

# CHAPTER TWO

## The WTO Case

### Introduction

2.1 Australia's commitment to a scientific assessment of risk as required by the World Trade Organisation's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) is exemplified by the existence of an agency to undertake the work.

2.2 During this inquiry, Biosecurity Australia reinforced the importance of science to the risk assessment process. In evidence to other inquiries the Committee has conducted into import risk analyses, Biosecurity Australia has also expressed this view. Biosecurity Australia's import risk analysis review panel has the responsibility of making assessments of the science in the risk modelling process. The then Executive Manager of Biosecurity Australia informed the Committee that:

The expert panel is responsible for considering the available scientific information and producing a draft report. Included in the draft report is the panel's view on the quarantine risks and risk management measures ...<sup>1</sup>

2.3 In relation to the IRA for apples from New Zealand, the Committee was informed of the conflicting scientific information available to the panel:

Some studies have found that, at the end of the season, and when you pick, some apples have got some levels of bacteria on them at picking. Other studies – even from severely blighted orchards, with severe symptoms throughout the orchards – have reached the conclusion that there are no viable bacteria left on apples at maturity and harvest.

So there is a mixed set of information there. The panel itself has gone through all this information, and the draft conclusions are of course in the draft report.<sup>2</sup>

2.4 Science is neither unequivocal nor static and the results of one scientific study are not necessarily applicable to field situations. The interpretative nature of the data for the risk modelling process is governed by the terms of the agreement and science, but it is a qualitative assessment. For some, the jurisprudence emerging from WTO appellate cases should be taken into consideration to provide some guidance to this process.

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1 RRAT Legislation Committee, *Transcript of Evidence*, Canberra, 30 June 2004, p. 1

2 RRAT Legislation Committee, *Transcript of Evidence*, Canberra, 30 June 2004, p. 38

## Japan – US dispute and WTO determination

2.5 In June 2002, a Panel was formed by the WTO's Dispute Settlement Body to hear a complaint from the US challenging Japan's existing SPS measures applied to US apples for export to Japan. In July 2003 the Panel found Japan's restrictions on US apples to be in breach of their obligations under the WTO's SPS Agreement, and on 12 November 2003 the WTO's Appellate Body upheld the findings of the Panel.<sup>3</sup> Australia and New Zealand were third parties to both decisions.

2.6 Principally, Japan was found to have established its SPS measures in a manner inconsistent with its obligations under Article 2.2 of the SPS Agreement, which states that:

Members shall ensure that any sanitary or phytosanitary measure is applied *only to the extent necessary* to protect human, animal or plant life or health, is based on scientific principles and is *not maintained without sufficient scientific evidence*, except as provided for in paragraph 7 of Article 5 (emphasis added).<sup>4</sup>

2.7 In *Japan – Measures Affecting the Import of Apples* the Appellate Body affirmed the principle that a test of a "rational or objective relationship" between an SPS measure and the available scientific evidence applied. This test is determined by an assessment of whether an SPS measure is "clearly disproportionate to the risk identified on the basis of the scientific evidence available".<sup>5</sup> In the context of Article 2.2, scientific evidence is only considered "sufficient" to justify an SPS measure if it demonstrates that the risk is proportional to its mitigation.

2.8 The facts of this case led the Panel and Appellate Body to conclude no rational or objective relationship between Japan's restrictions and the empirical risks.<sup>6</sup> According to the WTO, the evidence before the Panel suggested that the risk of mature, symptomless apples serving as a pathway for the spread of fire blight was negligible.<sup>7</sup>

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3 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, pp. 1-3 and p. 93

4 [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm). Article 5.7 provides that, in the absence of sufficient scientific evidence, measures may be adopted on the basis of "available pertinent information".

5 Panel report quoted in World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, p. 60

6 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, p. 60

7 The Committee recognises Japan's failure to produce scientific evidence relating directly to mature symptomless apples.

2.9 Japan's SPS measure comprised of a number of cumulative elements including:

- prohibition from orchards not completely blight-free;
- 500 metre buffer zone around designated orchards;
- joint visual inspections by US and Japanese officials; and
- chlorine treatment.<sup>8</sup>

The Panel and the Appellate Body concluded that this measure was not proportionate to the risk of fire blight being introduced to Japan by mature US apples.

2.10 However, the WTO Appellate Body was careful to emphasise that determining the appropriateness of a risk mitigation measure with regards to its basis of "sufficient scientific evidence", as required by Article 2.2, depends on the particular circumstances of each case.<sup>9</sup>

2.11 It is this aspect of the SPS agreement which is central to the debate as to whether risk mitigation protocols proposed by Australia for New Zealand apples is sufficiently scientifically based. Essentially, the question of proportionality is indicative of whether or not Biosecurity Australia's IRA protocols are more trade restrictive than necessary to achieve an appropriate level of protection (ALOP) from quarantine pests and disease.

### ***Appropriate level of protection (ALOP)***

2.12 According to Biosecurity Australia, the purpose of the International Agreement on the Application of Sanitary and Phytosanitary Measures is to:

... [define] the concept of an 'appropriate level of sanitary or phytosanitary protection (ALOP)' as the level of protection deemed appropriate by the WTO Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.<sup>10</sup>

2.13 The risk of an identified pest or disease entering Australia as a result of the importation of any given product, in this case apples from New Zealand, must fall below Australia's appropriate level of protection. The IRA Panel assess the risk as

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8 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, p. 7

9 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, p. 60

10 *Importation of Apples from New Zealand: Revised Draft ITA Report, Part A*, Department of Agriculture, Fisheries and Forestry, February 2004, p. 10

being a combination of the likelihood and the consequences of an identified pest or disease entering as a result of importing that product. If the risk does not fall below the ALOP, strategies to reduce the risk to an appropriate level of protection should be examined. The WTO Appellate Body's ruling clarified that any risk mitigation strategy proposed must bear a scientific relationship to the level of the assessed risk.

2.14 Australia is one of a number of countries that uses qualitative terms to express its appropriate level of risk. According to the revised draft IRA, the level of risk established by government policy reflects community expectations. This is currently expressed as "providing a high level of sanitary and phytosanitary protection, aimed at reducing risk to a very low level, but not to zero."<sup>11</sup>

2.15 Biosecurity Australia argues that a very low level of risk is the highest standard of protection possible, without limiting the movement of goods.<sup>12</sup> In discussing the implied level of risk of fire blight entering Australia, Dr Roberts, the chairman of the IRA panel, indicated that:

It is exactly the same as eight million tourists coming through the border. I can guarantee, although I cannot identify the number or who, that some of them have fire blight bacteria on them. I guarantee that some of them have backyards, gardens or businesses with fire blight hosts in them. So the bacteria are already crossing our border. It is unavoidable unless you say that nothing moves.<sup>13</sup>

2.16 However, the import risk assessment made by the expert panel combines that risk with the consequences of such entry. It is the outcome of that calculation that must be below Australia's ALOP.

## **Industry response**

2.17 The outcome of the WTO Panel and Appellate Body consideration of the *Japan – Measures Affecting the Import of Apple* dispute and its implications for Biosecurity Australia's draft IRA was a matter of substantial comment in Committee hearings and submissions, with the New Zealand government and Australian industry representatives offering different interpretations of the WTO's position.

### ***New Zealand***

2.18 The New Zealand government's submission placed considerable weight on the determination of the WTO in *Japan – Measures Affecting the Import of Apples*. They particularly emphasised the WTO Panel's conclusion, on the basis of the evidence

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11 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 10

12 RRAT Legislation Committee, *Transcript of Evidence - IRA on Pig Meat*, Canberra, 8 March 2004, pp. 17 and 33

13 RRAT Legislation Committee, *Transcript of Evidence*, Canberra, 30 June 2004, p. 39

before it, that "with respect to mature, symptomless apple fruits, the risk that the transmission pathway be completed is negligible".<sup>14</sup> Accordingly:

In New Zealand's view, the fact that there is not sufficient scientific evidence that apple fruit can serve as a pathway for transmission of fire blight means that any measures imposed to address risk of fire blight transmission from imported apples will be disproportionate to such risk and not based on science within the meaning of the SPS agreement.<sup>15</sup>

The upshot of the New Zealand government's argument is that the WTO has determined that *any* risk mitigation strategy with respect to mature apples would be inconsistent with Article 2.2 of the SPS Agreement.

2.19 These views are echoed in the comments made by the Chairman of Pipfruit New Zealand in evidence he gave to the Committee:

I guess the moot point is at what level, how it is transmitted, what is the pathway and so on. It is along the lines of the WTO saying mature apples pose no risk.<sup>16</sup>

2.20 The Committee considers New Zealand's position to be an optimistic one when held against the WTO's findings. Firstly, their view fails to reflect the Appellate Body's important qualifying statement. That is, assessing the proportionality of SPS measures in the context of Article 2.2 is a matter to be determined on a case by case basis. Secondly, Japan had not based its SPS measures on scientific evidence specifically related to the proposed export of apple fruit.<sup>17</sup> The WTO Panel consequently declared that Japan had not properly conducted their risk assessment as defined by the SPS Agreement.<sup>18</sup>

2.21 The Committee notes that the scientific evidence the WTO Panel relied on in *Japan – Measures Affecting the Import of Apples* is specific to that case and Japan's own assessment of risk. Alternative scientific evidence presented in accordance with Article 2.2 of the SPS Agreement requirements could facilitate the WTO Panel in adopting a different assessment of the risk of fire blight carried by mature apples.

2.22 The European Journal of International Law review of the decision suggests the possibility that a future dispute could produce a different outcome :

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14 Quoted in New Zealand government submission, *Submission 7*, p. 2

15 New Zealand government, *Submission 7*, p. 3

16 Mr John Allison, RRAT Legislation Committee, *Transcript of Evidence*, Canberra, 30 June 2004, p. 61

17 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, p. 74

18 See Article 5.1 and Annex A. Japan also failed to fulfil the requirements of SPS Agreement Article 5.1 in not examining SPS measures that *might* be implemented, in addition to those that were already in place.

The Japanese [SPS] measure at issue seems not to have raised difficult legal issues, because it had significant factual deficiencies.<sup>19</sup>

2.23 In this case, the WTO – through its 'case by case' caveat - articulated that no precedent has been established with regards to the factual question of transmitting fire blight via the importation of mature apples. Instead, the case affirms the principle of proportionality between SPS measures and scientifically assessed risk. The Committee believes that the New Zealand request for no risk mitigation at all is inconsistent with this principle and Australia's stated ALOP.

### *Australia*

2.24 Australian industry representatives have also disputed New Zealand's interpretation of the implications of *Japan – Measures Affecting the Import of Apples*. They highlighted the failure of the Japanese to adequately demonstrate the consistency of their measure with the SPS Agreement. In submissions to the inquiry, industry organisations contended that the main reasons for the outcome were Japan's failure to:

- (a) demonstrate that risk mitigation protocols were based on relevant science; and
- (b) conduct an appropriate risk assessment.<sup>20</sup>

2.25 The Australian industry's concern over *Japan – Measures Affecting the Import of Apples* is the impact the decision has had on Biosecurity Australia's approach to this IRA. The Apple and Pear Industry Taskforce claimed the decision had influenced Biosecurity Australia to make the revised draft IRA less trade restrictive:

There is no doubt that Biosecurity have a high level of concern in relation to a W.T.O. challenge by New Zealand. From our observation this is a common occurrence in all I.R.A.'s undertaken by Biosecurity.

It is relevant that Biosecurity personnel are not trade experts, and do not have legal training. Our contention is that an I.R.A. should be undertaken with W.T.O. policy issues left to trade and legal experts.

There is a very real danger that protecting Australia from any potential W.T.O. challenge will result in taking the "easy or safe options" when faced with issues that are reliant on opinions to resolve.<sup>21</sup>

2.26 The Tasmanian Apple and Pear Association also suggested that BA had interpreted the decision as a precedent that would be applied to any challenge against Australia's protocols:

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19 Trachtman, J. *Japan – Measures Affecting the Import of Apples*, European Journal of International Law, <http://www.ejil.org/journal/curdevs/sr44.pdf>, accessed 12 October 2004

20 Australian Apple and Pear Industry Taskforce, *Submission 14*, p. 27 and Tasmanian Apple and Pear Association Inc, *Submission 11*, p. 2

21 Australian Apple and Pear Industry Taskforce, *Submission 14*, p. 27

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This whole process is being undertaken in an environment where Biosecurity Australia is intimidated by the possibility that if New Zealand does not like what is proposed then they will take Australia to the WTO on the basis that science does not support the proposed measures and that they are too trade restrictive.

The recent WTO ruling against Japan has been interpreted as a precedent and seems to have a strong influence on the manner in which Biosecurity Australia has managed this revised draft IRA.<sup>22</sup>

2.27 Apple and Pear Australia Limited (APAL) also claimed that trade issues were BA's foremost consideration:

There is no doubt that what is the least trade restrictive is what influences Biosecurity's thinking. There is no doubt that everything they do is based on what the WTO would think about it, and I think it would be equally true to say that there is a free trade culture within Biosecurity and AFFA that pushes the lead on these issues.<sup>23</sup>

2.28 Biosecurity Australia has repeatedly stated to the Committee that its revised draft IRA is entirely science based:

The reassurance I give you is that the panel's deliberations on risk assessment measures and the judgment of risk are their own and are based on an Australian risk assessment—an Australian assessment of the scientific situation for Australia's position on quarantine risk in relation to New Zealand apples. It is a distinct, independent Australian assessment.<sup>24</sup>

2.29 The Committee accepts these reassurances, while noting that Biosecurity Australia also acknowledges that its approach to quarantine is consistent with the terms of the WTO's SPS agreement.<sup>25</sup>

2.30 Further, the Committee notes the use of the phrase "the judgement of risk are their own" in the above quotation. This implies the qualitative nature of risk assessments.

### ***Qualitative vs quantitative***

2.31 In its 2001 report, the Committee's predecessor recommended that:

Biosecurity Australia incorporate a full quantitative risk evaluation in the final IRA on the possible importation of New Zealand apples, in preference

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22 Tasmanian Apple and Pear Association Inc, *Submission 11*, p. 2

23 RRAT Legislation Committee, *Transcript of Evidence*, Canberra, 30 June 2004, p. 24

24 RRAT Legislation Committee, *Transcript of Evidence*, Canberra, 31 March 2004, p. 15

25 Department of Agriculture, Fisheries and Forestry, *Import risk analysis handbook*, Canberra 2003, p. 5

to the current unsatisfactory qualitative risk evaluation used in the draft IRA.<sup>26</sup>

2.32 A quantitative likelihood model was used in the 2004 revised draft IRA to "represent pathways relevant to the importation and utilisation of apple fruit, the disposal of fruit waste, and the possible exposure of susceptible host plants in Australia."<sup>27</sup>

2.33 The revised draft IRA states that the quantitative model provides the following four important technical facilities:

- a framework upon which to base the logical structure of each assessment;
- evaluation of the effect of the 'volume of trade' during a specified period;
- accommodation of 'uncertainty' or 'natural variation' in the likelihood estimate assigned to individual steps in pathways; and
- use of 'sensitivity analysis' to identify critical steps in each scenario, and thus focus information needs and (where relevant) risk management.<sup>28</sup>

2.34 However, the revised draft IRA also indicates that quantitative data:

... was not always available to support estimation of many of the probabilities assigned to the pathway steps considered in this analysis. The likelihoods assigned to these steps were subsequently based on expert judgements, and modelled using the qualitative likelihoods described in Biosecurity Australia's *Guidelines for Import Risk Analysis* (2001) [the Guidelines].<sup>29</sup>

2.35 The Guidelines set out the boundaries adopted for qualitative likelihoods, indicating that in choosing the boundaries it was important to:

- provide a system that could be adopted by those experts whose take it was to review scientific evidence and estimate likelihoods;
- ensure that the categories were neither overly precise nor constrictive; nor so broad as to lose the precision that may have been present in the original body of scientific evidence.<sup>30</sup>

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26 Senate Rural and Regional Affairs and Transport Legislation Committee, *The Proposed Importation of Fresh Apple Fruit from New Zealand, Interim Report*, July 2001, p. xxiii

27 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 46

28 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 46

29 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 48

30 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 48



2.36 The revised draft IRA indicates that it "was *not* critical that the categories were of equal width, or that they were assigned according to a predefined arithmetic or logarithmic scale."<sup>31</sup> Rather, it is argued, the

... emphasis was on useability and, once defined, a system that would enable experts to use the corresponding terms and definitions consistently, and for stakeholders to be clear on the meaning of the likelihood terms used.<sup>32</sup>

2.37 The Committee acknowledges that the modelling allows for a standard that can be used to assess quarantine risks over a range of imports and to assess them in an open and transparent way. However, it also creates an environment where there are no absolutes and judgements can be called into question. Biosecurity Australia are aware of the dilemmas that can arise:

The panel spent many meetings discussing this issue [the risk unit part of the model] with various experts. If you get a room full of experts on this particular issue you will get two rooms full of answers from them.<sup>33</sup>

2.38 Such problems are only heightened when the available scientific evidence does not relate specifically to the matter at hand or when there is conflicting evidence. The interpretative nature of the assessment requires judgements to be made over "best fit" to local circumstance and as with any judgements, differing views are likely to exist. Thus, Australian apple and pear industry representatives contended:

... from the industry's viewpoint, we believe there is a very strong case that could be argued about the transmission of fire blight to mature fruit. Our view would always be: you back it and you go in on that basis and work from there.<sup>34</sup>

### ***The precautionary principle***

2.39 The Committee recognises that it is tempting, in the midst of conflicting scientific evidence, to argue that Biosecurity Australia would be justified in applying a cautious approach to imposing protocols for the importation of New Zealand apples. This method of assuming the worst case scenerio in the face of scientific uncertainty is frequently referred to as the 'precautionary principle'.

2.40 Article 5.7 of the SPS Agreement states that:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of

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31 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 48

32 Biosecurity Australia, *Importation of Apples from New Zealand: Revised Draft IRA Report, Part A*, February 2004, p. 48

33 RRAT Legislation Committee, *Transcript of Evidence*, Canberra 30 June 2004, p. 38

34 RRAT Legislation Committee, *Transcript of Evidence*, Canberra 30 June 2004, p. 24

available pertinent information, including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.<sup>35</sup>

2.41 One possible interpretation of this provision is its role as an invitation to invoke the precautionary principle where scientific evidence is insufficient.

2.42 In the context of establishing SPS measures to prevent the transmission of fire blight, it is unlikely that the precautionary principle could be so invoked. Notwithstanding its possible broader application, the WTO in *Japan – Measures Affecting the Import of Apples* determined that there was sufficient scientific evidence pertaining to the transmission of fire blight through the importation of mature apples.<sup>36</sup> The WTO Panel and Appellate Body further clarified the issue, concluding that scientific uncertainty did not constitute insufficient evidence.<sup>37</sup>

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35 WTO SPS Agreement, [www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm), accessed 5 October 2004

36 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, pp. 65-66

37 World Trade Organisation, *Japan – Measures Affecting the Import of Apples: Report of the Appellate Body*, [www.worldtradelaw.net/reports/wtoab/japan\\_apples\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan_apples(ab).pdf), accessed 12 October 2004, p. 67