

The WTO dispute resolution system

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A procedure to resolve trade disputes between sovereign governments has been a critical part of the multilateral trade rules since the creation of the GATT in 1948. Modified and strengthened procedures came into effect as part of the World Trade Agreements in 1995.

The WTO provides an integrated dispute settlement system. The same procedures apply to disputes regarding trade whether of products or services, or the trade-related aspects of intellectual property protection. The dispute resolution system plays a central role in the security and predictability of the multilateral trading system. It is a rule-oriented system which favours mutually agreed solutions, and is designed to secure the withdrawal of inconsistent measures. The detailed procedures are of a quasi-judicial nature and include timetables, an appeal process and follow-up to ensure implementation.

Various entities are involved in the dispute settlement process:

- the Dispute Settlement Body, which is comprised of all WTO Members;
- the parties to the dispute;
- the adjudicators (panel members or arbitrators);
- the WTO Appellate Body;
- the WTO Secretariat; and
- in some circumstances, expert advisers.

¹ The views expressed are those of the author only and do not necessarily reflect the views of the World Trade Organization.

The dispute settlement process²

If country X believes that another Member is not complying with its obligations under a WTO agreement and that this is negatively affecting country X's trade opportunities, it may formally invoke the dispute settlement procedures to help it resolve the situation. Under these procedures, the first step is to submit notice to the Dispute Settlement Body that it is seeking formal consultations with the offending Member on this matter (Article 4.4). Other Members who have an interest in the matter may ask to be included in the consultations as third parties (Article 4.11).

If, following a period of at least 60 days, the consultations do not result in a resolution of the problem, country X can seek further, formal action (Article 4.7). Several options are available. The country may seek the good offices of the Director-General, or request conciliation or mediation (Article 5). Alternatively, the country may request the Dispute Settlement Body to establish a dispute resolution panel to examine the case. The offending country may not agree with the first request for a panel and suggest further consultations instead; however, it cannot block the establishment of a panel the second time it is considered by the Dispute Settlement Body (Article 6.1).

Once the Dispute Settlement Body has established a panel, the parties to the dispute enter into consultations on the selection of panel members and on the terms of reference of the panel. Unless the parties to the dispute reach agreement within 20 days on specific terms of reference, the standard terms of reference for a panel apply. These standard terms of reference are to examine, in the light of the provisions of the Agreements cited by the parties to the dispute, the matter referred to the Dispute Settlement Body by country X and to make such findings as will assist the Dispute Settlement Body to make appropriate recommendations or rulings (Article 7.1).

The dispute resolution panel is normally composed of a chairperson and two members. Panel members serve in their individual capacity and do not represent their countries. Nonetheless, nationals of the countries involved in a particular dispute, as well as those from other countries which have expressed an interest in being considered as third parties to the dispute, are normally excluded from serving on the panel. It is not unusual for trade diplomats serving in Geneva, retired government officials, academics and others knowledgeable about the WTO agreements to serve as panel members. If the parties to the dispute cannot reach agreement on the composition of the panel within 20 days, either party may request that the WTO Director-General appoint individuals to serve on the panel (Article 8). The WTO Secretariat provides the Secretary and legal advice to the panel.

The panel's working procedures usually involve the submission of written arguments and evidence by the parties, and two meetings at which the parties may present oral arguments and questions to each other (Article 12). In addition, the panel provides an opportunity for interested third parties to submit their written or oral arguments.

² References are made to the relevant articles of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, of the Marrakesh Agreement Establishing the World Trade Organization.

A panel may seek information from any source which it considers pertinent (Article 13). For disputes alleging violation of the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement),³ panels should seek advice from relevant technical and scientific experts. These experts are to be selected in consultation with the parties to the dispute, and their advice may be sought either on an individual basis or through the establishment of an expert review group.

A panel is not obliged to accept unsolicited information, including 'amicus briefs'. However, the Appellate Body has recently stated that panels should examine any such submissions and consider whether or not to accept them.

The panel prepares a report which contains a factual description of the situation, a summary of the claims and main arguments of the parties (including the third parties), the panel's findings and conclusions. Advice received from experts may also be included in the report. The parties to the dispute are provided an opportunity to comment on a draft of the descriptive part of the report and the summary of their arguments. The panel then provides an interim report, including both the descriptive part and the panel's findings and conclusions, to the parties. The parties may submit comments and request an interim review by the panel (Article 15). The final report of the panel is normally provided to the parties shortly before it is circulated to all WTO Members and submitted to the Dispute Settlement Body. At any time during the dispute resolution process, the parties may reach a mutually satisfactory resolution to their dispute and terminate the panel's consideration.

The proceedings of the panel are strictly confidential, although the parties to the dispute may make public their own submissions to the panel, and request that other parties to the dispute also provide a public summary of their submissions. The panel's final report, once translated into the WTO's three working languages (English, French and Spanish) is made public at the same time as it is circulated to all WTO Members.

The examination of a particular dispute by a panel should normally not exceed six months, or three months in the case of urgent situations involving trade in perishable products. However, it is not uncommon that the parties to the dispute request longer time periods in which to make their submissions. Furthermore, when expert advice is sought, compliance with the six-month deadline becomes virtually impossible. Nonetheless, most panel examinations are completed within nine to 12 months.

Once the panel's final report has been submitted to all WTO Members, there are two possible scenarios. The Dispute Settlement Body may consider the panel's report and agree to adopt it, unless there is a consensus not to adopt the report. Alternatively, the parties to the dispute (but not third parties) may appeal the panel's findings, in which case issues of legal interpretation will be examined by the WTO's Appellate Body (Article 16.4). Most WTO panel reports have been appealed.

³ Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

The Dispute Settlement Body has established a permanent seven-member Appellate Body, whose members have rotating four-year terms. Any appeal is heard by three members of the Appellate Body, who have access to all of the submissions made to the panel, plus additional submissions by the parties relating to the appeal. The Appellate Body must submit its report to the Dispute Settlement Body within 90 days. It can uphold, modify or reverse any or all of a panel's legal findings and conclusions (Article 17), but its review is limited to issues of law.

The Dispute Settlement Body must consider the Appellate Body's report within 30 days, and decide whether to accept it. The report will be adopted, and unconditionally accepted by the parties, unless there is a consensus not to adopt the report.

Following adoption of the panel's report, as modified by the Appellate Body, a WTO Member government has a legal obligation to bring its measure(s) into conformity with its obligations under the WTO. Recognising that legislative or other time-consuming modifications may be required, the WTO agreement provides an unspecified 'reasonable period of time' for compliance, noting that this should normally not exceed 15 months. Usually the parties to the dispute reach agreement on how much time is reasonably required in a particular situation. Where no agreement is reached, an arbitrator (normally an Appellate Body member) determines the reasonable period of time for compliance (Article 21.3).

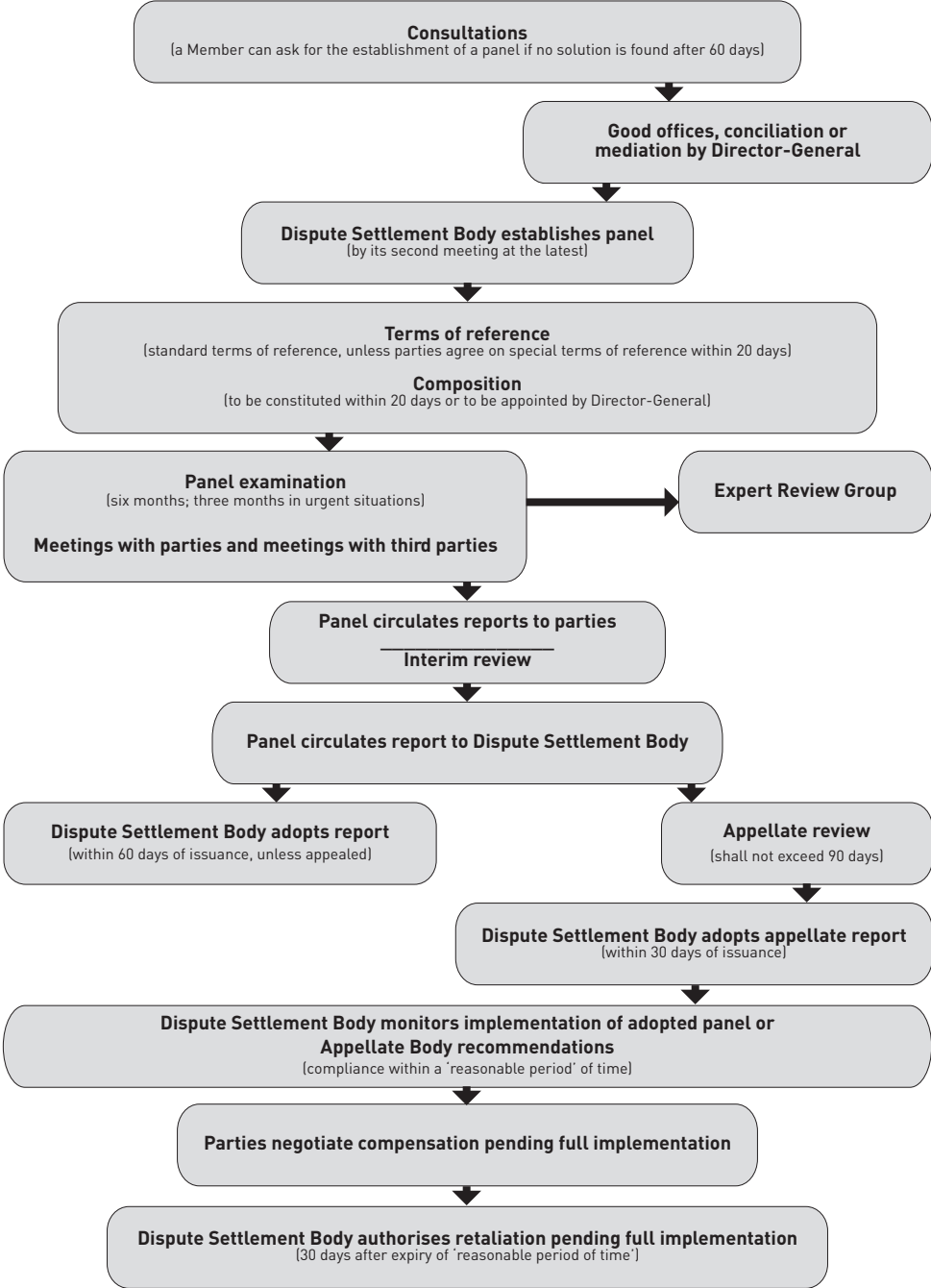
A Member who has 'lost' a dispute must report regularly to the Dispute Settlement Body on its progress in implementing the decisions of the panel and Appellate Body. If a government cannot bring its measure into compliance within the established period of time, it can offer to compensate the complaining party in the dispute for its lost trade opportunities. Such compensation normally takes the form of reduced tariffs or lower barriers to trade on products exported by the 'winning' party to the dispute (Article 22.2).

If no agreement can be reached regarding acceptable compensation, the 'winning' party may request the Dispute Settlement Body to authorise it to 'suspend concessions', that is, impose limited trade sanctions. This is often called 'retaliation' and involves increased tariffs (often 100 per cent increase) on products exported by the 'losing' party. If the parties cannot agree on the level of suspension that is appropriate, the original panel may be requested to determine the appropriate amount on an annual basis (Article 22.6). Neither compensation nor retaliation is retroactive; that is, compensation is only for lost trade opportunities starting from the expiration of the 'reasonable period of time' for implementation, not opportunities lost for the entire time during which the measure was in place. There is an exception to this non-retroactive rule for the repayment of illegally collected anti-dumping duties or subsidies.

If there is no agreement whether or not a 'losing' party has brought its measures into compliance with the panel or Appellate Body's ruling, the matter may be referred back to the original panel. The panel is expected to consider the case in an expedited manner, and normally give its ruling to the Dispute Settlement Body within 90 days (Article 21.5).

The normal procedure and timetable for the dispute settlement process is summarised in Figure 1.

Figure 1: WTO dispute settlement flow chart



Disputes on sanitary and phytosanitary measures

Many disputes involving quarantine and other sanitary measures are resolved without recourse to the formal dispute settlement system. In the first instance, bilateral consultations, formal or informal, are often sufficient to clarify misunderstandings and permit trade. In addition, the SPS Committee also provides a forum for the consideration of specific trade concerns and dispute prevention, whether between two trading partners or several. Raising an issue in the context of the SPS Committee also permits other countries to express their interest and concerns, and may lead to a resolution of the problem. To date, over 75 specific trade concerns have been discussed in the SPS Committee.

Members may also request the good offices of the chairperson of the SPS Committee to assist with the resolution of trade problems. There have been several instances in which the chairperson has been requested to organise and preside over bilateral or plurilateral consultations, facilitating resolution of the trade dispute.

As of August 2000, over 200 disputes had formally been raised under the WTO's dispute settlement system. Of these, 17 alleged violations of the SPS Agreement, although in four cases this was not the main focus of the dispute. In five cases panels have been established:

- two with regard to the European Union's ban on meat treated with growth-promoting hormones;
- two with regard to Australia's restrictions on imports of fresh, chilled or frozen salmon; and
- one to examine Japan's requirement that each variety of certain fruits be tested with regard to the efficacy of fumigation treatment.

In several of the remaining cases the parties found mutually agreed solutions through the bilateral consultations. The other cases are still pending and, if a solution is not eventually found, the complaining party could request the establishment of a panel. Table 1 provides further information regarding all disputes alleging violation of the SPS Agreement.

Table 1: WTO disputes invoking the SPS Agreement

Since 1 January 1995, violations of the SPS Agreement have been alleged in the following invocations of the formal dispute settlement provisions of the WTO. Those which have been referred to a panel are highlighted.

Dispute settlement number	Parties and nature of complaint	Comments
WT/DS3	United States complaint against Korea's inspection procedures for fresh fruits.	Consultations requested 6 April 1995; pending.
WT/DS41	United States complaint against Korea's inspection procedures for fresh fruits.	More precise complaint apparently covering the same measures as dispute WT/DS3. Consultations requested 24 May 1996; pending.
WT/DS5	United States complaint against Korea's shelf-life requirements for frozen processed meats and other products.	Mutually agreed solution notified in July 1995.
WT/DS18	Canada's complaint against Australia's import restrictions on fresh, chilled or frozen salmon.	Panel established 10 April 1997. Panel report issued 12 June 1998. Appellate Body report issued 20 October 1998. Reports adopted 6 November 1998. Reasonable period of time given: until 6 July 1999. Article 21.5 panel (on compliance) report circulated on 18 February 2000; adopted (without appeal) on 20 March 2000. Mutually agreed solution reported on 18 May 2000. Article 22.6 panel (on level of retaliation) established on 28 July 1999, suspended since September 1999.
WT/DS21	United States complaint against Australia's import restrictions on fresh, chilled or frozen salmon.	Panel established on 16 June 1999. Suspended since September 1999.
WT/DS20	Canada's complaint against Korea's restrictions on treatment methods for bottled water.	Mutually agreed solution notified in April 1996.
WT/DS26	United States complaint against EC's import prohibition on imports of meat treated with growth-promoting hormones.	Panel established 20 May 1996. Panel report issued 18 August 1997. Appellate Body report issued 16 January 1998. Reports adopted on 13 February 1998. Reasonable period of time given: until 13 May 1999. Article 22.6 arbitration on amount of retaliation authorised for United States (and Canada, see below) issued on 12 July 1999. Retaliation authorised on 26 July 1999.
WT/DS48	Canada's complaint against EC's import prohibition on imports of meat treated with growth-promoting hormones.	Panel established 16 October 1996. Same panel handled both complaints; same calendar as above.
WT/DS76	United States complaint against Japan's 'varietal testing' requirement for fresh fruits.	Panel established 18 November 1997. Panel report issued 27 October 1998. Appellate Body report issued 22 February 1999. Reports adopted on 19 March 1999. Reasonable period of time mutually agreed: until 31 December 1999. As of August 2000, parties indicating close to resolution.
WT/DS96	EC complaint against India's quantitative restrictions on agricultural and other products.	SPS minor issue; mutually agreed solution notified in April 1998.
WT/DS100	EC complaint against United States restrictions on poultry imports.	Consultations requested 18 August 1997; pending.
WT/DS133	Swiss complaint against Slovakia's BSE-related restrictions on cattle and meat.	Consultations requested 11 May 1998; pending.
WT/DS134	India's complaint against EC restrictions on rice imports.	SPS minor issue. Consultations requested 25 May 1998; pending.
WT/DS135	Canada's complaint against EC (French) measures affecting asbestos.	Primarily TBT issue; panel established 25 November 1998. Report expected August 2000.
WT/DS137	Canada's complaint against EC restrictions due to pine wood nematodes.	Consultations requested 17 June 1998; pending.
WT/DS144	Canada's complaint against United States state restrictions (South Dakota, etc) on movement of Canadian trucks carrying live animals and grains.	Consultations requested 25 September 1998; pending.
WT/DS/203	United States complaint against Mexico on measures affecting trade in live swine.	Primarily anti-dumping. Consultations requested 10 July 2000; pending.

Consultation of experts

Article 11.2 of the SPS Agreement states that in disputes involving scientific or technical issues, a panel should seek advice from experts chosen by the panel, in consultation with the parties to the dispute. The panel may seek advice from experts on an individual basis, or establish an advisory technical experts group. Experts have been consulted in all of the disputes involving quarantine measures, either at the request of the parties or at the panel's own initiative.

The panels have first identified the areas in which they need expert advice. The relevant standard-setting organisations (the Codex Alimentarius Commission, the Office International des Epizooties and the International Plant Protection Convention) have assisted in identifying individuals with expertise in the relevant issues. Curriculum vitae and other relevant information is sought from these individuals, as well as from any other experts identified by the parties. The parties to the dispute are given the opportunity to comment on the list of experts, and in particular to make known any compelling objections they may have to any particular individual. The panel then selects the experts it will consult.

The panel prepares specific written questions for the experts, on which the parties are provided the opportunity to comment. The written responses of the experts are provided to the parties to the dispute, and have subsequently been included in the panels' reports. In addition, the experts are invited to meet with the panel for a further discussion of the scientific and technical questions, and the parties participate in that meeting and may raise questions directly to the experts or comment on the experts' replies. A transcript of the meetings with the experts has been appended to the panels' reports.

European Union hormones ban

The complaints by the United States and Canada against the European Union's ban on imports of meat treated with growth-promoting hormones was the first dispute relating to the SPS Agreement referred to the panel process. The hormones under dispute were oestradiol 17 β , progesterone, testosterone, trenbolone acetate (TBA), zeranol and melengestrol acetate (MGA). The European Union argued that its ban was necessary in order to protect human health from potential risks arising from the residues of these veterinary drugs in meat. The main arguments of the United States and Canada were that:

- there was no scientific evidence of risks to human health from the proper use of these hormones for growth-promoting purposes;
- the EU measure was not based on the relevant international (Codex) standards;
- the EU measure was not based on a risk assessment;
- the level of risks accepted by the European Union with respect to hormones was inconsistent with the level of risk the European Union accepted in comparable situations; and
- there were less trade-restrictive measures which the European Union could impose in order to ensure its chosen level of health protection.

Two separate panels were established, on 20 May 1996 (United States complaint) and 16 October 1996 (Canadian complaint), although the same members served on both panels and the same experts were consulted. Expert advice was sought on the use of hormones and other veterinary drugs in animals for human consumption; on the role of hormones in human cancer; and on the Codex process of developing international standards for food safety. Both panel reports were circulated to WTO Members on 18 August 1997. The panels found the EU measure to be in violation of the SPS Agreement. In particular, it was not based on a risk assessment (Article 5.1), it was not consistent in the level of protection achieved (Article 5.5) and its deviation from the relevant international standard was not justified (Articles 3.1 and 3.3).

All three parties appealed certain aspects of the panel's findings. The Appellate Body considered the case and circulated its report to members on 16 January 1998. The EU was found to be in violation of Article 3.3 (deviation from international standard not justified) and Article 5.1 (not based on a risk assessment). Furthermore, the Appellate Body concluded that the precautionary principle found reflection in Article 5.7 of the SPS Agreement and did not override the explicit obligations of the SPS Agreement. However, the Appellate Body did not uphold the panel's findings regarding the lack of consistency in the level of protection.

The Dispute Settlement Body adopted the reports, as modified by the Appellate Body, on 13 February 1998. The parties were unable to agree on what was a reasonable period of time for compliance by the European Union. Therefore, the question was referred to arbitration, and the arbitrator determined that the deadline for implementation was 13 May 1999 – 15 months from the date of adoption by the Dispute Settlement Body.

When the European Union announced that it would not be able to comply by this deadline, it entered into consultations to provide compensation to Canada and the United States. No agreement was reached on compensation. The United States and Canada subsequently requested the right to suspend concessions (raise import tariffs) on certain products imported from the European Union. The European Union challenged the level of retaliation sought by both parties (US\$202 million per year and CDN\$75 million per year, respectively), and the matter was referred to the original panels for arbitration. On 12 July 1999, the arbitrators announced their decision of appropriate levels of US\$116 million per year and CDN\$11.3 million per year. These levels of retaliation were authorised by the Dispute Settlement Body, and both the United States and Canada have been applying 100 per cent tariffs on certain products from the European Union since the end of July 1999. The European Union has undertaken a number of scientific studies on the hormones at issue, and continues consultations with the United States and Canada regarding a solution to the dispute. Table 2 provides basic information about the dispute.

Table 2: Hormones – the facts at a glance

Official name:	EC Measures Concerning Meat and Meat Products (Hormones)
Parties:	Complainants: United States (WT/DS26) and Canada (WT/DS48) Respondent: European Communities Third parties: Australia, Norway, New Zealand
Under dispute:	An EC ban on imports of beef from cows treated with hormones for growth-promotion purposes, allegedly to protect human health. The United States and Canada claimed that there was no evidence of adverse effects on human health.
Panel:	<ul style="list-style-type: none"> • Mr Thomas Cottier, Chairman (Swiss law professor) • Mr Peter Palecka (Czech trade diplomat) • Mr Jun Yokota (Japanese trade diplomat)
Experts consulted:	<ul style="list-style-type: none"> • Dr Francois André, Laboratoire des Dosages Hormonaux, France • Dr Dieter Arnold, Deputy Director, Federal Institute for Health Protection of Consumers and Veterinary Medicine, Germany • Dr George Lucier, Environmental Toxicology Program, National Institute of Environmental Health Sciences, United States • Dr Jock McLean, University of Swinburne, Pro Vice Chancellor, Division of Science, Engineering and Design, Swinburne University of Technology, Australia • Dr Len Ritter, Executive Director, Canadian Network of Toxicology Centres, University of Guelph, Canada • Dr Alan Randell of the Codex Secretariat also advised the Panel.
Calendar:	Panels established: 20 May 1996 (US complaint) 16 October 1996 (Canadian complaint) Panel reports issued: 18 August 1997 Appellate Body report issued: 16 January 1998 Reports adopted by Dispute Settlement Body: 13 February 1998 Arbitrator's determined deadline for compliance: 13 May 1999 Arbitrator's decision on level of retaliation: 12 July 1999
Level of retaliation authorised:	US\$116 million per year CDN\$11.3 million per year

Australian restrictions on salmon imports

The complaint by Canada against Australia's import restrictions on fresh chilled and frozen salmon was the first dispute regarding measures taken to protect animal health from the potential introduction of diseases. Australia claimed that imports of salmon from Canada could result in the introduction of any of 21 exotic diseases and posed an unacceptable risk. Canada claimed that salmon imported for human consumption was very unlikely to lead to the introduction of fish diseases. Canada's main arguments were that:

- Australia's requirements were not based on international standards nor on a proper risk assessment;
- the level of risk accepted by Australia with respect to salmon was inconsistent with the level of risk Australia accepted from other fish; and

- there were less trade-restrictive measures which Australia could impose in order to ensure its chosen level of health protection.

A panel was established on 10 April 1997. It sought expert advice with respect to fish diseases, risk analysis in the context of animal health, and the international standards (OIE Aquatic Animal Code). The panel circulated its report to WTO Members on 12 June 1998. The Australian measure was found to be in violation of the SPS Agreement. In particular, the panel concluded that:

- no risk assessment had been undertaken with respect to some types of salmon;
- although the risk of diseases from ocean-caught Pacific salmon had been assessed, the measure was not based on a risk assessment (Article 5.1) and was therefore not based on scientific principles and the available scientific evidence (Article 2.2);
- the measure was not consistent in the level of protection achieved (Article 5.5) and resulted in discrimination (Article 2.3); and
- the measure was not the least trade-restrictive measure available to achieve the desired level of health protection (Article 5.6).

Both Australia and Canada appealed certain aspects of the panel's findings. The Appellate Body circulated its report to WTO Members on 20 October 1998. Australia's risk assessment was found to not fulfil all of the requirements for an appropriate risk assessment and therefore was in violation of Article 5.1 and Article 2.2. The Appellate Body upheld the finding of violation of Article 5.5 and Article 2.3 (not consistent and resulted in discrimination). However, it did not believe that there was sufficient factual information to permit a finding regarding Article 5.6 (least trade restrictive).

The panel report, as modified by the Appellate Body, was adopted by the Dispute Settlement Body on 6 November 1998. The parties were unable to agree on what was a reasonable period of time for compliance by Australia. This question was referred to arbitration, and the arbitrator determined that the deadline for compliance was 6 July 1999.

On 19 July 1999 Australia announced that it had modified its measure and was in full compliance with its WTO obligations. Canada disagreed and requested authorisation to suspend concessions on CDN\$45 million in products from Australia. Australia asked for arbitration to determine the level of retaliation. At the same time, Canada also requested that, in accordance with Article 21.5, a panel be established to examine Australia's compliance with the findings of the original panel and Appellate Body. On 28 July 1998, the DSB referred both the question of compliance and the level of retaliation to the original panel.

On 16 June 1999 the Dispute Settlement Body established a panel to examine a complaint by the United States against Australia's restrictions on imports of salmon. The panel was comprised of the same individuals as considered the Canadian complaint. In September 1999 the United States requested that the work of the panel be suspended until the question of compliance by Australia with the original panel's rulings had been determined.

Australia and Canada requested that the arbitration on the level of retaliation be suspended until the panel had completed its examination of the issue of compliance. The Article 21.5 panel sought scientific advice regarding risk analysis with respect to animal diseases. It issued its report on 18 February 2000. The panel concluded that Australia's new risk assessment met the requirements of Article 5.1 and that there was no longer a violation of Article 5.5 (consistency) or Article 2.3 (discrimination). However, the requirement for salmon to be imported in 'consumer-ready' form was not found to be justified by the risk assessment and therefore in violation of Article 5.1 and Article 2.2. Furthermore, the prohibition on imports into Tasmania was also found to be inconsistent with Article 5.1 and Article 2.2 of the SPS Agreement. The Dispute Settlement Body adopted the report on 20 March 2000. On 18 May 2000, Australia and Canada announced that they had reached agreement on a mutually acceptable solution to the dispute. Table 3 provides basic information about the dispute.

Table 3: Salmon – the facts at a glance

Official name:	Australia – Measures Affecting Importation of Salmon (WT/DS18)
Parties:	Complainant: Canada Respondent: Australia Third parties: European Community, India, Norway, United States
Under dispute:	Australia's ban on the importation of fresh chilled or frozen salmon, allegedly to protect the domestic salmon population from a number of diseases. Canada claimed that salmon imported for human consumption was very unlikely to lead to the introduction of these diseases.
Panel:	<ul style="list-style-type: none"> • Mr Michael Cartland, Chairman (Hong Kong trade diplomat) • Mr Kari Bergholm (Finnish trade diplomat and First Chairman, SPS Committee) • Ms Claudia Orozco (Colombian trade diplomat)
Experts consulted:	<ul style="list-style-type: none"> • Dr David E Burmaster, Alceon Corporation, United States • Dr Christopher J Rodgers, fish disease consultant, Spain • Dr James Winton, National Fisheries and Research Center, United States Fish and Wildlife Service, United States • Dr Marion Wooldridge, Department of Risk Research, Central Veterinary Laboratory, United Kingdom
Calendar:	Panel established: 10 April 1997 Panel report issued: 12 June 1998 Appellate Body report issued: 20 October 1998 Reports adopted by the Dispute Settlement Body: 6 November 1998 Arbitrators determined deadline for compliance: 6 July 1999 Article 21.5 panel established to examine compliance: 28 July 1999 Arbitration established on level of retaliation: 28 July 1999 Article 21.5 panel report issued: 18 February 2000 Article 21.5 panel report adopted by the Dispute Settlement Body: 20 March 2000 Mutually acceptable solution reported on 18 May 2000
Experts consulted by Article 21.5 panel:	<ul style="list-style-type: none"> • Dr Gideon Brückner, Director, Food Safety and Veterinary Public Health, South Africa • Dr Alasdair McVicar, Principle Scientific Officer, Aberdeen Marine Laboratory, • Dr Marion Wooldridge, Department of Risk Research, Veterinary Laboratories Agency, United Kingdom

Japan's variety-by-variety testing requirement

The third issue which has been considered by a panel relating to the SPS Agreement was a complaint by the United States against Japan. As part of its efforts to ensure that imported fruits did not harbour codling moth, Japan permitted entry only of those varieties of fruits which had been subjected to extensive testing to demonstrate the efficacy of a fumigation treatment. Japan claimed that this was a provisional measure, necessary to protect plant health. The United States claimed that there was no scientific justification for requiring each variety of a particular fruit (that is, each distinct variety of apple) to be separately tested. The main arguments of the United States were that the Japanese requirement was not based on scientific principles and was maintained against scientific evidence that it was not necessary.

A panel was established on 18 November 1997. It consulted scientific experts on codling moth and on fumigation treatment. The panel issued its report on 27 October 1998. It found that Japan was in violation of the SPS Agreement, in particular, because it was maintaining its measure without sufficient scientific evidence (Article 2.2). In terms of Japan's claim that its measure was provisional, the panel found that Japan failed to meet the requirements of Article 5.7 because it was not actively seeking additional scientific evidence in order to review its measure within a reasonable period of time. In addition, the panel found that Japan's measure was not the least trade-restrictive manner in which to achieve its desired health protection (Article 5.6) and that Japan was obliged to publish its requirement even though Japan did not consider it to be a mandatory regulation (Article 7 and Annex B).

Both Japan and the United States appealed certain aspects of the panel's findings. The Appellate Body issued its report on 22 February 1999. It upheld the panel's findings of violations of Article 2.2 (sufficient scientific evidence), of Article 5.7 (provisional measures) and of Article 7 (publication). The Appellate Body overturned the panel's finding on Article 5.6 (least trade restrictive) on the basis that the United States had not met its legal burden in this regard. In addition, the Appellate Body concluded that Japan's measure was not based on a risk assessment, in violation of Article 5.1.

The Dispute Settlement Body adopted the panel's report, as modified by the Appellate Body, on 19 March 1999. The United States and Japan agreed that it would be reasonable for Japan to ensure compliance by 31 December 1999. Since that date, the parties have reported that they are close to reaching a mutually agreed resolution. Table 4 provides a summary of the dispute.

Table 4: Variety testing – the facts at a glance

Official name:	Japan – Measures Affecting Agricultural Products (WT/DS76)
Parties:	Complainant: United States Respondent: Japan Third parties: Brazil, European Community, Hungary
Under dispute:	Japan's requirement to test each variety of a series of agricultural products (apples, cherries, peaches, walnuts, apricots, pears, plums and quinces) for the efficacy of treatment against codling moths. The United States claimed that it was not necessary to test each variety of a fruit for the efficacy of the treatment, and that this varietal testing requirement was unnecessarily burdensome.
Panel:	<ul style="list-style-type: none">• Mr Kari Bergholm, Chairman (Finnish trade diplomat and First Chairman, SPS Committee)• Mr Germain Denis (Canadian trade diplomat)• Mr Eirikur Einarsson (Icelandic trade diplomat)
Experts consulted:	<ul style="list-style-type: none">• Dr Neil Heather, Entomologist, University of Queensland, Corinda, Australia• Dr Patrick Ducom, Fumigation Expert, Lormont, France• Mr Robert Taylor, Fumigation Specialist, Natural Resources Institute, Chatham, United Kingdom
Calendar:	Panel established: 18 November 1997 Panel report issued: 27 October 1998 Appellate Body report issued: 22 February 1999 Reports adopted by Dispute Settlement Body: 19 March 1999 Mutually agreed deadline for implementation: 31 December 1999

Conclusions

The dispute settlement system is critical for ensuring the implementation of WTO agreements, including the SPS Agreement. In this highly technical area, the ability of WTO dispute settlement panels to seek scientific advice has been of critical importance, in particular on matters regarding scientific evidence and justification, and risk assessment. It has been a useful coincidence that the three issues which have been examined to date by panels concern the three major areas of application of the SPS Agreement; that is, food safety, animal health and plant health protection. Nonetheless, three cases are too few to be able to judge the effectiveness of the WTO dispute settlement system in ensuring compliance with the SPS Agreement.