CHAPTER THREE

THE WORLD TRADE ORGANISATION AND THE CANADIAN CHALLENGE

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The Legal and Administrative Quarantine Framework

3.1 The World Trade Organisation [WTO] is the only international organisation dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.[1] Australia's membership of the WTO carries with it rights and obligations, which affect the legal and regulatory regime established by Australia for the importation of goods.

3.2 AQIS is responsible for administering the *Quarantine Act* 1908 and the *Imported Food Control Act* 1992. AQIS can make regulations under these acts in relation to the importation of goods. However, the regulations must conform with Australia's obligations under the various international agreements to which it is a signatory. There are a number of significant agreements, which are detailed below.

3.3 Access to free markets is critical to many of Australia's export industries. It is recognised that Australia must continue to be diligent in its commitment to free trade, however, it must be fair. Consequential to that is the requirement that Australia conform with its international obligations so far as import controls are concerned. The Cattle Council of Australia notes that the 'rules-based system of international trade, as represented by the WTO, is vital to the future of Australian agribusiness'[2].

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1 WTO Website - introductory information

2 Cattle Council of Australia, Submission 14, p 1

3.4 Australia's submission to the WTO, dated 21 August 1997, highlighted the international importance to Australia, given the level of agricultural exports, of the WTO disciplines on sanitary and phytosanitary measures:

> Australia has a vested interest in ensuring that SPS measures are not used for the purposes of trade protection against its exports to third markets. Australia also has a vested interest in the maintenance of its agricultural asset base and in ensuring that its agricultural produce maintains a privileged health status that will enable it to meet the legitimate quarantine conditions of other markets. In many cases Australian agricultural produce commands a premium in other markets because of its privileged health status. This is particularly the case of exports of Australian salmon to Japan.[3]

3.5 DFAT states that 'the WTO dispute settlement system underpins Australia's access to the markets of the 134 WTO Members' and describes the system as 'powerful leverage for adherence to WTO obligations across a wide range of goods and services'.[4] The system enables member states to enforce obligations through a legal process which requires defaulting members to bring their measures into conformity with their obligations within a reasonable period of time.

Establishment of the WTO and the Major International Agreements

3.6 The major agreements affecting the Australian quarantine regime are:

a) The General Agreement on Tariffs and Trade [GATT], 'the WTO's principal rule book for trade in goods'[5];

b) The Agreement on Technical Barriers to Trade [TBT]; and

c) The agreement on Sanitary and Phytosanitary Measures [SPS Agreement], which references the standards, guidelines and recommendations adopted by the Codex Alimentarius Commission, the Office Internationale des Epizooties [OIE][6].

3.7 The SPS and TBT Agreements came into force with the creation of the WTO on 1 January, 1995. The agreements are complementary, the former applying to measures that aim to protect human, animal and plant life and health, while the latter covers all other technical regulations and voluntary standards, and the procedures to ensure that these are met.[7]

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3 First Submission by Australia, *Measures Affecting the Importation of Salmon*, 21 August 1997, p 3

4 DFAT, Correspondence to Committee, 28 February 2000

5 WTO Website

6 The OIE is the International Animal Health Organisation

7 Gascoine D, Wilson D and McRae C, *Quarantine policy in the World Trade Organisation environment*, Outlook 2000, p 171

3.8 Following the conclusion of the Uruguay round of GATT negotiations in 1994, the WTO was established on 1 January 1995. It replaced the General Agreement on Tariffs and Trade, however, the responsibilities of the new organisation were much broader than those under the GATT agreement and include:

a) The setting of trade rules;

b) The provision of a forum for trade negotiations; and

c) The provision of a legally binding dispute settlement mechanism.

3.9 The dispute settlement mechanism provides for either bilateral negotiations between disputing parties or for the pursuit of formal legal processes, which are binding on signatories and include sanctions should WTO rulings be ignored.

General Agreement on Tariffs and Trade [GATT]

3.10 The GATT agreement was amended and incorporated into the new WTO agreements at the conclusion of the Uruguay Round. The General Agreement on Tariffs and Trade [GATT] covers only trade, whereas the range of agreements under the WTO umbrella cover services and intellectual property, as well as trade issues.

3.11 The basic GATT principles require that countries are not able to use quarantine measures as 'a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevailed' and that a contracting country should choose the 'least restrictive approach to securing the human, animal or plant life and health objective'[8]. Under the GATT Agreement quarantine reasons provided an 'exceptional right' to deviate from other free trade provisions, such as those prohibiting discrimination between third countries or between domestic and imported produce. The provisions proved difficult to enforce, mainly because of a lack of objective criteria by which to justify such measures and the voluntary nature of the code.

The Agreement on Technical Barriers to Trade

3.12 The Agreement of Technical Barriers to Trade [TBT Agreement] recognises countries' rights to adopt the standards they consider appropriate, either to protect animal, human or plant life or health, protection of the environment or to meet other consumer interests. The Agreement contains a code of good practice for the preparation, adoption and application of standards by central government bodies and also provides that procedures to determine whether a product conforms have to be fair and equitable. Domestically produced goods are not to be accorded any unfair advantage.

8 AQIS, Submission 17, p 10

The SPS Agreement

3.13 The SPS Agreement was a result of the recognition by negotiators that, following the elimination of the right of countries to impose non-tariff barriers on imports of agricultural goods, pressures would increase on governments to use other means, such as sanitary and phytosanitary measures, to restrict trade. The SPS Agreement was therefore negotiated to apply the same disciplines to all measures taken for the purpose of protecting human, animal and plant life or health. The aim was to allow only scientifically-based health protection, without protectionism.

3.14 The SPS Agreement defines the basic rights and obligations in relation to sanitary and phytosanitary measures necessary to protect human, animal or plant life or health. DFAT describes the effect of the Agreement as follows:

> The SPS Agreement accords sovereignty to members in regard to appropriate levels of health protection. Broadly, the Agreement accords a basic right (as compared to an exceptional right under GATT) to members to take measures with trade effect that may be necessary for the protection of human, animal or plant life and health, provided that the measures are based on sufficient scientific evidence and provided also that there is consistency in treatment between products having diseases or pests in common and on condition that the measures are the least trade restrictive for achieving appropriate levels of human, animal or plant health protection.[9]

3.15 The underlying principles of the SPS Agreement include:

a) *Harmonisation* - measures should be based on international standards where appropriate;

b) *Scientific basis* - measures should have a scientific basis, particularly if international standards are not followed;

c) *National treatment* - imports are not subject to more restrictive treatment than domestic product;

d) *Transparenc*y - comments of interested parties to be invited and taken into account so as to achieve an open and transparent decision-making process;

e) *Regionalisation* - absence or low prevalence of pests or diseases in parts of a country can be taken into account in the specification of measures;

f) *Equivalence* - the same objectives may be achieved by alternative means;

9 DFAT, Submission 21, p 4

g) *Risk assessment* - measures are to be based on an assessment of risk; and

h) *Risk management* - the risk to be managed in a consistent way.[10]

3.16 AQIS advised the three major requirements under the SPS Agreement:

a) The necessity to avoid arbitrary or unjustifiable distinctions in the application of the ALOP, ie Australia is unable to take different approaches to the acceptance of risk from one commodity to another;

b) The quarantine measures put in place cannot be more trade restrictive than what is required to meet the ALOP; and

c) There must be no discrimination between quarantine measures that are applied nationally within Australia and measures applied to similar commodities produced by another country where similar conditions prevail [the concept of equivalence].[11]

3.17 The National Farmers' Federation expressed support for the SPS Agreement in its submission, arguing that its importance to Australia results from its protection of and extension to the degree of agricultural trade liberalisation that was achieved in the Uruguay Round. The NFF argues that it is an 'important lever for Australian exporters seeking access to foreign markets':

> Where quarantine barriers have been used to block Australian exports the SPS Agreement can provide new market openings without jeopardising our own health status.[12]

The Role of the OIE and the International Animal Health Code

3.18 Australia is a member of the Office International des Epizooties, or International Organisation for Animal Health [OIE], which includes the Fish Diseases Specialist Commission. The list of fish diseases developed by the OIE forms the reference point for diseases considered in the IRA, which underpins the quarantine import controls on salmon.

3.19 The SPS Agreement makes reference to the 'relevant international standards and guidelines'. Annex A: 3(b) of the SPS Agreement states that the international standards, guidelines and recommendations relevant for animal health and zoonoses are those developed under the auspices of the OIE, contained in the OIE's animal health code. The OIE is an inter-governmental organisation, created in 1924 by international agreement, and signed by 28 countries. Based in Paris with 153 member

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10 AQIS, *Salmon Import Risk Analysis* 1996, para 1.3.1

11 AQIS, Evidence, RRAT, 24 September 1999, p 21

12 National Farmers Federation, Submission 33, p 3

countries, its role is the development of international animal health standards. The main objectives of the OIE are to:

a) Inform governments of the occurrence and course of animal diseases throughout the world and ways to control these diseases;

b) Co-ordinate studies devoted to the surveillance and control of animal diseases; and

c) Harmonise regulations for trade in animals and animal products among its member countries.[13]

3.20 The organisation has a permanent working relationship with the WTO, with the WTO's SPS Agreement being developed under the auspices of the OIE. Australia takes an active role within the organisation, with the Chief Commonwealth Veterinary Officer being a permanent member of the OIE.

3.21 The OIE is divided into specialist and regional commissions, one of which is the Fish Diseases Specialist Commission. This Commission is responsible for aquatic animal health, as determined by the International Aquatic Animal Health Code. The Fish Diseases Specialist Commission classifies aquatic animal health diseases and harmonises rules for governing trade in aquaculture products.

The Obligations under the SPS Agreement

3.22 The most significant articles in relation to quarantine measures are Articles 2, 3 and 5:

a) Article 2.1 gives members the right to 'take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health'. Article 2.2 places restrictions on the exercise of that right, ie the measures must be based on scientific principles and evidence, and Article 2.3 provides that they must not 'arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail' or could be 'applied in a manner which would constitute a disguised restriction on international trade[14]', [the consistency rule];

b) Article 3 emphasises that members should base their measures on international standards, guidelines or recommendations. This provision is qualified in paragraph 3, which permits the introduction of a higher level of protection if there is scientific justification or if the member considers the appropriate level of protection should be set at the higher level;

13 WTO, Report of the Panel, 12 June 1998, p 7

14 *Agreement on the Application of Sanitary and Phytosanitary Measures*, p 2

c) Article 5 of the Agreement refers to the assessment of risk to the member's environment and industry, and its determination of the 'Appropriate Level of Sanitary or Phytosanitary Protection' (ALOP).

3.23 Under Articles 3 and 5, members are able to determine their own level of quarantine protection, even if this exceeds relevant international or exporting country standards. There is no obligation to adopt an international standard, but where the international standard is adopted, the Member is not required to undertake a risk assessment. Measures not based on an international standard, guideline or recommendation must be based on a risk assessment and the adoption of the higher standard must be justified scientifically.

3.24 Under Article 5, while there is scope for a nation's declared Appropriate Level of Protection [ALOP] to stand in the face of scientific uncertainty, these rights are strongly conditional on that country having first developed a credible *assessment of risk* to domestic lifeforms and industries, and on the ALOP being applied in a consistent manner, ie one which avoids 'arbitrary or unjustifiable distinctions' in the levels considered to be appropriate, if such distinctions result in discrimination or a disguised restriction on international trade'.[15]

The Concept of Equivalence

3.25 The SPS Agreement, in Article 4, contains formal recognition of the concept of equivalence:

> Members shall accept the sanitary and phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing member for inspection, testing and other relevant procedures.[16]

3.26 AQIS points out in its submission that the concept of equivalence does not mean parity between the stringency of one country's SPS regime and another country's regime as they relate to trade between the two countries, nor to measures applying to similar hazards.[17] In its response to a question on notice, AQIS advised:

> Inclusion of the principle of equivalence in the SPS Agreement recognises the legitimacy of different approaches to achieving the same animal and plant health objectives. Differences may apply to methods of pest and disease monitoring and surveillance, animal and plant health services

15 ibid, pp 3-4

16 ibid, Article 4

17 AQIS, submission 17, p 13

> infrastructure, approaches to the control and eradication of pests and diseases, procedures for commodity testing, and inspection systems in processing plants.
>
> In this context, equivalence may be defined as the acceptance by an importing country of alternative animal and plant health measures demonstrated by an exporting country to achieve the importing country's ALOP.
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> The SPS Agreement obliges Members to enter into negotiations aimed at recognising equivalence. It places an obligation on the importing country to accept an objective demonstration of equivalence and on the exporting country to allow the importing country all reasonable means of verification, which may include the provision of relevant information and access to farms and facilities.[18]

The Dispute Settlement Procedures in the WTO

3.27 The principal aims and objectives of the WTO dispute settlement system are set out in Articles 3 (*General Provisions)* and 23 (*Strengthening of the Multilateral System)* of the Dispute Settlement Understanding [DSU], reproduced in the DFAT submission.

3.28 The DSU provides signatory countries to the WTO with an integrated framework for the settlement of disputes relating to the consistency of actions by signatory governments under the WTO Agreements, including the SPS Agreement. The DSU is administered by the WTO Dispute Settlement Body (DSB), consisting of all WTO members. The jurisdiction of the DSU is compulsory on members and findings adopted by the DSB are legally binding on the parties to a dispute.[19] Adoption of the DSU by WTO members has meant the development of proceedings which are quite legalistic in character.

3.29 The DSB has the following powers:

a) The authority to establish panels;

b) The authority to adopt Panel and Appellate Body reports;

c) The ability to maintain surveillance of implementation of rulings and recommendations; and

d) The ability to authorise suspension of concessions as an outcome of legal processes.[20]

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18 AQIS, Correspondence to Committee, 1 March 2000

19 DFAT, Submission 21, p 4

20 ibid

3.30 DSB decisions are determined by consensus, including reverse consensus[21] in the case of adoption of reports and authorisation for suspension of concessions. The DSB has no authority to interpret or amend WTO legal rights and obligations.

The Dispute Settlement Process

3.31 DFAT sets out the process in its submission. Figure 3.1 shows the process by which a dispute comes before the WTO. The process comprises six stages:

a) Consultations,

b) Panel review;

c) Appeal;

d) Implementation;

e) Compensation; and retaliation.

The Consultation Phase

3.32 A WTO member may formally request consultations under the provisions of Article 4 of the DSU. A request for consultations must be notified to other WTO members and include details of the measures complained against, together with the legal provisions at issue. Consultations may either represent leverage to negotiate a bilateral outcome (depending on the strength of legal claims) or form part of preparations for judicial determination.

3.33 The respondent party is required to respond to a request for consultations within 10 days of receipt and to enter into consultations within 30 days of receipt, although these time limits can be extended by agreement of the parties.

3.34 In certain circumstances, third party WTO members having a significant commercial or policy interest in the dispute may join in the consultations subject to the agreement of the respondent party.

3.35 Under standard procedures, a complainant has the option of:

a) Lodging a request for a panel 60 days after its request for consultations;

b) Holding further WTO consultations, with a view to negotiating a bilateral outcome; or

c) Suspending its complaint, which can be reactivated at any time in the future.

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21 Reverse consensus means a report is adopted if no appeals are notified

Figure 3.1 The Dispute Settlement Process

WTO DISPUTE SETTLEMENT PROCESS

1. Once request for consultation received, reply within 10 days and consultation must begin within 30 days - can be accelerated in urgent cases, such as with perishable goods.

2. If consultation fails to settle the dispute within 60 days, consideration by a Panel may be requested.

3. Panel required to report within six months - can be accelerated to three months in urgent cases, such as with perishable goods.

4. Once report handed down, there is a three week interim review period.

5. If parties wish to appeal, Appellate body convened - the appeal process generally takes no longer than 60 days and in no case more than 90 days.

6. Within 30 days of adoption of Appellate body's report, members must inform the Dispute Settlement Body of intentions regarding the implementation of recommendations.

7. If it is deemed impractical to comply immediately, the member shall have a "reasonable period of time" to do so.

8. The member proposes a timeframe. The parties have 45 days to agree on timeframe. If no agreement, the matter goes to arbitration. The arbitrator's guidelines state that the "reasonable period of time" should not exceed 15 months.

9. If a member does not implement the DSB's recommendations, the parties have to come to an agreement on compensation. If they cannot, within 20 days of the expiry of the "reasonable period", a member can issue a formal request to the DSB for compensation/retaliation. (This is to be seen as an absolute last resort measure. It is only to be temporary and preferably in the same area as the original dispute.)

10. The DSB will make a ruling on the request within 30 days of the expiry of the "reasonable period".

11. If there is disagreement about this finding, the matter goes to arbitration, to be completed within 60 days of the expiry of the "reasonable period".

The Panel Phase

3.36 Panels are established by the DSB at the request of a complainant, the request for establishment forming the terms of reference of the panel, unless otherwise agreed between the parties in consultation with the DSB chair. Following establishment of a panel, a three member panel is constituted, with panellists selected by agreement of the parties or by the WTO Director-General in consultation with the Chair of the DSB in the event of disagreement. Panellists are required to be well-qualified governmental and/or non governmental persons, who are sufficiently independent and of a sufficiently diverse background (Article 8.1 of the DSU). Citizens of members who are parties or third parties to a dispute are excluded, except by agreement between the parties (Article 8.2).

3.37 The function of panels is to make an objective assessment of the matters before them, against the legal rights and obligations of the parties. Panel outcomes cannot impose new rights or obligations on the parties.

3.38 Panels have the following powers and responsibilities:

a) Panels may call on experts, who are selected in consultation with the parties to the dispute;

b) Panel processes are required to be completed within six months, depending on the complexity of the matters before it. The processes involve written submissions from parties and oral hearings in Geneva;

c) 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 will lapse. 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;

d) The panel circulates a report to DSB members at the conclusion of its examination, including its legal findings. The panel's findings are adopted by the DSB, subject to a reverse consensus, or in the event of an appeal on matters of law;

e) Once a Panel report is 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.

The Appellate Phase

3.39 Either party to the dispute may appeal to the WTO Appellate Body on questions of law. The Appellate Body is required to complete its report within 60 days, subject to exceptional circumstances. The processes involve written submissions from parties and oral hearings in Geneva. The proceedings are confidential, but may be published with the final report.

3.40 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 the force of WTO law, requiring the respondent party to repair any inconsistencies within a reasonable period of time.

Implementation and Arbitration

3.41 A responding party must implement measures consistent with the WTO agreements. If a party is found to have a measure in place which is inconsistent with the WTO agreements, that party must take action to bring the measure into conformity with the Agreements. If it is impracticable to comply immediately, the responding party may be given 'a reasonable period of time', but not normally longer than 15 months.[22] The time period for implementation commences on adoption by the DSB of a Panel/Appellate Body report.

3.42 The time period can either be negotiated between the parties or be subject to binding arbitration. Arbitration is conducted by an Appellate Body member. Arbitration must be completed within 90 days from the date of DSB adoption of findings. To date, negotiated or arbitrated time periods have ranged between 3 to 15 months. WTO arbitrators have taken the position that a "reasonable period of time" should be the shortest period possible within a WTO member's legal system, but that the time period relating to administrative decision-making should be considerably shorter than the period for legislative implementation.

3.43 In the event of failure to implement within an agreed or arbitrated time period, a complaining party 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.

Compensation and Retaliation

3.44 In circumstances of disagreement about the consistency of implementing measures, the DSU provides for special, accelerated procedures of 90 days duration (unless otherwise agreed). The procedures involve examination by the original panel, wherever possible. To date, these procedures have been invoked on only two occasions - EC banana import quotas and salmon. Special accelerated Panel processes on salmon were finalised on 18 February 2000. The level of trade damage will now be arbitrated by the original panel.

3.45 To determine the extent of retaliation, the following procedure applies:

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22 DFAT, Correspondence to the Committee, 28 February 2000, Annex B

a) The complainant lodges a submission about proposing a methodology for the assessment of damage;

b) There is then an opportunity for the respondent to challenge that methodology, through submissions to the arbitrator and for counter submissions by the applicant;

c) A meeting then takes place between the parties and the panel, which can seek advice on, for example, the extent of potential market penetration and the damage.

The Jurisprudence of the SPS Agreement

3.46 In its submission, AQIS advised that a number of principles governing the introduction and maintenance of quarantine measures have been established since the Agreement came into force in 1995. These principles have been developed out of the three disputes which have been finalised since the Agreement's inception and include:

a) The sovereignty of a WTO member to determine its appropriate level of protection;

b) A zero level of risk is not excluded under the Agreement, provided there is consistency in application of the ALOP to comparable products;

c) There is no obligation on WTO members to adhere to an international standard, but when a relevant international standard is not followed, a measure must be based on sufficient scientific evidence and on a risk assessment conforming with SPS criteria;

d) A risk assessment must:

i) Identify the diseases or pests whose entry, establishment or spread the member wants to prevent, as well as the potential biological and economic consequences associated with entry, establishment or spread;

ii) Evaluate the probability of entry, establishment or spread, as well as the associated biological and economic consequences;

iii) Evaluate the probability of entry, establishment or spread, according to the measure which might be applied;

e) In respect of the object of 'consistency' in the application of the ALOP, consistency should be examined on the following basis:

i) Whether there are differences in measures between products having one or more diseases/pests in common;

ii) Whether any such distinctions in measures between products having one or more diseases/pests in common;

iii) Whether these distinctions result in discrimination or a disguised restriction on international trade;

f) Adoption of the least trade restrictive measure available that would achieve the appropriate level of protection, taking into account economic and technical feasibility, should be examined on the following basis:

i) Whether there is another measure reasonably available, taking into account economic and technical feasibility;

ii) Whether any such alternative measure would meet the appropriate level of protection; and

iii) Whether any such alternative measure is significantly less trade restrictive;

g) The right to take provisional measures in the absence of sufficient scientific evidence is conditional on a WTO member obtaining the additional information necessary to a more objective assessment and reviewing existing measures in that light.[23]

3.47 However, AQIS advises that guidelines on the application of the consistency rule have yet to be finalised.[24]

Australia and the WTO

3.48 Since the inception of the WTO in 1995, Australia has been involved in 19 disputes, four as a complainant, five as a respondent and 10 as a third party in disputes involving Australia's export interests. The DFAT submission set out the profile and outcome of cases to which Australia is a party or has been a party.

3.49 Australia has initiated four WTO complaints: Hungarian agricultural subsidies, Indian import restrictions, United States lamb safeguards, and Korean restrictions on imported beef. DFAT advised that the disputes with Hungary and India were settled with positive outcomes for Australian commercial export interests, while panel processes are under way on Korean beef restrictions and US lamb safeguards.

3.50 The complaints against Australia include:

a) Two complaints by Canada on salmon quarantine measures;

b) A US complaint on quarantine measures on salmon and trout;

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23 AQIS, Submission 17, pp 21-22

24 AQIS, Evidence, RRAT, 24 September 1999, p 55

c) A complaint by Switzerland about provisional anti-dumping measures on plastics; and

d) A US complaint about assistance to the automotive leather sector.

3.51 Australia is a third party in a wide range of disputes involving commercial or wider policy interests. Many of these disputes are pending, such as that on Canadian dairy assistance measures, which is at the appeal stage. Others are at the implementation stage (eg. restrictions on access to the US prawn market and European Community health measures relating to the use hormonal growth promotants in cattle production).

3.52 The majority of matters brought by complainants proceeding to judicial determination have been successful, although some panel findings have been modified on appeal. There have only been two unsuccessful legal challenges, both involving the United States as a complainant.

3.53 In all completed disputes to date, only one WTO member (the European Community) has not implemented legal findings. The EC is still to complete implementation in the beef hormones dispute and its implementing measures on bananas were found to be WTO inconsistent. In both cases, WTO authorisation was given to the complainant parties for the application of retaliatory measures.

The Challenge in the WTO on Salmon

3.54 Since 1975, Canada has been seeking access to the Australian market for uncooked salmon products. Despite the many technical exchanges between Australia and Canada on the matter, no mutually satisfactory outcome was reached. AQIS sets out the history of the dispute in Part C of its submission, as does DFAT in Part E of its submission. The chronology of events is set out in Appendix Four.

3.55 Canada complained that:

a) The measure was maintained without sufficient scientific evidence contrary to Article 2.2;

b) The measure arbitrarily or unjustifiably discriminated between Members where identical or similar conditions prevailed contrary to Article 2.3;

c) There were relevant international standards, guidelines or recommendations in existence;

d) The measure was not based on existing international standards, guidelines or recommendations contrary to Article 3.1 and did not meet the conditions set out in Article 3.3 for introducing measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations;

e) The measure was not based on a risk assessment contrary to Article 5.1;

f) The measure reflected arbitrary or unjustifiable distinctions in the levels of protection that Australia considered appropriate in different situations, and that such distinctions resulted in discrimination or a disguised restriction on international trade, contrary to Article 5.5; and

g) The measure was more trade restrictive than necessary, taking into account technical and economic feasibility, contrary to Article 5.6.[25]

The Major Issues Raised by Australia for Consideration by the Panel

3.56 The burden of proof under the SPS Agreement lies initially with the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the Agreement on the part of the defending party or of its SPS measure complained about. Once the *prima facie* case is made, it is then up to the defending party to refute the claimed inconsistency.[26]

3.57 In defence of its position, Australia raised a primary argument that, given the established practice before the GATT and WTO for the complaining party to present a *prima facie* case of inconsistency, it was for Canada, in the first instance, to provide sufficient evidence to raise a presumption that Australia's measure was inconsistent with the rights and obligations under the GATT 1994 and SPS Agreement, ie Canada bore the evidentiary burden of proof.[27]

3.58 The Panel report of June 1998 stated that it was for Canada to establish a *prima facie* case of inconsistency of the Australian measure at issue with each of the provisions of the SPS Agreement invoked by Canada and it was then up to Australia to refute the claims. The Panel cited a previous Appellate Body report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, when it stated:

> In other words, if Canada 'adduces evidence sufficient to raise a resumption that what is claimed is true, the burden then shifts to [Australia], who will fail unless it adduces sufficient evidence to rebut the presumption'.[28]

The Panel's Findings

3.59 The Panel ultimately found that Australia had acted inconsistently with Articles 5.1, the requirement that SPS measures be based on a risk assessment; 5.5, the consistency provision, and 5.6, the requirement that measures not be more trade

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25 First Submission by Australia, *Measures Affecting the Importation of Salmon*, 21 August 1997, p 20

26 WTO, Report of the Panel, June 1998, p 147

27 First Submission by Australia, *Measures Affecting the Importation of Salmon*, 21 August 1997, pp 18-19

28 WTO, Report of the Panel, June 1998, p 147

restrictive than required to achieve the ALOP; and by implication, Articles 2.2, measures to be applied only to the extent necessary to protect human, animal and plant life or health, and 2.3, no arbitrary or unjustifiable discrimination between Members, of the SPS Agreement. The Panel report stated:

> (i) Australia, by maintaining a sanitary measure which is not based on a risk assessment, has acted (both in so far as the measure applies to salmon products at issue from adult, wild ocean-caught Pacific salmon and the other categories of salmon products in dispute), inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground has also acted inconsistently with requirements of Article 2.2 of the SPS Agreement;
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> (ii) Australia, 'by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations (on the one hand, the salmon products at issue from adult, wild ocean-caught Pacific salmon, and, on the other hand, whole, frozen herring for use as bait and live ornamental finfish), which result indiscrimination or a disguised restriction on international trade, has acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground, has also acted inconsistently with the requirements contained in Article 2.3 of that Agreement;
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> (iii) Australia, by maintaining a sanitary measure (with respect to those salmon products at issue from adult, wild ocean-caught Pacific salmon) which is more trade-restrictive than required to achieve its appropriate level of sanitary protection, has acted inconsistently with the requirements contained in Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures.[29]

3.60 The Panel concluded that:

> a) The measures applying to salmon other than adult fresh chilled or frozen wild ocean caught Pacific Salmon were not based on a risk assessment as defined in Article 5 of the SPS Agreement;
>
> b) There were arbitrary and unjustifiable distinctions in the levels of sanitary protection between adult fresh chilled or frozen wild ocean caught Pacific salmon and whole frozen herring for use as bait and live ornamental finfish. This resulted in a disguised restriction on international trade;
>
> c) The measures applying to the Pacific Salmon product were more trade restrictive than required to achieve Australia's appropriate level of sanitary protection, because heat-treated salmon was allowed access although no

29 WTO, Report of the Panel, 12 June 1998, p 206

scientific data was supplied to support the quarantine temperature specifications.[30]

3.61 In summary, the Panel concluded that Australia had acted inconsistently with the SPS Agreement and had nullified or impaired the benefits accruing to Canada under that Agreement. The Panel recommended that the DSB request Australia to bring its relevant sanitary measures in dispute into conformity with its obligations under the SPS Agreement.[31] The Panel made no finding on Canada's claim that Australia had breached Article XI of the GATT or Article 3 of the SPS Agreement, the harmonisation provision.

The Appeals to the Appellate Body

3.62 Following the Panel Report, both Canada and Australia filed submissions with the WTO Appellate Body. The appeals panel reversed the decisions which referred to the heat treatment (thus absolving Australia of being inconsistent with Article 5.6 of the SPS), along with the complaint that Australia had breached Article 2.3, but upheld the bulk of the earlier findings.[32] The Appellate Body made the following findings against Australia:

a) The 1996 Final Report was not a risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A of the SPS Agreement, and Australia, had acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the SPS Agreement;

b) By maintaining the measure at issue as it applied to ocean-caught salmon, Australia acted inconsistently with its obligations under Article 5.5 and, by implication, Article 2.3 of the SPS Agreement;

c) The Panel erred in its application of the principle of judicial economy by limiting its findings under Articles 5.5 and 5.6 to ocean-caught Pacific salmon, and in considering that it was unnecessary to address Articles 5.5 and 5.6 of the SPS Agreement with respect to other Canadian salmon;

d) By maintaining the SPS measure at issue with regard to other Canadian salmon, Australia acted inconsistently with Article 5.5 of the SPS Agreement.[33]

3.63 In November 1998, the WTO Dispute Settlement Body adopted the Panel Report as modified by the Appellate Body's report.

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30 AQIS, Submission 17, pp 71-72; Department of Foreign Affairs and Trade, Submission 21, p 13

31 AQIS, Submission 17, p 72

32 AQIS, Submission 17, pp 72-74; Department of Foreign Affairs and Trade, Submission 21, p 14;

33 AQIS, Submission 17, pp 72-74

The Implementation Period

3.64 At that point a dispute arose between Canada and Australia over the time allowed to Australia to respond to the WTO findings. On 25 November 1998, Australia informed the DSB, pursuant to Article 21.3 of the DSU, that it would implement the findings, but also indicated that it would require a reasonable period of time to complete the implementation process.

3.65 Australia sought Canada's agreement to 15 months as a 'reasonable period of time' for implementation. AQIS argued that it would legitimately take 15 months to revise the IRA, to allow for research, scientific peer review and public and industry consultation. Canada refused the request, arguing that further risk assessment was unnecessary and that Australia should comply within weeks by allowing fresh imports that had been eviscerated. Canada requested binding arbitration, and in February, the WTO Arbitrator ruled that Australia should implement the WTO decision by 6 July 1999, ie eight months from 6 November 1998.[34] This was the decision that necessitated the accelerated IRA process.

3.66 Australia missed the arbitrated implementation date of 6 July for salmon by approximately 14 days. Canada sought WTO authorisation to retaliate up to a level of CAN$45 million, with Australia requesting arbitration on this figure. The arbitration processes are suspended pending the outcome of other legal processes, as is the US complaint on salmonids.[35]

The 1999 Panel Process

3.67 Following the outcome of the initial Panel and Appellate Body reports, AQIS amended its measures to bring Australia into conformity with its obligations under the SPS Agreement. After the announcement of the revised measures on 19 July 1999, (see Chapter One and Appendix Five) Canada initiated new proceedings, arguing that both the consistency and existence of the Australian measures were in doubt. Canada claimed that:

> a) Australia failed to take the measures necessary to comply with the recommendations and rulings of the DSB in the original dispute;
>
> b) Even if Australia has implemented some measures purporting to comply with the recommendations and rulings of the DSB, those new measures were inconsistent with several provisions of the SPS Agreement. More specifically, Canada claimed 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

34 AQIS, Submission 17, pp 74-75; Department of Foreign Affairs and Trade, Submission 21, pp 14-16

35 Australia was found to have acted inconsistently with its subsidy obligations to the United States in regard to assistance to the automotive leather sector and has implemented those findings. The Swiss complaint was withdrawn at the consultation stage.

and are also inconsistent with Articles 5.6, 8 and Annex C, paragraph 1(c), of that Agreement.[36]

3.68 Australia defended the claim, arguing that the measures announced on 19 July 1999, brought it into full compliance with the recommendations and rulings of the DSB. Australia argued:

a) In product scope the measures went 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);

b) 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);

c) 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;

d) 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.[37]

3.69 Australia argued that it had implemented the appropriate measures, citing the issue of a certificate for the import of Canadian salmon and the granting of an import permit as irrefutable evidence that Australia had removed the import prohibition on fresh chilled or frozen salmon from Canada and that the measures as described were being applied to fresh chilled or frozen salmon from Canada.[38]

3.70 On 28 October 1999, following the announcement by the Tasmanian Government that it would ban imports of salmon into that state, the WTO

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36 Australia - Measures affecting importation of salmon - recourse to Article 21.5 by Canada, Report of the Panel, 18 February 2000, p 12

37 Australia - Measures affecting importation of salmon - recourse to Article 21.5 by Canada, Report of the Panel, 18 February 2000, p 13

38 ibid

acknowledged the Canadian Government's request to lodge a supplementary submission concerning the Tasmanian action. AQIS advised that:

a) Canada had opposed the new policies on the grounds that the conditions for salmon were unnecessarily restrictive and went beyond what was justified with regard to quarantine risk;

b) Canada had also asserted that there was a continuing inconsistency between policies on salmonid and non-salmonid product.[39]

The Report of the Panel - February 2000

3.71 The WTO Panel released its report on the consistency of Australia's measures on 18 February 2000. The Panel found for Australia in the following matters:

a) The AQIS IRA met the requirements of a risk assessment under the WTO;

b) While there were delays in introducing the measures for bait fish and ornamental fish, which meant that Australia remained inconsistent for short periods of time, Australia did not act inconsistently in respect of different requirements between salmon and other fish - Australia was found not to be acting in an arbitrary, discriminatory way in relation to salmon and other fish and not to be applying a disguised restriction to trade;

c) The different requirements between salmon and domestic fish that are applied did not discriminate between Australian and Canadian fish and it found that the inspection and approval information requirements that AQIS introduced were not beyond what was necessary to reach Australia's appropriate level of protection.

3.72 The Panel found against Australia on the following measures:

a) The consumer ready requirements were not supported by the risk assessment and were more trade restrictive than necessary to meet Australia's ALOP;

b) The Tasmanian measures were found to be inconsistent with the WTO agreement and not supported by the AQIS IRA.

3.73 The major implications of the 18 February decision were that:

a) The Government and AQIS, in particular, in accordance with its decision of 19 July last year, was required to consider alternative, less trade restrictive options in relation to the measures that were found not to be consistent;

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39 AQIS, Supplementary Submission 59, p 10

b) Canada had retaliation rights with regard to the impact of the consumer ready requirements on its trading prospects, however, the amount of retaliation is limited to that determined by a WTO arbitrator;

c) There was the possibility of reactivation of the United States challenge and claims to retaliation rights and/or compensation.

3.74 On 21 March 2000, Minister Vaile announced that Australia would not be appealing the decision of the WTO, given the high appeal risks. The Minister stated that an appeal, for which only limited grounds were available, would invite a cross-appeal, which would, which 'could have re-opened the many positive findings in Australia's favour, including the 10 approved measures'.[40]

3.75 On 17 May 2000, Minister Vaile released the text of a Bilateral Statement on the outcome of discussions with Canada on the salmon issue. The new arrangements replaced the consumer ready requirement with the following requirements:

a) Imported salmon product must be in at least head-off, gilled and gutted form.

b) Holders of import permits would be required to provide a declaration in relation to each imported consignment of salmon product that such product will only be sold for *commercial processing* at AQIS approved premises, for *processing for retail sale* or for *direct retail sale*. Alternatively holders of permits could enter into compliance agreements with AQIS that provide for importation under the same conditions.

c) The existing condition that commercial processors must have a compliance agreement with AQIS would remain in place. A compliance agreement would also be required for premises processing imported product for retail sale where such processing would lead to the generation of volumes of waste comparable with that produced in commercial processing (ie the processing of more than 300kg of imported salmon product daily in a single location). [41]

3.76 The full text of the Bilateral Statement is at Appendix Three.

The Tasmanian Government's Ban on Imported Salmon Products

3.77 In response to the AQIS July 1999 decision to relax import controls on salmon, the Tasmanian Government declared a protected area on 19 October 1999, under Section 42 of the *Tasmanian Animal Health Act* 1995.[42] The measures

40 Minister for Trade, Media Release, 21 March 2000

41 *Trade News,* 17 May 2000

42 24 (1) If the Chief Veterinary Officer considers that there is an immediate risk of a disease being introduced into or further spread in Tasmania, the Chief Veterinary Officer may make an emergency restriction notice that –

prohibited the entry into mainland Tasmania of fish that were not sourced from an area certified as free from bacterial kidney disease, furunculosis, infectious salmon anaemia, infectious haematopoietic necrosis virus, infectious pancreatic necrosis virus and whirling disease. The declaration means that Tasmania permits the importation of fish product sourced from an area that is free of all the specified diseases or of canned fish.

3.78 The ban was for a period of 60 days, with a once only option to renew for another period of not more than 60 days. When, the Tasmanian IRA was released on 23 February 2000, the ban remained in place. The issue is now one of some political sensitivity between the federal and state governments.

Memorandum of Understanding on Animal and Plant Quarantine Measures

3.79 On 21 December 1995 the Commonwealth, State and Territory Governments signed a Memorandum of Understanding [MOU] on Animal and Plant Quarantine Measures. The Memorandum was deemed to have come into effect on 1 January 1995, when Australia assumed its obligations as a member of the WTO. The preamble to the Memorandum notes that the States and Territories have legal competence for establishing and maintaining quarantine measures to the extent that they are consistent with Commonwealth legislation. The Memorandum specifically states that it does not create binding legal obligations on the parties.[43]

3.80 The Memorandum recognises the responsibility of States and Territories to implement quarantine measures, but requires them to ensure that any measures which may directly or indirectly affect trade into Australia comply with the provisions of the SPS Agreement. Clauses 9 and 11 of the Memorandum state:

> 9 States and Territories shall consult fully with the Commonwealth before implementing any relevant sanitary or phytosanitary measures which could inhibit trade into Australian and which may not conform with the provisions of the SPS Agreement.
>
> 11 States and Territories shall not apply any relevant sanitary or phytosanitary measures within their jurisdictions which would not conform with the provisions of the SPS Agreement.

3.81 If a State or Territory implements quarantine measures which are found (under the WTO's provisions for the settlement of disputes) to contradict the SPS Agreement, the State or Territory is required to take appropriate corrective action as a matter of urgency [clause 12]. Under clause 13, all parties to the Memorandum

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a) specifies that a class of animal material must not be imported; or
b) specifies that a class of animal material may only be imported in accordance with the conditions specified in the emergency restriction notice.

43 Memorandum of Understanding (1995), p 3. Cited in AQIS, Submission 17, Attachment C

agreed to make all relevant information available to the other parties to facilitate implementation of the Memorandum and to consult with other parties as appropriate.

3.82 In its submission to the Committee, the Tasmanian Government argued that the Commonwealth Government had not honoured the agreement with the States and Territories in relation to the SPS Agreement and the ALOP. Part of the MOU, it claimed, was an agreement that the States and Territories would be factored into quarantine considerations:

> Part of that memorandum of understanding was an agreement that the states and territories would be factored into environmental considerations. The offset of that was that we would cede those powers, once agreed, to the Commonwealth to take forward internationally. We have not been properly considered in the process and therefore we believe that the Commonwealth has breached that understanding in that respect.[44]

3.83 The Tasmanian Government further argued that it was implicit in the Memorandum, that the Commonwealth would not do anything to damage the interests of those parties.[45]

The Tasmanian Ban on Salmon Imports and its IRA

3.84 Following the release of the IRA and amendments to quarantine arrangements for the import of salmon, the Tasmanian Government was critical of the revised IRA, arguing that it did not satisfy the SPS Agreement, because it did not 'attribute due weight to some important means of introduction, establishment and spread of the disease … they do not reflect the full extent of the risk, especially to this State'. In a letter to the Prime Minister, dated 2 August 1999, the Premier of Tasmania announced the Government's intention to prohibit the importation of all raw fish which posed an unacceptable disease risk to Tasmania and to develop its own risk assessment of imported salmon consistent with WTO guidelines.'[46]

3.85 Division 1 of Part 4 of the *Tasmanian Animal Health Act* 1995 provides powers to prevent the importation of animals, restricted materials and infected animal materials into Tasmania or to determine conditions under which importations of those things may occur. The powers are vested in the Chief Veterinary Officer [CVO], who is able to make decisions on import access requests and the determination of measures to reduce the quarantine risk to a level acceptable to Tasmania.[47]

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44 The Hon. David Llewellyn, Minister for Primary Industries, Water and Environment, Tasmanian Government, Evidence, RRAT, 5 October 1999, p 222

45 Tasmanian Government, Submission 42, p 4

46 ibid, p 2

47 Tasmanian Government Import Risk Analysis for the Importation of Non-viable Salmonids and Non-salmonids Marine Finfish, February 2000, p 1

3.86 The Tasmanian Government amended its *Animal Health Act* in December 1999. The justification for the amendment and the intent of the legislation were stated to be:

> The potential exists for a State's quarantine controls to be held contrary to section 92 of the Australian Constitution. That section requires trade between the States to be absolutely free. The provisions of this bill are intended to provide a robust mechanism to provide protection against the introduction of serious animal disease into Tasmania in infected products should our interstate quarantine measures be held to be in breach of section 92 of the Australian Constitution. These same provisions also reinforce existing powers in the act to deal with incursions of serious animal diseases.
>
> The bill creates an offence to possess specified things unless the person possessing those things can establish that they are not infected. This provision is intended to provide protection against the introduction of disease either in conjunction with the existing quarantine powers of the act or alone in the event of interstate quarantine measures being struck down. [48]

3.87 The provisions of the amendment relate to those animals and animal products and the associated relevant animal diseases which have been listed for this purpose and published in the Tasmanian Government Gazette. A person in possession of a listed animal or animal product will need to be able to demonstrate that the product has been derived from animals from an area known to be free of the diseases of concern or that it has been treated in an appropriate manner so that it is no longer considered to be infected.[49]

3.88 Part of the Tasmanian justification for its actions, apart from the potential for harm to its aquaculture, trout fishing and tourism industries in a state with limited employment opportunities, relates to state sovereignty and the misgivings about AQIS' ability to develop a set of quarantine measures which will be applicable to every part of Australia:

> Tasmania is concerned that the Commonwealth unilaterally determines a level of quarantine protection 'appropriate for Australia' without regard to the sovereignty of States and Territories in such matters. Also, in a country as large and diverse as Australia, the suitability of a 'one size fits all' set of quarantine measure is highly questionable given that the Sanitary and Phytosanitary (SPS) Agreement requires that countries adopt least trade restrictive measures. The need for different quarantine measures in different parts of Australia is quite apparent when considering precautions necessary to prevent establishment of salmonid diseases in Australia.[50]

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48 Tasmanian House of Assembly Hansard, 23 November 1999

49 Second Reading Speech, Hon David Llewellyn, 23 November 1999

50 Hon David Llewellyn, Correspondence dated 11 January 2000, p 2

The Tasmanian IRA

3.89 The Tasmanian Government's Import Risk Analysis report was released on 23 February 2000. The IRA was undertaken 'to address the particular circumstances and quarantine requirements of Tasmania taking account of the potentially serious consequences of diseases of salmonids to Tasmania'.[51] The scope of the IRA was described as follows:

> This IRA considers the quarantine risks potentially associated with the importation into Tasmania of non-viable salmonids and non-salmonid marine finfish from any source. Tasmania will evaluate the risks associated with individual diseases/disease agents and identify measures consistent with Tasmania's Appropriate Level of Protection [ALOP] in respect of the risks presented by the importation of non-viable salmonids and non-salmonid marine finfish. In the case of this IRA, eviscerated [ie head on, gills in] salmonids and non-salmonid marine finfish are the base commodity under consideration.[52]

3.90 The Tasmanian IRA provides the basis for Tasmania's quarantine policy and practice in respect of non-viable salmonids and non-salmonid marine finfish.

Ministerial Media Release of 21 March 2000

3.91 The Hon Mark Vaile, Minister for Trade, released a press statement on 21 March. The statement advised of consultations with the Tasmania Government, that:

> a) The Tasmanian Government had been made fully aware of the risks involved in any appeal; and
>
> b) That an appeal could only be on points of law and could not be used to introduce new evidence, such as the draft risk assessment as released by the Tasmanian Government on 23 February.

3.92 A request from the Minister for Agriculture, Fisheries and Forestry, the Hon Warren Truss, is to be forwarded to his Tasmanian counterpart under the terms of the MOU with State Governments, to request that Tasmania align its quarantine measures with the national standards.

3.93 Should Tasmania not comply, and there is a recognised obligation on the Commonwealth to bring Australia's measures into conformity, the Committee was advised that the following action would be the likely outcome:

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51 Tasmanian Government Import Risk Analysis for the Importation of Non-viable Salmonids and Non-salmonids Marine Finfish, February 2000, p 1

52 Tasmanian Government Import Risk Analysis for the Importation of Non-viable Salmonids and Non-salmonids Marine Finfish, February 2000, p 1

> If there was some need to change legislation to ensure that Australia's domestic legislation complied with the requirements of a treaty, the legislation could be enacted at Commonwealth level and under the Constitution any inconsistent state legislation would be of no effect.[53]

3.94 The Tasmanian Minister for Primary Industries, the Hon David Llewellyn, argued in response that the SPS Agreement provides specifically for countries to recognise and take account of different circumstances in parts of both an exporting and importing country when considering measures necessary to prevent spread of disease, 'that in a country as large and diverse as Australia different quarantine measures should apply to different areas and that this is provided for in the SPS Agreement'.

3.95 On 17 May 2000, Minister Vaile, in his announcement on the final outcome of the discussions with Canada, advised that one of the terms of the settlement on the salmon issue was that the Commonwealth would continue to seek observance on the part of Tasmania and discussions would continue to that end.

Regionalisation Principle

3.96 The SPS Agreement allows members to accommodate the regionalisation principle, where absence of or low prevalence of pests or diseases in parts of a country can be taken into account in the specification of measures**.** In response to a request from the Committee in relation to Minister Llewellyn's statement, AQIS advised:

> In a broad sense Minister Llewellyn's statement is correct. It is the fact that there are differences in the pest/disease status of different parts of Australia. These differences are preserved in part by natural barriers against the spread of pests and diseases (eg climatic differences or the presence or absence of host species), in part by industry practices and in part by regulatory interventions by government (eg restrictions under State legislation on interstate or inter-regional movement of plants, animals or their products).[54]

3.97 At public hearing, AQIS advised the following in response to Senator Calvert's comments:

> **Senator CALVERT**—But the problem I have is this: we have the right to stop meat coming in from an area that has foot and mouth disease but we do not have the right to stop fish coming in from an area that has disease.
>
> **Mr Hickey**—That is correct. It is because the starting point under the rules is the international codes and standards. The question you are raising, which is a valid one, is whether there is actually consistency amongst the standards themselves across a whole range of products. That is an entirely separate and very complex set of questions that we grapple with. Our response to that

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53 Mr Mark Zanker, Attorney General's Department, Evidence, RRAT, 18 February 2000, p 390

54 AQIS, Correspondence to Committee, 10 April 2000

> has to be to be involved in international processes, like the ones that Ms Findlay has been involved in, which ultimately feed into international standard determination processes. We have to seek to influence those processes in ways that best meet our requirements, but we are not starting from a perfect position. We concede that.[55]

3.98 However, AQIS went on to say:

> The …SPS Agreement says that WTO Members 'shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined'.
>
> AQIS recognises regional differences within Australia in its approach to quarantine risk management. In the case of importation of table grapes from California, for example, AQIS has chosen measures which, *inter alia*, would preclude import into Western Australia because that state, unlike the rest of Australia, is free from downy mildew. Because of Western Australia's isolation it is feasible to reliably prevent entry of Californian table grapes into that state even if the same product is permitted to be marketed freely in the other State and Territories.[56]

3.99 AQIS argued that, in the case of salmon, it is not practicable to introduce and maintain controls which would prevent imported product from coming into proximity of vulnerable fish populations in Australia, while allowing the same product to be freely sold and consumed elsewhere in the country and that import conditions specified are 'fully adequate to protect the most vulnerable domestic populations' against pest and disease risks. AQIS argues that, 'if it were practical to segregate these latter areas in terms of the trade in imported salmonids, AQIS would apply to the vulnerable areas the same restrictions as it has already specified and apply much less stringent conditions to product imported for use in other areas'[57].

3.100 AQIS concluded that the Tasmanian position is unjustified:

> Tasmania cannot justify the imposition of its own more restrictive quarantine measures on the basis of regionalisation, because the conditions specified by AQIS for entry of salmonid product into Australia provide the required high level of quarantine safeguard of salmonid populations (including those in Tasmania) necessary to meet Australia's appropriate level of protection.[58]

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55 Evidence, RRAT, 18 February 2000, p 386-7

56 ibid

57 ibid

58 ibid

Disease Free Area Status

3.101 Article 6 of the SPS Agreement[59] requires member countries, when formulating and applying sanitary and phytosanitary measures, to recognise disease free or pest free areas. In the past, importing countries often required exporting countries to be wholly free of disease before allowing trade. However, under the SPS Agreement, the importing country is required to allow trade if the product is from a disease free area within the country. These areas may not correspond to political boundaries. For example, animal diseases such as foot-and-mouth disease may be limited only to a geographical area within a country.

3.102 The SPS Agreement places the burden of demonstrating that a given area within an exporting country is free from disease upon the exporting country. The exporting country is also required to allow experts from importing countries to inspect the area concerned and the controls in place.

The Application of Disease Free Areas by AQIS

3.103 Quarantine measures are determined in part by the IRA process. According to the results of this process, AQIS has the legislative authority to prohibit or permit imports into Australia with or without conditions.[60] The IRA on the importation of dairy products provides an example of implementation of the requirements of Article 6 of the SPS agreement by AQIS. As stated in the report:

> Australia, as a Member of the WTO, agrees under Article 6 of the AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES to ensure that sanitary or phytosanitary measures are adapted to the area from which the product originated and to which the product is destined. In particular, Australia has committed to accept the concept of pest- or disease-free areas and manage quarantine risk accordingly.

3.104 The IRA on dairy products subsequently implements stringent requirements for the importation of dairy products (other than cheese and butter) of bovine origin from approved countries.

3.105 However, there are also instances where AQIS has not fully implemented the requirements of article 6 of the SPS agreement. In the draft IRA for the importation of bulk maize from the USA for the use as animal feed, AQIS state:

> If maize is to be sourced using the principle of "Area Freedom", this will require detection, monitoring and delimiting surveys for quarantine pests to be carried out annually, as well as the dedication and monitoring of rail cars. This is not normal practice in the USA.

3.106 The report went on to state:

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59 Appendix 6

60 See sections 4 and 13 (1) of the *Quarantine Act 1908*

> Maize sourced from areas free of quarantine pests would be acceptable to AQIS, if appropriate phytosanitary measures are taken to prevent contamination during transport. Similarly, a sufficiently low incidence of a pest in areas from which the bulk maize is sourced could reduce the phytosanitary risk to a level acceptable to AQIS.
>
> No maize producing State of the USA was free of all quarantine pests identified in this analysis. In addition to this, there are considerable practical difficulties in preserving the identity of maize sourced from such areas. Given the scope of the proposal, that maize is sourced from the USA as a whole, and difficulties with area preservation, localised area freedom or low incidence for all quarantine pests has not been addressed in detail in this IRA.

3.107 The view of the maize risk assessment panel was that area freedom is unlikely to be achievable for imports of bulk maize from the USA. However, area freedom remains an option if it can be shown that a region in the USA can demonstrate and maintain area freedom and the integrity of the grain can be satisfactorily maintained in transporting the grain from this area to Australia

3.108 In supplementary advice to the Committee, AQIS argued that the IRAs for dairy products and maize demonstrate the difficulty of comparing quarantine restrictions placed on the import of different products into Australia. Rather, AQIS argued that the more valid comparison is between the extent to which different import restrictions for different products achieve the same ALOP for Australia. Once again however, this raises concern how Australia's ALOP is defined, and whether it varies for different products.

The Conduct of the Litigation

3.109 As the department with primary responsibility for trade, DFAT takes a lead role in WTO disputes. However, other agencies are also involved. There is an Office of International Law, situated within the Attorney-General's Department. There is within AFFA an International Branch, with responsibility for 'providing overall leadership and direction in portfolio policy responses to international trade and investment related issues'.[61] The Office of the Australian Government Solicitor as part of its statutory functions, has responsibility for international law, including litigation.

WTO Disputes Investigation and Enforcement Mechanism

3.110 The Minister for Trade announced late last year a new mechanism, the WTO Disputes Investigation and Enforcement Mechanism, to provide exporters with a formal means to request the Government to exercise Australia's WTO rights on their behalf. The mechanism has been set up to work with an exporter to:

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61 AFFA Website

a) Document the nature of the problem;

b) Identify any WTO legal basis for pursuing the access concerns; and

c) To develop a possible road map for maximising identifiable WTO leverage.[62]

3.111 DFAT advised that as the rules governing international trade have developed and as the practical operation of the WTO agreements has become clearer, 'so too has the need to ensure that Australia's, and Australian exporters', interests are protected and advanced'.[63]

3.112 The new mechanism 'seeks to facilitate equity of access for all Australian exporters to Government support and assistance in circumstances where other WTO Member governments may not be honouring their obligations under the WTO Agreements' and exercises Australia's WTO rights for the benefit of exporters, and, DFAT states, Australia as a whole.[64]

Responsibility for International Litigation

3.113 However, there is also the question of the appropriate **defence** of Australia's interests at the WTO. International litigation is a tied matter and able to be undertaken by the Office of International Law within the Attorney-General's Department, the Australian Government Solicitor or the Department of Foreign Affairs and Trade. The Attorney-General has issued ministerial directions on tied areas of Commonwealth work. Those directions state:

> Public international law work of the following kinds is tied to the Attorney-General's Department, AGS and also, in relation to sub-paragraphs (a) to (d), the Department of Foreign Affairs and Trade:
>
> (a) *International litigation and arbitration (ie Government to Government)*
> This work covers proceedings before the International Court of Justice, a World Trade Organisation Dispute panel or appellate body, an arbitral tribunal or some other form of internationally constituted tribunal.
>
> (b) *Advice involving Australia's or another country's obligations under international law*
> This work covers requests concerning Australia's or another country's obligations under international law generally or under a particular treaty to which Australia or the country is a party. It also, more indirectly, covers requests for advice under legislation which

62 Minister for Trade Press Release, 16 September 1999

63 DFAT, Correspondence to Committee, 28 February 2000

64 ibid

implements a treaty where the obligations under that treaty are an issue. For example, a request for advice whether certain conduct by the Commonwealth is permitted by legislation which implements a treaty might give rise to a question whether Australia had met its international law obligations under that treaty. However, it does not cover advice on procedural aspects of an exercise of power under the legislation where those procedural aspects are unrelated to a question of Australia's international law obligations.

(c) *Advice on treaty negotiation*
This work covers legal advice preparatory to, or in the course of, treaty negotiations.

(d) *Advice on implementing a treaty (including bilateral agreements)*
This work includes advice on changes to legislation and practice necessary to become a party to a treaty.

(e) *Domestic litigation involving a significant public international law issue*
This work covers litigation where a court will or may decide whether Australia or another country has acted in conformity with its international law obligations (including as an incidental or indirect aspect of the case). Litigation involving legislation which implements a treaty will not be tied if it merely involves interpretation of that legislation or of the treaty for the purposes of applying that legislation or of the treaty for the purposes of applying that legislation and it does not raise the question whether Australia has complied with its international obligations.[65]

3.114 However, the directions are silent on who should take the lead in the different areas of Commonwealth work, and merely state that for the above matters, they are areas of tied responsibility. The parameters of the respective roles of the different organisations are not clearly defined. The Committee considers that the respective roles need to be clearly defined.

The Role of the Department of Foreign Affairs and Trade

3.115 DFAT explained their role in the WTO dispute resolution proceedings as follows:

> We take the lead in the Panel processes in Geneva. It depends a little bit on case by case…Also we would draw on the expertise of the mission there in Geneva and certainly Ambassador Raby participated in several of the panel hearings on the salmon case. Also there is clearly legal and trade policy expertise both in Canberra and in Geneva and we draw on that as needs be.[66]

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65 Attorney-General's Department, Correspondence to Committee, 24 February 2000

66 DFAT, Evidence, RRAT, 11 November 1999, p 306

3.116 It was clear from the evidence that DFAT's lead role status is to some extent an historical accident, and is a result of the close relationship the Department of Trade (and later DFAT) had with GATT negotiations.

3.117 DFAT did draw on expertise in AQIS about the SPS Agreement and the legal aspects of that agreement, and to a limited extent on advice from the Office of International Law within the Attorney-General's Department, an officer from that Office being seconded to DFAT to assist in the preparation for the Panel hearing. However, strictly legal questions are handled within DFAT.[67] In the view of the Committee, this arrangement creates a weakness in Australia's capacity to have the best independent legal advice.

3.118 DFAT, at the hearing on 11 November 1999, affirmed the 'whole of government approach' to defending cases in the WTO:

> We do approach all these dispute processes very much from a task force, whole of government approach to them. We did put together on salmon a team that included, besides the Trade Negotiations and Organisations Division, ourselves in DFAT and people from other areas of the legal area of the department. Clearly, we worked very closely with AQIS colleagues, who were also key parts of the delegations that went to Geneva. We also in this case, as part of the task force, got additional legal support and assistance from the Attorney-General's Department. An officer was seconded across to my branch for a period particularly to deal with the appeal process of the salmon case.[68]

> …in the WTO, the dispute settlement understanding has been developed over many years. The current version of it came out of the Uruguay Round negotiations but there have been these sorts of processes going under the GATT that preceded it. We have been involved in quite a number of cases over the years, with a degree of success, in relation to the EU sugar policy, US sugar policy, and Japanese import restrictions. It is an ongoing process and it does involve quite a deal of our own resources. I mentioned that we have in my division a degree of in-house experience, not only in trade policy. We have 10 officers in my division who have legal qualifications. We have two officers in our WTO mission in Geneva who have legal qualifications. We have within the department a legal office whose services we can call upon. Mr Rowe is the head of that office. … We do try to bring to bear a very broad range of legal experience and particular expertise in preparing to prosecute or defend cases.[69]

3.119 The Committee notes the establishment last year of the Disputes Investigation and Enforcement Unit. The unit is a trade facilitation mechanism and appropriately the province of DFAT. It has been established to assist Australians wishing to obtain

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67 DFAT, Evidence, RRAT, 11 November 1999, p 307

68 DFAT, Evidence, RRAT, 11 November 1999, p 306

69 DFAT, Evidence, RRAT, 18 February 2000, p 403

access for their products to international markets and who may be prevented from accessing those markets as a result of unjustified trade barriers.

3.120 DFAT has further advised that, following the salmon case in the WTO, the legal branch has been expanded.[70] In a letter to the Committee, DFAT advised that an additional two lawyers had been added to the Disputes Investigation and Enforcement Unit, as well as additional legal staff within other areas of the Division.[71] However, the advice did not specify whether the additional staff were litigation specialists, or in what areas their skills lay.

3.121 The Committee's concern in relation to the role of DFAT in the defence of quarantine restrictions which have the effect of a restraint on trade was discussed at public hearing:

> **Senator O'BRIEN**—The case that you are presenting is a mixture of your trade responsibilities and AFFA's responsibilities for quarantine; so AQIS were involved. To what extent do trade considerations influence the way that you would present Australia's case? I suppose that is a very broad question. I am trying to think how I could ask for the information I want. I suppose – and tell me if I am wrong – that the department has to have an eye on our overall trade interests in pursuing matters such as this before a WTO panel.
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> **Mr Hussin**—Yes, that is right. We have a broad trade policy interest in these issues. Australia is an exporter as well as an importer. So, yes, we try to bring a broad view to these sorts of issues.[72]

3.122 However, Mr Hussin went on to state that DFAT was 'not in the business of trading off one set of interests for another' and that DFAT was very conscious that Australia's trade credentials in a lot of areas depend upon having high quarantine standards.[73]

The Role of the Attorney-General's Department

3.123 The Office of International Law is located within the Attorney-General's Department and provides specialist advice on international law, including international trade law and human rights and treaties. The Office also assists with developing and implementing projects in the international law field and in international and domestic litigation involving international law. One of the two branches within the Office is the International Trade and Environment Law Branch, responsible for areas of international trade law-related policy, including international

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70 DFAT, Correspondence to Committee, 28 February 2000

71 ibid

72 DFAT, Evidence, RRAT, 18 February 2000, p 397

73 Mr Mark Zanker, Attorney General's Department, Evidence, RRAT, 18 February 2000, p 397

commercial arbitration.[74] The Office has expertise in the conduct of international litigation. The Office recently pursued a successful application by Australia for provisional measures before the International Tribunal for the Law of the Sea in the Southern Bluefin Tuna case.

Australian Government Solicitor

3.124 The Office of the Australian Government Solicitor [AGS] provides legal services to Australian government departments and agencies. The four major areas of practice within the AGS are Administration and Government, which includes International Law, Litigation and Dispute Resolution, Commercial Law and Revenue and Regulation.

3.125 AGS advises the following:

> The Australian Government Solicitor (AGS) provides legal and related services in support of the full range of activities of Commonwealth departments and agencies nationally. These services include the conduct of litigation and the provision of legal advice and business and commercial assistance to clients.[75]

3.126 On 11 March 1998, the AGS became a statutory authority, with the passing of the Judiciary Amendment Bill 1998. While much Commonwealth legal work was no longer tied, public international law work was one of the areas which remains tied to the Commonwealth.

3.127 The AGS lists International Law as one of its specialist legal services. However, the material provided publically by the AGS, especially that on its website under 'International Consulting', provides little advice on the specific expertise of the office in terms of international law and litigation in which it has been involved.

Co-ordination between DFAT and the Specialist Legal Agencies

3.128 The Department of Foreign Affairs and Trade [DFAT] has generally not sought to involve the Attorney-General's Department or the AGS in WTO cases and the Attorney-General's department was not afforded a significant role in the salmon case.[76] The representative from the Office of International Law advised, in response to a question on respective international law responsibilities, that the involvement of the Office of International Law was client driven - it was limited to the extent that the Office responded to client requests - if no request was received, then no work would be undertaken on the matter:

> The matters of international litigation and arbitration, advice on international law treaty negotiation and advice on implementing treaties are

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74 Attorney General's Department Website

75 Attorney General's Department, Annual Report 1998-99, p 9

76 Robert Cornall, Attorney-General's Department, Correspondence to Committee, 29 January 2000

the shared responsibility of the Attorney-General's Department, the Australian Government Solicitor and the Department of Foreign Affairs and Trade. In terms of the involvement of the Office of International Law in these matters, that will depend entirely on the client agency. If we are asked to do something in relation to any of those particular matters we will do it, but it is customer driven, if you like. If we are not asked to do something, we would not necessarily be aware of it.[77]

But, if there was a possibility that the government, through one of its departments or agencies, was going to become involved in some sort of international dispute settlement process, that is a matter which should ordinarily come to our office for consideration as to whether the decision to proceed with the litigation is a sound one, and what the prospects of success might be – that sort of stuff.[78]

3.129 A discussion on the appropriate responsibilities of each department ensued:

CHAIR—Let me ask you another question in regard to that. It seems to me in this whole thing that the only party that can claim independence from the issue is you. The Department of Foreign Affairs and Trade has a dual responsibility. The main emphasis, as I would read it and understand it, is on issues of trade – promoting trade, facilitating trade and all those types of things – yet they go in there to defend the principal defender of Australia in terms of a quarantine issue. That must lead to a conflict of interest looking into the future as well as the past in some of these negotiations. You have AQIS responsible for quarantine and trade, and they have very different roles. Do you see that in fact there is a potential for conflict of interest in doing two things?

Mr Zanker—There are arguments on either side. Another view could be that disputes in the World Trade Organisation before the dispute settlement panels and the appellate bodies are integral aspects of Australia's overall trade policy and for the trade people in the Department of Foreign Affairs and Trade to be closely involved in those matters is essential for the proper conduct of trade policy in Australia.

CHAIR—I am not saying that they should not be involved and I am not saying that they do not have an interest. What I am saying is that, in terms of their particular position in trying to do both tasks, it could well be better in future if we had the independence of your department or –

Mr Zanker—You could certainly have additional legal skills brought to bear if that is considered to be a desirable course of action.

CHAIR—Concerning expertise, you made a comment that you can utilise outside advocates. Were you talking in terms of outside advocates within the

77 Mr Mark Zanker, Attorney General's Department, Evidence, RRAT, 18 February 2000, p 390

78 Mr Mark Zanker, Attorney General's Department, Evidence, RRAT, 18 February 2000, p 392

whole of government or were you talking about advocates from the private sector, or both?

Mr Zanker—Obviously international litigation is a pretty rare bird. As I indicated, the case on southern bluefin tuna involved us engaging four advocates: one from my office, the Chief General Counsel from the Australian Government Solicitor, an Australian academic based at Cambridge University and also the Attorney-General. All of the people involved have particular advocacy skills and are highly qualified and respected international lawyers. What we are interested in is to present Australia's views in these cases as best we can, in the hope of securing a victory.[79]

3.130 It was noted in hearings by the Office of International Law representative that WTO cases are very intensive and require considerable effort. Should the Office be required to take an enhanced role in such cases, resources would be an issue.[80]

Committee Comment

3.131 The Committee is concerned that Australia's interests have not been sufficiently looked after in the international arena. The Committee considers that is essential to have appropriate legal input at each and every stage of international negotiations and from the commencement of steps towards negotiations, no matter what the issue. To be insufficiently aware of the significance of our international responsibilities and to be ill prepared for any litigation which might ensue is reckless.

79 Mr Mark Zanker, Attorney General's Department, Evidence, RRAT, 18 February 2000, p 390-1

80 Mr Mark Zanker, Attorney General's Department, Evidence, RRAT, 18 February 2000, p 391