CHAPTER ONE

AUSTRALIA'S MEMBERSHIP OF THE WORLD TRADE ORGANISATION

Introduction

1.1 This chapter initially summarises the principal provisions of the WTO agreement framework relating to plant quarantine. Australia is a signatory to the WTO. The agreement framework requires that Member countries adopt the least trade restrictive quarantine barriers possible, but entitles Members to take sanitary and phytosanitary measures necessary to protect human, plant and animal life or health, provided such measures are scientifically based, non-discriminatory and consistently applied. Where necessary, Members may adopt the 'precautionary principle' if the scientific evidence on a particular pest is inconclusive.

1.2 Subsequently, the chapter considers the various means available under the WTO framework for developing appropriate standards to protect animal, human or plant life or health and the environment. One of those means is the conduct of IRAs. The chapter also considers the resolution of disputes under the WTO by the WTO Dispute Settlement Body.

The WTO Agreement Framework

1.3 Australia is a member of the WTO, which is the only international body dealing with the rules of trade between nations. At its heart are the WTO agreements, the legal ground-rules for international commerce and trade policy. The agreements have three main objectives: to help trade flow as freely as possible, to achieve further liberalisation of trade gradually through negotiation, and to set up an impartial means of settling disputes.[1]

1.4 The founding WTO agreement affecting Australia's quarantine regime is the General Agreement on Tariffs and Trade (GATT); as amended at the conclusion of the Uruguay Round. The GATT Agreement contains provisions relating to the use of trade and trade-related measures for non-economic purposes, such as for quarantine protection. These are set out in Article XX *General Exceptions* provisions. The preamble to Article XX and the relevant provisions applying to quarantine, Article XX(b), states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

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1 WTO Website – Introductory Information, http://www.wto.org

> between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... necessary to protect human, animal or plant life or health.[2]

1.5 Additional trade and quarantine provisions are provided in two supplementary WTO agreements:

a) the Agreement on Technical Barriers to Trade (TBT); and

b) the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures.

1.6 The TBT agreement came into force with the creation of the WTO on 1 January 1995. It recognises Members' right to adopt the standards they consider appropriate to protect animal, human or plant life or health, the environment and to meet other consumer interests. The TBT Agreement contains a code of good practice for the preparation, adoption and application of standards by central government bodies.

1.7 The SPS Agreement complements the TBT, and also came into force on 1 January 1995. The Committee notes the distinction between sanitary and phytosanitary measures: sanitary measures deal with human and animal life or health; phytosanitary measures deal with plant life or health. The SPS Agreement is reproduced in Appendix 3.

1.8 In broad terms, the agreement requires that countries adopt the least trade restrictive quarantine barriers possible, but provides Member countries with a right to take sanitary and phytosanitary measures necessary to protect human, plant and animal life or health, provided such measures are scientifically based, non-discriminatory and consistently applied.[3] These requirements are discussed below.

Scientifically Based Risk Assessment

1.9 Article 5.1 of the SPS Agreement places an obligation on Members to ensure that sanitary and phytosanitary measures are based on a scientific assessment of risk. Articles 5.2 and 5.3, which set out factors that Members should take into account in a risk assessment, further elaborate this.[4]

Consistency in the Level of Protection

1.10 Article 5.5 of the SPS Agreement requires Members to avoid arbitrary or unjustifiable distinctions in the level of sanitary and phytosanitary protection applied

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2 Cited in submission 39, p 2

3 *Ibid*

4 *Ibid*, p 4

in different situations, if they result in discrimination or a disguised restriction on international trade.[5]

Non-Discriminatory Trade Measures

1.11 Article 5.6 of the SPS Agreement requires Members to ensure that sanitary and phytosanitary measures are not more trade-restrictive than required to achieve the Member state's ALOP, taking into account technical and economic feasibility.[6]

The 'Precautionary Principle'

1.12 Article 5.7 of the SPS Agreement entitles Members to take sanitary and phytosanitary measures necessary to protect human, plant and animal life or health where the science is inconclusive. The article states:

> In cases where the relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

1.13 The Department of Foreign Affairs and Trade (DFAT) raised the 'precautionary principle' in its written submission to this inquiry. DFAT indicated that while individual countries are entitled to proceed with precaution in scientific assessment and policy-making, there is no internationally or commonly agreed definition of what is meant by the term 'precautionary principle'.[7]

1.14 This uncertainty arises from the *EC Measures Concerning Meat and Meat Products (Hormones)* case, known as the "EC – Hormones" case. This case revolved around a complaint by the US and Canada against EC prohibitions on the import of beef derived from cattle grown with hormonal growth promotants.[8]

1.15 In "EC-Hormones", the EC invoked the 'precautionary principle' as a principle of customary international law that should apply to the provisions of the SPS Agreement. However, the Appellant Body found that the 'precautionary principle' does not justify measures otherwise inconsistent with the specific provisions of the SPS agreement:

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5 *Ibid*, p 7

6 *Ibid*, p 8

7 *Ibid*, pp 5-6

8 *Ibid*, p 2

> Uncertainty of the potential economic consequences of pest and disease establishment does not therefore permit a Member to override the science-based obligations of the SPS Agreement.[9]

1.16 In evidence, Mr Bruce Gosper from DFAT noted that the European Union (EU) has since stated that it intends to seek clarification on the 'precautionary principle', and its applicability to food safety and human health.[10]

1.17 Given this uncertainty, the Committee notes the WTO summary document *Understanding the Agreement on Sanitary and Phytosanitary Measures*. It poses the questions: "Can governments take adequate precautions in setting food safety and animal and plant health requirements? What about when there may not be sufficient scientific evidence for a definitive decision on safety, or in emergency situations?" In response, the document states:

> Three different types of precautions are provided for in the SPS Agreement. First, the process of risk assessment and determination of acceptable levels of risk implies the routine use of safety margins to ensure adequate precautions are taken to protect health. Second, as each country determines its own level of acceptable risk, it can respond to national concerns regarding what are necessary health precautions. Third, the SPS Agreement clearly permits the precautionary taking of measures when a government considers that sufficient scientific evidence does not exist to permit a final decision on the safety of a product or process. This also permits immediate measures to be taken in emergency situations.[11]

The Determination of Quarantine Policy under the WTO

1.18 In developing appropriate standards to protect animal, human or plant life or health and the environment, Member states may either follow relevant international standards, guidelines or recommendations, or must conduct an appropriate scientific risk assessment. These two options are discussed below.

International Standards for Phytosanitary Measures

1.19 Australia is a contracting party to the International Plant Protection Convention (IPPC). The IPPC is the organisation recognised in the SPS Agreement as the source for international standards for phytosanitary measures (ISPMs) affecting trade. Specifically, Annex A: 3(b) of the SPS Agreement defines the relevant plant health standards as:

> for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the

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9 *Ibid*, p 6

10 Evidence, RRAT, 5 April 2001, p 420

11 WTO, 'Understanding the WTO Agreement of Sanitary and Phytosanitary Measures', http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm

> International Plant Protection Convention in cooperation with regional organisations operating within the framework of the International Plant Protection Convention.

1.20 One-hundred and eleven (111) governments are currently contracting parties to the IPPC.[12]

Scientific Risk Assessment

1.21 Article 5.1 of the SPS Agreement requires that sanitary or phytosanitary measures, if not based on an ISPM, must be based on a scientific assessment of the risk in the particular circumstances using an IRA-type process. Under IPPC No 2, a risk assessment must:

a) identify the pests that could enter, establish and spread within the Member's territory if trade in a particular commodity were to occur, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these pests;

b) evaluate the likelihood of entry, establishment or spread of these pests; and

c) evaluate the likelihood of entry, establishment or spread of these pests according to the SPS measures that apply.[13]

1.22 In its written submission, DFAT argued that these three principles have been confirmed by three disputes that have been resolved in the WTO since 1995. In particular, in *Australia - Measures Affecting Importation of Salmon*, known as the "Australia – Salmon case", involving a complaint by Canada against Australia's animal health quarantine restrictions on fresh, chilled or frozen salmon, the salmon 'implementation' panel confirmed Australia's approach to risk assessments as meeting the above IPPC guidelines:

> In that dispute, the panel found that 10 of the 11 measures which Australia applied in excess of the international standard met the first two tests. The "consumer-ready" requirement – which the panel found as not meeting the third test – was subsequently replaced with an alternative measure which reduced the risk from processing waste to negligible levels.[14]

12 Submission 41, p 15

13 Biosecurity Australia, Draft Import Risk Analysis on the Importation of Apples from New Zealand, October 2000, p 20

14 Submission 39, p 5

1.23 Accordingly, DFAT argued that if BA continue to model their IRAs on the approach adopted by AQIS in the "salmon case", the legitimacy of those IRAs with the WTO should be assured.[15]

The Resolution of WTO Disputes

1.24 The settlement of disputes arising between WTO Member governments on the implementation of WTO Agreements is made under the Dispute Settlement Understanding (DSU). The DSU covers a total of 27 WTO Agreements, including the SPS Agreement.

1.25 The DSU is administered by the Dispute Settlement Body (DSB). The DSB comprises representatives of all WTO Members. The jurisdiction of the DSB is compulsory on Members, and dispute settlement findings adopted by the DSB are legally binding on the parties to the dispute. The DSB does not have the authority to interpret or amend WTO legal rights and obligations.[16]

1.26 The dispute settlement process comprises the following stages:

a) Consultation;

b) Panel review;

c) Appellate review; and

d) Implementation of legal findings.

1.27 These stages are discussed briefly below.

Consultation

1.28 A WTO Member may formally request consultation under the provisions of Article 4 of the DSU in response to a particular grievance. A request for consultations must be notified to other WTO Members and include details of the grievance, together with the legal provisions at issue.

1.29 The respondent party is required to respond to a request for consultations within 10 days and to enter into consultations within 30 days, although the times can be extended by agreement of the parties. In certain circumstances, third party WTO Members with a significant commercial or policy interest in a dispute may join in the consultations subject to the agreement of the respondent party.

15 *Ibid*

16 *Ibid*, Attachment A, p 1

1.30 Following consultation, the complainant has the option of:

- lodging a request for a panel review following the lapse of 60 days after the request for consultations;
- holding further WTO consultations, with a view to negotiating a bilateral outcome; or
- suspending its complaint, which could be reactivated at any time in the future.[17]

Panel Review

1.31 Where a complainant lodges a request for a panel review (this has occurred in every instance to date), a three-member panel is established by the DSB. Panellists are selected by agreement of the parties or, in the event of disagreement, by the WTO Director-General in consultation with the Chair of the DSB.

1.32 The function of panels is to make an objective assessment of the matters before them based on the legal rights and obligations of the parties. Panel outcomes cannot impose new rights or obligations on the parties. The proceedings of panels are confidential. Panels may call on experts, for example in the scientific area. Experts are selected in consultation between the parties to the dispute.

1.33 Panels are required to report within 6 months, however in practice, many panels have gone beyond this time. In addition, a panel may suspend its work at any time at the request of the complainant, for a period not exceeding 12 months. If suspended for more than 12 months, a panel's authority lapses. The complaint may also be withdrawn at the panel stage and it remains possible to negotiate a bilateral solution up to the time of the panel's report.

1.34 Panels circulate a report to DSB Members at the conclusion of their inquiry, including their legal findings. The panel's findings are adopted by the DSB, subject to a reverse consensus, or in the event of an appeal, matters of law. Once adopted by the DSB, the findings have the force of law and require the respondent party to repair any WTO inconsistencies within a reasonable period of time (see below).[18]

Appellate Review

1.35 Either party to a dispute may appeal the panel decision to the WTO Appellate Body on questions of law. The Appellate Body consists of seven standing members appointed for four-year terms by the WTO Members on the basis of their expertise in WTO law. In cases of appeal, the Appellate Body selects three of its Members on a rotation basis to serve on the appeal.

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17 *Ibid*, pp 2-3

18 *Ibid*, pp 3-4

1.36 The Appellate Body is required to complete its report within 60 days, subject to exceptional circumstances. Appellate Body reports are automatically adopted at scheduled meetings of the DSB, subject to a reverse consensus. Once adopted by the DSB, the findings have force of law, requiring the respondent party to repair any inconsistencies within the requirements of WTO membership in a reasonable period of time.[19]

Implementation of Legal Findings

1.37 A responding party must implement measures consistent with the findings of the panel or appellate reviews. While the preferred outcome is for the respondent to withdraw a measure found to be WTO-inconsistent, the respondent has a degree of discretion in the means of bringing a measure into WTO conformity, provided that this is done within a reasonable period of time.

1.38 The outer time frame for a 'reasonable period of time' is 15 months from date of adoption of findings. The time period can either be negotiated between the parties or arbitratrated by an Appellate Body Member. Arbitration must be completed within 90 days from the date of DSB adoption of findings.

1.39 In the event of a respondent failing to implement the findings of a panel or appellate review, a complainant may elect to negotiate compensatory arrangements with the other party, or seek DSB authorisation to suspend concessions against the other party, up to an assessed level of trade damage. The request is granted subject to a reverse consensus, but authorisation is suspended if the respondent seeks arbitration on the level of trade damage (the product coverage itself cannot be arbitrated). Arbitration must be completed within 60 days of the expiry of a reasonable period of time, unless otherwise agreed between the parties.[20]

19 *Ibid*, p 5

20 *Ibid*