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WTO Dispute Settlement: Lessons Learned from the Salmon Case

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WTO dispute settlement: lessons learned from the salmon case *

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Background

1. There have been three cases dealing with sanitary/phytosanitary matters which have been subjected to dispute settlement panel and Appellant Body proceedings under the World Trade Organisation's Dispute Settlement Understanding:

- the European Union defended its ban on use of certain hormonal growth promoting substances by beef producers;
- Japan defended its requirement for variety-by-variety testing of fruit to establish the efficacy of disinfestation treatments; and
- Australia defended its prohibition on the importation of fresh, chilled and frozen salmon.

In each case the defendant's measure has been found not to conform with obligations under the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement).

2. A chronology setting out the 25 year history of disagreement between Canada and Australia on the salmon issue is Attachment 1 to this paper. It records, in short, that the prohibition was instituted by the Australian quarantine authorities in 1975. Following representations by Canada over the ensuing years, Australia issued a first discussion paper (on risk associated with the importation of wild, ocean-caught Pacific salmon) in 1989. The Australian Quarantine and Inspection Service (AQIS) then prepared and issued two draft import risk analyses (IRAs), and a final IRA early in 1997. As Canada was dissatisfied, formal dispute settlement panel proceedings under the new WTO Dispute Settlement Understanding were commenced in March 1997 and the panel found against Australia in June 1998. The WTO's Appellate Body then heard appeals, and its findings against Australia were adopted in November 1998. AQIS then conducted a generic IRA on non-viable salmonids and salmonid products, as well as on non-viable marine finfish and ornamental fish. The WTO's arbitration process allowed Australia until July 1999 to bring its measures into conformity with its obligations. Certain aspects of AQIS's proposed new measures on salmonids/salmonid products, announced in July 1999, were contested by Canada through further dispute settlement panel proceedings. The panel found against Australia in relation to one of 11 specified conditions of entry, and this matter was resolved by subsequent negotiation between the parties.

3. To date under the new import conditions only about 200 tonnes of salmon has been imported, almost all of it from New Zealand; imports from Canada to date have been negligible.

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What Australia did wrong (and right)

4. Until 1995, Australia had not produced a draft import risk analysis (IRA) to justify its restriction on Canadian salmon. The draft published in May 1995 recommended that importation be allowed of headless, eviscerated wild-caught Pacific salmon under specified conditions. This proposal was strongly criticised by Australian salmonid producers and other domestic stakeholders. Another draft IRA was prepared, but not before both Canada and the United States had initiated formal consultations with Australia under WTO auspices.

5. A revised draft IRA was released in May 1996. It contained no recommendations. After public comment and external scientific peer review had been taken into account, a final IRA was prepared and published in January 1997. The final IRA proposed that the existing ban on imports of fresh, chilled or frozen salmon be maintained. The dispute settlement panel which heard the complaint of Canada (supported by the USA, the European Union, Norway and India as third parties) against this continuation of the prohibition found that Australia had failed to meet its obligations in a number of respects. The WTO Appellate Body upheld some elements of appeals lodged by Australia and Canada, but effectively confirmed the broad thrust of the dispute settlement panel's findings, in particular that –

- Australia had failed to base its measure on a risk assessment appropriate to the circumstances;
- Australia's measure did not reflect a consistent approach to risk management, having regard to the apparently less stringent restrictions on imports of certain non-viable marine finfish and ornamental fish.

6. The new measures announced by Australia in July 1999 following a further, intensive risk analysis process (now also covering ornamental fish and non-viable marine finfish) permitted importation of Canadian salmon subject to certain requirements, in particular that the product be in either consumer ready form or subject to further processing under quarantine control. Consumer ready was defined, in broad terms, as in pieces weighing less than 450 grams. Canada then instituted further proceedings, and in due course the dispute settlement panel found that the consumer ready requirements were not supported by the risk assessment and were more trade restrictive than necessary to meet Australia's appropriate level of protection. The panel also found that measures introduced by the Tasmanian Government restricting entry of imported salmon to that State were not supported by an appropriate risk assessment and were otherwise inconsistent with the SPS Agreement.

7. The Australian Government decided not to appeal this determination, and negotiations between the Canadian and Australian authorities eventually led after several months to an alternative set of consumer ready requirements which allowed importation of head off, gilled and gutted fish for direct retail sale, or for processing under controlled circumstances. The Tasmanian ban remained (and remains) in place.

8. These extremely complex and protracted dispute settlement proceedings thus culminated in a set of conditions for trade which (with the exception of the Tasmanian ban) are acceptable to all WTO Members. In the process the WTO's arbitral bodies – the panel, and the Dispute Settlement Body – validated Australia's final risk analysis and 10 of the 11 proposed control measures. Canada's right to compensation and/or to institute trade retaliation was not exercised.

Some observations

9. Many lessons could be drawn from the salmon case in relation to the proper understanding of the SPS Agreement, and its significance for Australian quarantine policy. Perhaps the most obvious, and important observation is that the SPS Agreement, backed by the WTO dispute settlement procedure, is capable of exerting very substantial discipline over the design and implementation of quarantine restrictions by WTO Member countries. Furthermore, the scrutiny to which a defendant is subjected in the dispute settlement process is extremely intense even though the dispute settlement panel cannot be expert in the technical subject matter and notwithstanding the variable relevance of input from experts recruited to assist the panel. In short, the Agreement has teeth.

10. A second, related observation is that the salmon case has included judgments which give strong guidance on the practical interpretation of some of the key provisions of the Agreement (such as Article 5.5 on consistency in risk management); and, even more significantly, it has set the bar for compliance at a very high level specifically in relation to what constitutes a risk assessment appropriate to the circumstances (Article 5.1). AQIS had to go to quite extraordinary lengths to gather and analyse information and formulate recommendations in a coherent way so as to produce risk analyses robust enough to withstand scrutiny within the WTO. In the process many of the most highly qualified scientific experts in Australia and overseas were retained to provide commentary and advice. Even though they were produced under acute time pressure and amidst many distractions, the IRAs on salmon, ornamental fish and non-viable marine finfish are state of the art – but it seems doubtful that anything less could hope to satisfy both domestic stakeholders and the WTO and its Members.

11. Thirdly, the cost of conducting quarantine policy making under the glare of intensive observation through the WTO is very high. Not only is there the large cost of conducting enough, scientifically defensible risk analysis, but also the cost of defending a full-blown dispute settlement case is substantial. Costs include:

- preparation of numerous submissions, rebuttals and presentations;
- related legal and other expert advice;
- consultations with interested parties;
- communication strategies;
- travel to Geneva;
- negotiations in national capitals.

Another cost item which is not as directly measurable is the wear and tear on key staff who are subjected to demanding timetables and conflicting pressures over long

periods of time. There are also opportunity costs in terms of other tasks not carried out. An imponderable is the cost to national reputation if a WTO dispute settlement proceeding finds against a defendant WTO Member.

Other lessons for Australia

12. The observations made above underline the importance of having in place a quarantine policy which is fully consistent with the SPS Agreement and which is firmly and consistently applied. Australia, like all other WTO Members who maintain quarantine barriers to trade, is vulnerable to being pursued through the WTO dispute settlement process unless we have done enough sound and defensible import risk analysis and we are prepared to argue in support of it if challenged.

13. Australia's well known highly conservative approach to the acceptance of quarantine risk is defensible in the WTO, but is also likely to make us more of a target than many other countries with worse pest/disease profiles and/or a more permissive quarantine regime. It is therefore desirable to minimise any perception amongst other WTO Members that Australia's quarantine regime is questionable in terms of its conformity with WTO obligations.

14. A corollary is that quarantine policy and administration needs to be conducted in a manner which will support Australia's position in the event of a further WTO challenge. Since relevant international standards are often not available as a suitable basis for Australia's quarantine requirement, the IRAs which underpin our measures will be the prime focus of attempts to coerce us to lower technical barriers to imports. Consequently Australia will need to maintain an extremely high standard of import risk analysis to support both new or revised measures and existing requirements. This is a very large task, requiring sufficient in-house expertise, access to the best independent expert advice, proper prioritisation, careful record-keeping and much more.

15. It will be highly desirable to discourage trading partners from taking formal WTO dispute settlement action, even though we are confident of our ability to provide plausible defence of measures which are applied. On the evidence of the salmon case, as noted above, dispute settlement proceedings are very costly and require significant diversion of resources from other tasks. Once commenced, dispute settlement proceedings can acquire momentum which makes it difficult to halt until all legal avenues are exhausted.

16. A particular point of concern is the reminder provided by the salmon case that under the constitutional distribution of powers between levels of government in Australia's federal system, States and Territories retain the capacity to apply quarantine restrictions affecting international trade over and above measures applied by the Commonwealth Government. The Tasmanian Government has chosen to maintain a restriction on imported salmon even though this measure has been found by the WTO to place Australia in violation of its international obligations, and notwithstanding that such action is contrary to the terms of the memorandum of understanding signed by the Commonwealth and each State/Territory Government in 1995.

17. One further point concerns stakeholder perceptions. In many situations it is the expectation of domestic stakeholders, especially in industries threatened by the possible reduction of quarantine barriers against competing products from overseas, that such barriers will be maintained unless it can be proven beyond doubt that importation can be safely permitted. As the salmon case reminds, however, Australia's international obligation is not to impose any quarantine barrier unless it can be demonstrated on the basis of scientific evidence that any quarantine restriction on trade is justified.

Senate inquiry

18. During 1999-2000 the Senate Rural and Regional Affairs and Transport Legislation Committee conducted an inquiry on *"The effectiveness of the legal and regulatory regimes governing the Australian Quarantine and Inspection Service (AQIS) and the need to ensure transparency, consistency, scientific rigour and the highest standards of protection of the environment, the local fish population and the fishing and recreational fishing industries of Australia, having regard, in particular, to the administrative procedures and decision-making processes involved in the recent AQIS decision to allow the importation of salmon products into Australia"*. It published its report, entitled *"An Appropriate Level of Protection?"* in June 2000, making 14 recommendations (as set out in Attachment 2) which mostly address administrative and procedural matters. The Government will respond publicly to the recommendations in due course.

Conclusion

19. The outcome of the salmon case was the establishment of conditions under which trade could proceed on an agreed basis, resolving a bilateral trade irritant of very long standing. No change to Australia's quarantine policy framework or approach was brought about by the WTO proceedings, and we are satisfied that Australia's appropriate level of protection is being maintained by the measures now in place. No compensation was paid nor any trade retaliation applied. Thus the result is a very positive one, albeit that it was achieved at considerable cost.

CHRONOLOGY OF EVENTS RELATING TO THE FISH IMPORT RISK ANALYSES AND THE WORLD TRADE ORGANIZATION (WTO) PROCESS

June 1975	**Import restrictions placed on salmonid product. The importation of fresh, frozen or chilled salmonid product from any source is not permitted.**
1975-1993	Numerous exchanges with Canada at Ministerial and officials levels on Australia's restrictions on salmon.
1989	**AQIS releases first discussion paper for comment on the risk associated with the importation of wild, ocean-caught Pacific salmon.**
1992	**AQIS commissions the comprehensive study *Aquatic Animal Quarantine in Australia* by BRS.**
January 1994	Canada requests consultations in the GATT.
March 1994	**Consultations held with Canada in the GATT.**
July-August 1994	**AQIS sends technical delegation to Canada and USA (included industry member).**
December 1994	**Preliminary draft import risk analysis provided to Tasmanian Salmonid Growers Association, Canada, USA and CSIRO for technical review.**
May 1995	Draft IRA paper released for public comment. The draft recommends the importation of headless, eviscerated wild Pacific salmon from North America product under specified conditions be allowed. Numerous representations received and meetings and exchanges held with Tasmanian industry and Government representatives. Over 170 submissions received.
May 1995- December 1996	**Numerous meetings and exchanges with Tasmanian industry and Government representatives.**
October 1995	**Canada requests WTO consultations.**
November 1995	**WTO consultations held with Canada.**
November 1995	**USA requests WTO consultations.**
December 1995	**WTO consultations held with USA.**

April-May 1996	**Scientific peer review, including industry participation, of draft revised IRA.**
May 1996	**Revised draft IRA on wild Pacific salmon from North America released for public comment, not containing any recommendations. 34 submissions received.**
August-December 1996	Final IRA document prepared including external scientific peer review, with industry participation.
20 December 1996	**AQIS's decision on salmon announced; existing ban on uncooked salmon maintained, based on IRA for wild Pacific salmon from North America.**
January 1997	Final Report circulated.
March 1997	**Canada challenges Australia's decision in the WTO, requesting establishment of a WTO dispute settlement panel.**
10 April 1997	Panel established comprising Cartland (Hong Kong) as chair, Bergholm (Finland) and Orozco (Colombia).
May 1997-April 1998	**Panel work undertaken with participation from Australia and Canada, third parties (Norway, USA, EU and India) and experts advising the Panel.**
June 1998	**Panel finds Australia in breach of certain obligations under the SPS Agreement.**
July 1998	**Canada and Australia appeal against the Panel's finding.**
October 1998	**The WTO Appellate Body upholds some of Australia and Canada's appeals.**
6 November 1998	**WTO Dispute Settlement Body (DSB) adopts Panel findings, as modified by the Appellate Body, that Australia had not complied with its obligations under the WTO SPS Agreement with regard to the measures applying to salmon.**
27 November 1998	**AQIS commences a generic IRA on all non-viable salmonids and salmonid products (ie members of the Family Salmonidae including salmon and trout). As a generic analysis, the IRA to consider the importation of salmonid product from any source country and include assessment of all potential animal disease agents that may be introduced to Australia via the importation of such products.**
24 December 1998	**Canada asks for binding arbitration on period Australia would be allowed to implement Appellate Body findings.**

4 January 1999	**AQIS consulted on scope and risk analysis panel membership for the generic IRA.**
5 February	**AQIS advises confirmation of scope and RAP membership; appeals received from TSGA and NZ Government but appeals lapse following decision on accelerated approach (below).**
23 February 1999	**WTO Arbitrator hands down decision giving Australia until 6 July to address its obligations.**
30 March 1999	**AQIS consults stakeholders (AQPM 1999/24) on a proposal to conduct import risk analyses on non-viable salmonids and non-salmonid marine finfish subject of the WTO findings according to a common, accelerated timetable, to meet the WTO deadline.**
23 April 1999	**AQIS announces decision (AQPM 1999/27) to conduct the (IRAs) according to a common, accelerated, timetable.**
April-July 1999	**Sections of draft risk analyses published for comment progressively on AQIS's web-site. 23 formal technical submission received on salmon issues.**
11 May 1999	Stakeholders provided a progress report (AQPM 1999/30) on consultation steps and scientific review of AQIS papers.
19 May 99	**AQIS advises stakeholders (AQPM 1999/33) on status of external consultancies relevant to the IRAs.**
May-June 99	**Series of public stakeholder meetings attended by the key agencies and industries held in five capital cities**
1 June 99	**AQIS provides further information on external consultancies (AQPM 1999/38).**
17-18 June 99	**Meeting of Australian based scientific reviewers (B Munday, B Jones, C Hawkins, J Rees, M Crane, W Townsend, E Bernoth, J Humphrey and S Pyecroft and M Nunn).**
2 July 99	AQIS announces deferral of decision to 19 July (AQPM 1999/44).
19 July 99	**Announcement of AQIS's policy determination on salmonids, ornamental fish and non-viable marine finfish (AQPM 1999/51). Import of fresh, chilled or frozen salmon was permitted in consumer ready form under certain conditions. Conditions for import of ornamental fish and non-viable marine finfish were tightened somewhat.**
28 July 99	**DSB agrees to Canada's request for the establishment of an Article 21.5 dispute settlement panel on whether Australia's new measures conform with WTO obligations.**
20 Oct 1999	**Tasmanian Government announces restrictions on entry to that State of imported salmon.**

18 Feb 2000	**Panel finds Australia's requirement that imported fresh chilled or frozen salmon (other than from New Zealand) be imported in consumer ready form was not supported by the risk assessment and was more trade restrictive than necessary to meet Australia's appropriate level of protection; Panel also found that Tasmanian measures were inconsistent with the SPS Agreement.**
17 May 2000	**Minister for Trade announces revised quarantine requirements, acceptable to Canada, which eliminate weight criterion for consumer readiness.**

RECOMMENDATIONS

Recommendation 1

That the Australian Government make application to the WTO for a variation to the WTO Rules to have disease free area status applied to fish and fish products that are untreated.

Recommendation 2

That AQIS maintain an ongoing review of its import protocols and develop procedures that enable it to implement new import protocols as a response to any changes in perceived risk or any new scientific evidence which might arise.

Recommendation 3

The Committee affirms recommendation 8.17 in its 1996 report on AQIS and recommends that, prior to the publication of documentation, AQIS consult with stakeholders, incorporating the outcome of such consultations in any documentation.

Recommendation 4

The Committee recommends that AQIS, in its review of the IRA processes and procedures, amend the procedures to allow for the direct involvement of domestic stakeholders through the establishment of a Risk Assessment Committee for each import risk analysis.

Recommendation 5

That the Import Risk Analysis procedures and Handbook be amended to ensure that the consultation process takes place prior to the development and publication of documents such as issues papers and the like.

Recommendation 6

That draft Import Risk Analysis documents and other like documentation not contain any proposed or indicative conclusions.

Recommendation 7

That:

a) The publication of documentation be limited to the requirements of our international obligations; and

b) Discussion papers or draft documents should have limited distribution on a strictly confidential basis and be restricted to domestic stakeholders and the seeking of expert opinion.

Recommendation 8

That, wherever possible, AQIS support their qualitative analysis with quantitative risk assessment techniques.

Recommendation 9

That, given the fundamental significance of risk analysis, the Government establish a Key Centre for quarantine related risk analysis, consistent with that proposed by the Nairn Committee in *Australian Quarantine – A Shared Responsibility.*

Recommendation 10

That the Commonwealth Government, in consultation with the community and with State and Territory governments, be responsible for the establishment of an appropriate level of protection for Australia.

Recommendation 11

That the ALOP be more explicit and include as part of its determination environmental factors and the application of the precautionary principle.

Recommendation 12

That an International Legal Adviser's Office be established to provide high quality international legal advice from the early stages of Australia's relationships with other countries and international organisations.

Recommendation 13

That the International Legal Adviser's Office be established as a statutory authority within the Attorney-General's Department.

Recommendation 14

That the Head of that Office, the Legal Adviser, be appointed at the highest level, reporting to the Attorney-General and to the Prime Minister.