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PANEL: INTERNATIONAL COOPERATION IN FOOD PROTECTION: "FROM THE FARM TO THE TABLE"

INTERNATIONAL ARBITRATION IN THE FOOD TRADE

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CONTENT

Page

1. Background

International arbitration in the food trade is a relatively new phenomenon. New, because international arbitration presupposes that there exists international law or rules on which such arbitration can be based, and until recently food trade was to a great extent not adequately covered by any such law or rules. In fact not until the conclusion of the Uruguay Round Multilateral Trade Negotiations and the establishment of the World Trade Organization (WTO) in 1995 has the food trade been fully covered by international rules.

A number of agreements under the WTO may have impact on the food trade. However, this presentation is limited to only those two agreements which are relevant for the health protection. These are the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

Before starting my presentation I want, however, make it clear that opinions which I may present are my own, and shall not to be construed to represent those neither of my country Finland, of the European Union in which Finland is a member, nor of the WTO.

2. Scope and Principles of the Two Agreements

TBT and SPS Agreements both deal with requirements on products, their characteristics, production methods, packaging, marking and labelling as well as on conformity assessment procedures. Many provisions in these Agreements, e.g. those on transparency, are almost identical. There are, however, also important differences and therefore it is necessary to know the scope of the two Agreements and the borderline between them.

TBT is a general agreement on product requirements covering, in principle, all requirements presented as technical regulations, standards or conformity assessment procedures irrespective of the objective of the measure. SPS, on the other hand, is a specific agreement covering only measures with strictly limited objectives.

As to food safety the SPS Agreement covers any measures to protect human life or health from risks arising from

additives,
contaminants,
toxins or
disease causing organisms in food or beverages.

The TBT Agreement covers all other requirements on food and beverages, e.g. those dealing with

nutritional value,
organoleptic properties,
quality, classifications,
ethical concerns,
consumer information (except health related), and
prevention of deceptive practices.

As to animals, the SPS Agreement covers measures to protect animal life and health, and the TBT Agreement other requirements, e.g. those on animal welfare.

Similarly for plants, SPS Agreement is valid for measures to protect plant life and health, and the TBT Agreement for other requirements, e.g. those on plant suitability.

The basic principle of the two agreements is to ensure that governments maintain their sovereign rights to pursue legitimate objectives, like the protection of life and health, but simultaneously to prevent that these sovereign rights are misused for protectionist purposes or for creating unnecessary barriers to trade.

The sovereign rights are ensured especially by the provision that each country has the right to establish its own appropriate level of protection. The misuse of the sovereign rights is prevented by the establishment of a number of so called disciplines to which the countries have to comply with. These disciplines deal e.g. with:

transparency,
necessity and justification of the measure,
international standards, and
conformity assessment procedures.

In an international trade dispute the sovereign rights of governments cannot be challenged. What can be challenged, is if a government does not comply with all the relevant disciplines.

3. SPS Agreement

Because the theme of this panel is food protection, I will now concentrate on the relevant provisions of the SPS Agreement.

A fundamental requirement of the SPS Agreement is that any measures under this Agreement are based on science. This can be demonstrated in two ways:

by implementing relevant international standards or
by a risk assessment.

The only exception from this rule is the case when the relevant scientific evidence is not sufficient. In such case temporary measures may be based on the so called precautionary principle. This means that the implementation of the SPS Agreement is heavily dependent on the results of international standardization work and on the development of risk assessment methods.

The SPS Agreement indicates as international standards those established:

by Codex Alimentarius Commission for foods,
by International Office of Epizootics for animals, and
by International Plant Protection Convention for plants.

In order to ensure a close cooperation between on the one hand these "three sisters" and on the other hand the WTO, a mutual representation has been established. The representatives of the "three sisters" are invited to participate in all meetings of the SPS Committee which is the administrative body for the Agreement. Respectively the WTO Secretariat may attend such meetings of these organizations which are of relevance for the implementation of the Agreement. The SPS Committee has also established a monitoring system for the international standardization work whereby it could identify needs to establish or update international standards.

The SPS Committee is, for obvious reasons, highly interested in the development of risk assessment methodologies, but the work is done by the relevant international organizations, not by the WTO. The same goes for the establishment of pest and disease free areas.

4. WTO Dispute Settlement Procedure

One of the many new achievements of the Uruguay Round was a significantly strengthened dispute settlement procedure. Unlike most other non-military international organizations WTO has teeth, it can bite.

The rules for the WTO Dispute Settlement Procedure are both comprehensive and detailed. According to these rules the settlement of a dispute between two Members of the WTO shall proceed in three steps:

bilateral consultations,
panel, and
appellate body.

As far as possible any disputes between the Members of the WTO should be settled by bilateral consultations. If the parties to the dispute so agree, they can request for good offices, conciliation and mediation to assist them to achieve a mutually acceptable solution to their dispute. If bilateral consultations fail to settle the dispute, each party of the dispute (in practice the complainant) has the right to request the establishment of a panel.

Panels shall have, as a rule, three independent, well-qualified members. All members are proposed by the Secretariat, but accepted by the parties to the dispute. The panels are assisted by the WTO Secretariat. For all practical purposes a Panel is working like a court of justice having as law the relevant WTO Agreements.

The initial burden of proof lies on the complaining party which must establish a *prima facie* case of inconsistency with a particular provision of a WTO Agreement on the part of the defending party. After that the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.

A panel may seek advice from internationally recognized experts to which both parties of the dispute also may present questions. Panel proceedings are confidential. Both parties may, however, make public their own submissions to the panel.

The results of the panel work are presented in a report. The report contains the arguments of the parties, the contribution of the experts and findings of the panel. The findings are accompanied with a comprehensive justification. If the panel finds that the measures of the defending party are in conflict with specific provisions of the WTO

Agreements, the Panel will recommend the defending party to bring its measures in dispute into conformity with its obligations under the relevant WTO Agreements.

If not satisfied with the findings of the panel, either party of the dispute has the right to appeal. To handle the appeals WTO has established an Appellate Body. While the panels are *ad hoc* bodies, established separately for each case, the Appellate Body is permanent, with seven permanent members.

After receiving the appeal the Appellate Body selects among its members three persons to deal with that particular case. The Appellate Body shall not deal with the factual basis of the case, but review the legal interpretations of the panel.

The conclusions of the Appellate Body, or of the panel report if not appealed, are legally binding for the parties of the dispute. The reports of the panels and of the Appelate Body are public.

It is then expected that all Members will, in good faith, implement the recommendations emanating from the dispute settlement. If a Member, however, is unable or unwilling to do so, it can agree to provide compensation to those other Members which are affected by its unlawful measure. In case it has not been possible to agree on compensation, the other countries can request the suspension of concessions to the Member concerned.

Decisions on the suspension of concessions (sanctions) are taken by the Dispute Settlement Body (DSB). The DSB has the general responsibility of the functioning of the dispute settlement procedure and takes all the necessary decisions. In most cases, however, its decisions are more or less automatic, prescribed by the rules of the procedure.

For all phases of the dispute settlement procedure there are time-limits. Deviations from these time-limits could in general be accepted only by agreement of all those concerned.

5. Problems of the Dispute Settlement Procedure

As noted above, the Dispute Settlement Procedure was significantly strengthened and developed as a result of the Uruguay Round negotiations. Practical experience has, however, already now shown that there remain some problems or weaknesses in the system.

Parties to the dispute have an unlimited right to appeal. The Appellate Body has no right to screening, but has to review each appealed case. This means that a Member that has lost a case is able to prolong the procedure also in cases which are completely clear and unambiguous.

The appellate Body has also no right to send a case back to the panels for consideration. This would be especially useful in cases when the Appellate Body considers that the factual part of the panel report is insufficient or misleading. As noted earlier, the Appellate Body has the mandate to reconsider the interpretation of the law only.

A panel or Appellate Body, may, but only may suggest ways in which the Member concerned could implement its recommendations. This has, however, happened almost never and would anyway be only a suggestion, not binding. This obviously opens the way for interminable quarrels on whether the recommendations have been implemented in an appropriate way.

6. Cases under the SPS Agreement

So far there has been three dispute settlement cases under the SPS Agreement. All three were appealed and the Appellate Body has presented its recommendations. The cases have dealt with all the three main sectors of the coverage of the Agreement: food safety, animal health and plant health. The cases are the following:

1. EC Measures Concerning Meat and Meat Products (Hormones).
   Claimants United States and Canada.

2. Australia - Measures Affecting Importation of Salmon.
   Claimant Canada.

3. Japan - Measures Affecting Agricultural Products.
   Claimant United States.

These cases have provided interpretations to practically all the significant provisions of the Agreement, Here are some conclusions.

- For disputes under the SPS Agreement the provisions of the General Agreement (GATT 94) are not relevant. If a Member is fulfilling its obligations under the SPS Agreement, it is deemed to have fulfilled them under the General Agreement as well.

- The role of the risk assessment is crucial. In all three cases one of the findings was that the defendant had not fulfilled its obligations concerning the risk assessment.

- The provisions on consistency (Article 5.5.) are not an "empty" requirement. To demonstrate that a measure is in conflict with these provisions is, however, rather complicated.

- Article 5.7 could be understood as providing the right to apply the so-called "precautionary principle". This right is, however, not unconditional. The user of this right has to demonstrate that he is actively seeking additional information in order to be able to conduct a normal risk assessment.

7. Conclusions

The Members of the WTO (except those who have lost their cases) seem to be rather satisfied with the functioning of the new dispute settlement procedures. As to the SPS Agreement the role and importance of the international standards cannot be overestimated. A full fledge risk assessment is both time consuming and rather expensive, and therefore not feasible to apply extensively by countries with limited resources. According to the Agreement any SPS measure shall, however, be based either on an international standard or on a risk assessment. The only exception is when the precautionary principle is applied.

The Hormone case has focused attention more generally in cases where the scientific evidence is limited, but the concerns of the consumers significant. In addition to the hormone-treated meat similar cases are e.g. gene modified food and irradiated food. In democratically governed countries the government has to take into account the opinions of the citizens. On the other hand the SPS Agreement requires scientific proof. How this kind of conflicts are finally solved, has to be seen.

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