude that Australia has acted inconsistently with Article 5.6. We recall that in so doing we do not impose any specific alternative upon Australia. We have been convinced, however, that there are other, significantly less trade restrictive, measures which are reasonably available, be it the options discussed above taken separately or a combination thereof, that would meet Australia's ALOP. We leave it up to Australia, preferably in close cooperation with Canada and other trading partners, to select and identify the details of such other measure(s).

H. INFORMATION REQUIREMENTS CONTRARY TO PARAGRAPH 1(C) OF ANNEX C TO THE SPS AGREEMENT

7.154 Canada next invokes Article 8 that requires Members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures". It refers, in particular, to paragraph 1(c) of Annex C. This provision requires that

"Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary ... measures, that:

...

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures".

7.155 The allegedly unnecessary information requirements referred to by Canada are the requirements to prove that: (1) fish are derived from a population for which there is a documented system of health monitoring and surveillance; (2) fish are not juveniles or sexually mature adults; and (3) fish are not derived from a population slaughtered as an official disease control measure.

7.156 In our view, however, all three Australian requirements referred to are substantive sanitary measures in their own right, i.e. risk reduction measures allegedly needed to achieve Australia's ALOP, not procedures or information requirements "to check and ensure the fulfilment of sanitary ... measures" that are subject to paragraph 1(c) of Annex C. Canada does not make any claim of inconsistency in respect of these three requirements under any other provisions of the SPS Agreement.

7.157 We thus find that Australia has not acted inconsistently with Paragraph 1(c) of Annex C or Article 8.

I. THE TASMANIAN MEASURE OF 24 NOVEMBER 1999

7.158 We recall that the Tasmanian measure which we decided to examine in this case following our preliminary rulings of 6 December 1999²⁵⁰ and our further considerations above²⁵¹, declares a large part of Tasmania as a so-called "protected area" into which fresh chilled or frozen salmon may only be moved if, to the satisfaction of the Chief Veterinary Officer, the salmon has been sourced from an area which is free from six specified diseases. Canada acknowledges that it is not free from all of the specified diseases, so that fresh chilled or frozen salmon from Canada is effectively banned from importation into the relevant parts of Tasmania.

7.159 Canada claims that this Tasmanian measure nullifies Australia's federal measures taken to comply with DSB recommendations in that it restricts importation into most of Tasmania of even the limited range of salmon product than can be imported under the federal regime. Canada claims that the Tasmanian measure is inconsistent with Articles 5.1, 2.2, 5.6 and 8 of the SPS Agreement.

²⁵⁰ See para. 7.10.

²⁵¹ See paras. 7.13-7.20.

7.160 The Tasmanian measure is, according to its own terms, imposed "for the purpose of preventing the introduction into the [protected] area" of six specific diseases. The six diseases referred to are all "high priority" diseases in respect of which imports of eviscerated salmonids would, according to the 1999 IRA, not meet Australia's ALOP. However, the 1999 IRA concludes that the risk related to these diseases can be reduced to a level that meets Australia's ALOP by allowing imports of salmonids – even from areas where these diseases have been reported – on condition that certain certification and product related requirements are met. The Tasmanian measure, in contrast, *prohibits* the importation of *all* fresh chilled or frozen salmon (including salmon allowed for import under the 1999 IRA conclusions) unless it is sourced from areas that are free from all six diseases of concern.

7.161 Australia does not refer to any risk assessment or scientific evidence other than the 1999 IRA in support of the sanitary measures examined here. Since the Tasmanian measure – imposing a much stricter trade regime than what is called for in the 1999 IRA – finds no rational support in the 1999 IRA, it is not based on a risk assessment, contrary to Article 5.1. There is no other scientific evidence before us that would justify the Tasmanian measure. As a result, it is maintained without sufficient scientific evidence, contrary to Article 2.2.²⁵²

7.162 Given these two findings of violation we do not further examine any other Canadian claim in this respect. We agree with Australia that Canada has not substantiated a claim under Article 13 of the SPS Agreement obliging Members to "formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies". We do not, therefore, decide here whether Australia has met this obligation. This does not prevent us, however, from making reference to Article 13 in support of our finding above that the Tasmanian measure is subject to the SPS Agreement and falls under the responsibility of Australia.²⁵³

7.163 In summary, we find that the Tasmanian measure of 24 November 1999 is inconsistent with Articles 5.1 and 2.2 of the SPS Agreement.

VIII. CONCLUSIONS

8.1 In light of the findings above, we reach the following conclusions:

- (i) due to the delays in the entry into force of several implementing measures -- beyond the expiration of the reasonable period of time for Australia to implement (6 July 1999) -- no measures taken to comply "existed" in the sense of Article 21.5 of the DSU (1) from 6 July 1999 to 20 October 1999 in respect of Canadian fresh chilled or frozen salmon; (2) from 6 July 1999 to 1 December 1999 in respect of herring for use as bait; and (3) from 6 July 1999 to the present (and, unless changes occur, until 1 May 2000) for live ornamental finfish; as a result, during those periods, Australia failed to bring its measure into compliance with the SPS Agreement as called for in the DSB recommendations and rulings adopted in the original dispute in the sense referred to in Article 22.6 of the DSU;

²⁵² In this respect we note that even Australia itself does not support the Tasmanian measure. In its letter of 9 December 1999 to the Panel Australia stated: "It cannot be in any way inferred that Australia supports the action taken by Tasmania in regard to the previous or latest measure. Australia has neither required nor encouraged the Government of Tasmania to take this action. Australian Commonwealth Ministers are on the public record in objecting to such action".

²⁵³ See paras. 7.12 and 7.13 above as well as footnote 147 thereto. Obviously, the fact that Australia itself objects to the Tasmanian measure cannot mean that the measure is no longer subject to the provisions of the SPS Agreement.

- (ii) even though the 1999 Import Risk Analysis, referred to by Australia in support of its implementing measures, meets the requirements of a risk assessment set out in the SPS Agreement, Australia, by requiring that only salmon product that is "consumer-ready" as specifically defined can be imported into Australia and released from quarantine, is maintaining sanitary measures that are not *based on* a risk assessment, i.e. the 1999 Import Risk Analysis, contrary to Article 5.1 of the SPS Agreement and, on that ground, is also acting inconsistently with Article 2.2 of the SPS Agreement;
- (iii) Australia has not acted inconsistently with its obligations under Article 5.5 of the SPS Agreement;
- (iv) Australia has not acted inconsistently with its obligations under Article 2.3, first sentence, of the SPS Agreement;
- (v) Australia, by requiring that only salmon product that is "consumer-ready" as specifically defined can be imported into Australia and released from quarantine, is maintaining sanitary measures that are more trade restrictive than required to achieve Australia's appropriate level of sanitary protection, contrary to Article 5.6 of the SPS Agreement;
- (vi) Australia has not acted inconsistently with its obligations under paragraph 1(c) of Annex C or Article 8 of the SPS Agreement;
- (vii) Australia, by means of a measure enacted by one of its regional governments, the Government of Tasmania, that effectively prohibits the importation of Canadian fresh chilled or frozen salmon into most parts of Tasmania without being based on a risk assessment and without sufficient scientific evidence, is acting inconsistently with its obligations under Articles 5.1 and 2.2 of the SPS Agreement.

8.2 Since Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", we conclude that to the extent Australia has acted inconsistently with the DSU and the SPS Agreement it has nullified or impaired the benefits accruing to Canada under those agreements.

8.3 Given our conclusions above – and without prejudice to Canada's rights under Article 22.6 of the DSU -- we encourage the parties to resume their efforts to reach a mutually acceptable solution consistent with the SPS Agreement and the DSU in order to achieve the prompt settlement of this dispute.

8.4 We *recommend* that the Dispute Settlement Body request Australia to bring its measures into conformity with its obligations under the DSU and the SPS Agreement.