

*Australia – Measures Affecting the Importation of Apples from
New Zealand*

(WT/DS367)

**Executive Summary of the Second Written Submission
of New Zealand**

28 April 2009

I. INTRODUCTION

1 In its first written submission, New Zealand established that Australia’s measures for the importation of apples from New Zealand are not in conformity with Australia’s obligations under the *SPS Agreement*. Australia’s purported rebuttal seeks to shelter the *Final Import Risk Analysis for Apples from New Zealand* (IRA) from effective review, and divert the Panel from the fundamental issue in this case, namely, the lack of sufficient scientific evidence to support Australia’s measures. The responses of the experts to the Panel’s questions have confirmed the flaws in the IRA and the insufficiency of the scientific evidence relied on by Australia.

II. DETAILED REBUTTAL OF AUSTRALIA’S ARGUMENTS

A. Measures at issue

2 Australia is incorrect in arguing that the definition of SPS measures contained in the *SPS Agreement* only includes measures that “actively” reduce SPS risks (“principal measures”), and not measures that reduce risk by supporting or implementing “principal measures” (“ancillary measures”). It is clear that the definition of SPS measures in the *SPS Agreement* includes any measures applied to protect against SPS risks. The reasoning in *US – Export Restraints* does not change this definition, and is entirely consistent with treating both “principal” and “ancillary” measures as SPS measures in the present case.

3 With the exception of measure 12, New Zealand maintains its position that the measures identified in New Zealand’s panel request remain at issue, and are correctly characterised.

B. Product at issue

4 Whatever disagreement remains as to the precise “product at issue” in this case, the parties appear to agree that the focus of this dispute should be on the product that is actually traded. New Zealand articulates this as “mature, symptomless apples”. There is no practical difference between this and the product assessed in the IRA.

C. Standard of review and burden of proof

5 The appropriate standard of review in this case is set out in Article 11 of the DSU, which requires that the Panel make an “objective assessment” of the matter. The Appellate Body has stated that this “articulates with great succinctness but with sufficient clarity the appropriate standard of review”, and this standard has been applied in every SPS case to date. Australia proposes a standard of “considerable deference” which has been rejected twice before by the Appellate Body. None of the cases cited by Australia support a “considerable deference” standard, and the “balance of jurisdictional competencies” would be undermined, not promoted, by Australia’s proposed standard of review.

6 New Zealand has not presented an alternative view of the science as Australia suggests. Rather, New Zealand has established that Australia’s measures, and the conclusions in its risk assessment, do not find sufficient support in the science, which is simply discharging New Zealand’s burden of proof.

7 The right to rely on divergent scientific opinion does not help Australia’s defence. The studies or information relied on by Australia either do not meet the definition of “divergent scientific evidence”, or do not sufficiently support Australia’s conclusions. In addition, there is no evidence, divergent or otherwise, regarding the completion of the various pathways as a whole. Moreover, Australia’s implication that the IRA is itself a source of divergent scientific opinion is simply another variation of “considerable deference”, designed to prevent meaningful WTO review of the IRA.

D. Relationship between Article 2.2 and 5.1, and order of analysis

8 Articles 2.2 and 5.1 establish separate legal obligations. Australia’s view that compliance with Article 2.2 “can only be answered” by considering compliance with Article 5.1 is incorrect and ignores the jurisprudence of panels and the Appellate Body. Australia seeks to conflate two distinct provisions into a single obligation with a single test. Combined with Australia’s “considerable deference” standard of review, the result is that panels would be denied a mandate to objectively assess the sufficiency of the science. New Zealand disagrees that Article 2.2 was drafted too narrowly, or that the complexity of risk analysis, the weighing of factors, the use of judgement by risk assessors, or the application of particular methodologies, are reasons to read down Article 2.2 in favour of Article 5.1.

9 In New Zealand’s view, it would be appropriate in the circumstances of this case for the Panel to start its examination with Article 2.2. This approach is consistent with that taken in *Japan – Apples* and the opinions of the Appellate Body in *EC – Hormones* and in *Australia – Salmon*.

E. Australia’s measures are inconsistent with Article 2.2

10 Australia’s measures for fire blight assume that there is a risk that mature, symptomless apples are involved in the spread of the disease. Yet Australia has been unable to point to any scientific evidence to support the existence of a pathway that would or could allow the introduction of fire blight in Australia via mature, symptomless apples imported from New Zealand. The experts’ responses to the Panel’s questions also support New Zealand’s position that there is no such scientific evidence. There is therefore no rational or objective relationship between any of Australia’s measures for fire blight and the scientific evidence, in breach of Article 2.2 of the *SPS Agreement*.

11 There is also a lack of scientific evidence to support each of the individual steps into which Australia breaks up its hypothetical fire blight pathway. For example, New Zealand and the experts have noted the absence of scientific support for Australia’s hypothesis that a single *E. amylovora* bacterium, or a very small number of such bacteria on a mature, symptomless apple, would be sufficient to introduce fire blight under natural conditions. Accordingly, New Zealand maintains its submission that the population levels of *E. amylovora* occasionally found on infested apples at harvest are, under natural conditions, insufficient to be transferred to a susceptible host and result in the spread of disease. While it is possible that in rare circumstances *E. amylovora* may survive on harvested apple fruit, any such bacteria will only survive in small and diminishing numbers, unable to multiply.

12 Having been unable to produce any scientific evidence to support its fire blight measures, Australia then asserts that New Zealand is required to produce the evidence to prove that mature, symptomless apples *could not* introduce fire blight. But this is an attempt to reverse the obligations in the *SPS Agreement*. Rather, under Article 2.2, Australia may not maintain a measure without sufficient scientific evidence. Australia has failed to rebut New Zealand’s case that Australia’s fire blight measures are maintained without sufficient scientific evidence.

13 Australia’s European canker measures are based on the contention that mature, symptomless apples from New Zealand provide a pathway for the establishment of European canker in Australia. The experts’ responses confirm that such a pathway has never been demonstrated to exist.

14 In New Zealand, pre-harvest fruit rots caused by *N. galligena* are extremely rare and latent fruit rots (the only kind relevant to the alleged pathway) are virtually non-existent, which, as confirmed by the experts, reflects the generally unfavourable summer climatic conditions for fruit infection in New Zealand. New Zealand has demonstrated, and the experts have confirmed, that the only “evidence” put forward by Australia of latent infections in New Zealand, the Braithwaite report, does not constitute sufficient scientific evidence to support Australia’s assumptions.

15 Moreover, climatic conditions in Australia are not conducive to the establishment and spread of European canker, an assessment supported by the experts. Australia’s attempts to discredit New Zealand’s climate arguments are misconceived. Australia has resorted to defending the IRA by producing an alternative climate analysis, but this lacks transparency, is methodologically flawed, and shows incorrect results when compared against the known incidence of European canker.

16 The failure of the disease to spread from the four affected orchards during the outbreak of European canker in Tasmania supports New Zealand’s arguments as to climatic unsuitability. In an attempt to rebut this, Australia offers new explanations, not previously

considered by the IRA, as to the existence of a heterothallic strain of *N. galligena* and the absence of a suitable mating partner. However, Australia's theory relies on an isolated finding in Germany which has no basis in the facts surrounding the Tasmanian outbreak. In addition, Australia has failed to rebut evidence of the absence of a pathway, in light of the failure of the disease to spread beyond the four affected Spreyton orchards despite the unrestricted movement of apple fruit for the duration of the Tasmanian outbreak.

17 Australia has failed to provide any scientific support for its contention of a pathway for the transmission of European canker via New Zealand apple fruit. Accordingly, none of the measures imposed by Australia in respect of European canker are based on sufficient scientific evidence, and are thus in breach of Article 2.2.

18 Australia's measures for apple leaf curling midge (ALCM) are also maintained without sufficient scientific evidence. They are premised on the incorrect assumption that all ALCM cocoons are risk factors. But the scientific evidence is clear that only viable cocoons would present any risk, and only a very small proportion of cocoons on New Zealand apples contain viable ALCM.

19 Australia argues that it did take cocoon viability into account but, as confirmed by the experts, it is obvious from the text of the IRA that it did not. Australia's attempt to critique the methodology of the scientific studies on viability is flawed, and does not change the fact that Australia ignored the relevant scientific evidence.

20 Australia's measures are also based on the incorrect assumption that ALCM females have a flying range of up to 200m. As confirmed by the experts, this conclusion is not sufficiently supported by the scientific evidence. The experts have also confirmed New Zealand's position that ALCM emergence will occur over an extended period of time, which was not factored into the IRA's conclusions. Finally, Australia's measures are based on incorrect assumptions about normal retail supply chain practices which would effectively exclude any opportunity for ALCM establishment.

21 There is, therefore, no rational basis for Australia's conclusion that the sequence of events required for ALCM establishment in Australia – many thousands of apples left outside of cold storage, uncovered, in the same place, at the same time, within 30-50m of newly unfurling apple leaves – would occur. Australia's comparison with the establishment of wheat bug in the Netherlands (which has not been linked to trade in apples) is irrelevant to this dispute.

22 Because none of the pest-specific measures are supported by sufficient scientific evidence, neither are the general measures. Australia has failed to identify, with reference to scientific evidence, the particular risks which the general measures are supposed to

address, or their efficacy in dealing with that risk. Australia’s flawed principal/ancillary distinction cannot remedy this failure.

F. Australia’s measures are inconsistent with Article 5.1

23 New Zealand has demonstrated that the IRA is not objectively justifiable; it does not contain reasoning that is objective and coherent, or conclusions that find sufficient support in the scientific evidence relied upon. Australia’s attempts to read down the obligation in Article 5.1 – by proposing a new “objective and credible” standard, misrepresenting the phrase “appropriate to the circumstances”, falling back on “expert judgement” and “scientific uncertainty”, and claiming that New Zealand has conducted its own risk assessment – are without basis, and should be rejected.

24 Australia’s responses to the three fundamental flaws with the IRA’s methodology identified by New Zealand also lack merit. Australia effectively admits that there is no correlation between the maximum value of one in a million apples, and the qualitative description of a “negligible” likelihood as an event that would almost certainly not occur. Australia’s arguments regarding the second flaw merely underline the fact that using a uniform distribution results in an over-representation of values that significantly overestimate the risk. When applied to something traded in millions of units (the “per apple” methodology), the result is that “negligible” events are assessed as occurring numerous times each export season. With regard to the third flaw, Australia has failed to rebut New Zealand’s arguments that the volume of trade will be significantly lower than the IRA’s most likely value and that this is another factor causing the assessed level of risk in the IRA to be inflated.

25 Australia did not evaluate the likelihood of importation, establishment and spread of fire blight, or of the associated potential biological and economic consequences, in relation to imports of mature, symptomless apples from New Zealand. No evidence of the existence of a pathway is contained in the IRA, or in Australia’s first written submission, and thus Australia has failed to assess risk in accordance with Article 5.1. In addition, none of the experts have identified any scientific evidence supporting Australia’s contention that a pathway exists for the introduction of fire blight via mature, symptomless apples.

26 Contrary to Australia’s assertion in its first written submission, New Zealand draws appropriately on the following four matters in support of its case that the IRA is inconsistent with Article 5.1:

- a *Japan – Apples*, in which the panel found that, with respect to mature, symptomless apples, the risk that the transmission pathway could be completed is negligible; and that pathways must have a basis in science before they can legitimately form part of a risk assessment. Without making any suggestion that the Panel in the present case

is “bound” to follow the findings in *Japan – Apples*, or that Australia did not need to carry out its own risk assessment, New Zealand’s position remains that the findings in *Japan – Apples* are directly relevant to the present dispute.

- b The spread of fire blight to other countries via trade in apple fruit has never been reported.
- c Under natural orchard conditions, the number of *E. amylovora* that may, very rarely, be present on fruit will be low, dormant and declining, and as such will be insufficient to be transferred to susceptible hosts and initiate new infections.
- d Roberts and Sawyer 2008 and Roberts *et al.* 1998, which concluded that the risk of introduction of fire blight via imported apple fruit was so small as to be insignificant. None of Australia’s criticisms of these studies have any merit. In any event, Australia misunderstands the purpose of New Zealand’s reference to these studies. New Zealand does not contend that they are a substitute for Australia’s risk assessment, or for the Panel’s role in making an objective assessment of the matter presently before it. Nevertheless, the Panel may look at the conclusions in those papers (as it can with respect to any other relevant scientific study) in considering whether the conclusions in the IRA are supported by the scientific evidence.

27 New Zealand has also established that several of the conclusions drawn by the IRA in relation to its ‘importation scenario’ lack sufficient support in the scientific evidence relied upon. Australia has failed to rebut these criticisms. For example, Australia has failed to rebut New Zealand’s argument that the IRA’s conclusion on the probability of entry of *E. amylovora* into Australia is greatly inflated and is not supported by the scientific evidence. Nor has Australia rebutted New Zealand’s case that there is no evidence to support Australia’s crucial transmission (“exposure”) theory. Australia speculates that *E. amylovora* would be transferred from mature, symptomless apples, either by insects or by mechanical means, to susceptible hosts, under natural conditions, and that an infection would be initiated. New Zealand maintains its claim that there is no scientific evidence that, under natural conditions, low (or any) numbers of *E. amylovora* bacteria on mature apple fruit can be transferred onto a susceptible host and result in an infection. To the contrary, the scientific evidence shows that the likelihood of such occurrence is so small as to be insignificant.

28 In addition, the experts’ responses cast further doubt on the conclusions Australia draws in relation to: its importation steps for *E. amylovora*; the likelihood of importation of *E. amylovora*; and the probability of *E. amylovora* being transferred to and infecting a susceptible host.

29 The IRA’s conclusions about entry, establishment and spread of European canker, as well as its assessment of consequences are not supported by sufficient scientific

evidence. In New Zealand’s first written submission, in addition to noting the lack of scientific support for the pathway as a whole, New Zealand pointed out the lack of scientific support for the individual steps in the pathway. In particular, there is no objective or rational relationship between the scientific evidence and the probability value that is chosen at each step of Australia’s European canker pathway. In other words, the conclusions drawn by the IRA do not find sufficient support in the evidence relied on. The experts’ responses confirm the lack of scientific evidence for almost every step of the pathway.

30 The probability value assigned to the likelihood that infected fruit may be picked (importation step 2) is exaggerated in light of the absence of confirmed reported instances of latent fruit infections in New Zealand due to the unfavourable summer climatic conditions in New Zealand’s apple growing regions. Australia relies primarily on the unverified personal communication referenced in the Braithwaite report and data from Northern hemisphere countries with climatic conditions more favourable to fruit infection, to justify its conclusion in relation to this step, but these do not provide the necessary scientific support.

31 In addition, the experts confirm the lack of scientific support for the IRA’s conclusions with respect to the likelihood that fruit may become surface-contaminated (infested) with *N. galligena* (importation steps 3, 5 and 7). Australia attempts to downplay the significance of these importation steps to the IRA’s assessment, describing them as of only “minor” concern, but in fact they account for more than 80% of the total probability of entry. The experts also support New Zealand’s arguments that the IRA’s conclusions regarding the survival of *N. galligena* during packing house processes and transport to Australia (importation steps 4 and 6) do not find sufficient support in the scientific evidence relied on.

32 As a consequence, the IRA arrives at an inflated estimate of the overall probability of entry, which estimates that approximately 1 in 15,000 New Zealand apples arriving into Australia would be latently infected or infested. Such a conclusion is not supported by the scientific evidence.

33 Australia has also failed to rebut New Zealand’s argument that the IRA’s conclusion on exposure is not supported by sufficient scientific evidence. In particular, New Zealand pointed out the lack of scientific support for the IRA’s conclusions about spore production and dispersal of spores from rotten fruit onto a susceptible host in Australian conditions. Although Australia now seeks to distance itself from the IRA’s assumptions about mummified fruit producing ascospores as a source of new infections in Australia - assumptions which have also been dismissed by the experts - Australia’s revised position is inconsistent with the IRA. In addition, although Australia now insists that the IRA factored in that the dispersal range is no more than a few metres, this is not evident from the IRA. Finally, Australia’s focus on a “sequence of events” continues to overlook the fact that the

IRA failed to factor in the requirement for the simultaneous interaction of all three factors; pathogen, host and climate; in order for infection to occur.

34 Australia's attempted rebuttal of New Zealand's arguments on establishment and spread focuses on attacking New Zealand's climate analysis. Australia's first written submission relies on its own deeply flawed climate analysis, which does not remedy the flaws in the IRA's original consideration of this crucial factor. Australia's rebuttal of New Zealand's arguments on alternative hosts continues to rely on assumptions about the climatic similarity of Australia to regions where *N. galligena* is present on those hosts. These arguments cannot be sustained.

35 Finally, as the experts confirm, Australia's assessment of consequences is a significant over-estimate, as once again Australia has failed to consider its own circumstances, in particular the unfavourable climatic conditions.

36 The IRA's assessment of risk with respect to ALCM is also not sufficiently supported by scientific evidence. Indeed, the expert responses confirm that the IRA's assessment of risk is so flawed that it needs to be "recalculated".

37 The IRA's assessment of the likelihood that picked fruit will be infested with ALCM (importation step 2) has no scientific basis because it did not take into account the scientific evidence on viability. The IRA's conclusions with respect to the likelihood of contamination of New Zealand apples during packing and transport (importation step 3) also have no scientific basis.

38 Australia's only response to the numerous flaws in the IRA's estimate of the likelihood of ALCM entry is to concede that the IRA's eight step analysis of the likelihood of ALCM entry is irrelevant because it also used the August 2005 data provided by New Zealand. Australia's readiness to discard a significant part of its risk assessment is striking and calls into question the soundness of the rest of Australia's risk assessment.

39 The IRA's assessment of the likelihood of ALCM establishment and spread, and related consequences, also has no scientific basis. There is no scientific support for the IRA's key assumptions in respect of ALCM biology and the effect of normal trade practices on the risk associated with the importation of apples from New Zealand.

40 Finally, Australia has failed to evaluate the likelihood of entry, establishment and spread of each pest "according to the SPS measures which might be applied". Australia does not contest the IRA's lack of evaluation of what it terms 'ancillary' measures, but relies instead on its flawed principal/ancillary distinction to argue, incorrectly, that it is under no obligation to do so. In any event, the jurisprudence is clear that even what Australia calls 'ancillary' measures must be evaluated. Further, Australia responds to the

argument that it has failed to consider the retail-ready measure put forward by New Zealand by misinterpreting the relevant case law.

G. Australia’s measures are inconsistent with Article 5.2

41 Australia is incorrect to claim that it was not required, under Article 5.2, to give genuine consideration to the factors identified by New Zealand. Australia has failed to rebut New Zealand’s case that these factors were not taken into account in the IRA.

H. Australia’s measures are inconsistent with Article 5.5

42 New Zealand showed in its first written submission that the way Australia treats the similar risks associated with Japanese nashi pears and New Zealand apples constitutes a breach of Article 5.5. In response, Australia effectively concedes that the diseases are comparable (Japanese Erwinia and fire blight; and brown rot and European canker respectively) and focuses almost exclusively on showing differences in risks between the two situations. Australia relies on, *inter alia*: ‘assumptions’ about area freedom in export areas; a flawed interpretation that situations must be current in order to be compared; arguments about the relevance of trade volumes which are not borne out by the measures applied to Japanese nashi pears; and supposed differences in consequences which are not even supported by Australia’s own assessments in the context of its Draft China Apples IRA. Despite the similar risks, Australia applies no measures to Japanese Erwinia, and the measures applied to Japanese nashi pears in respect of brown rot are much less onerous than those applied to New Zealand apples in respect of European canker. Australia is unsuccessful in its attempts to downplay or discredit the warning signals and additional factors identified by New Zealand, and taken into account in previous cases, as demonstrating discrimination and a disguised restriction on international trade.

I. Australia’s measures are inconsistent with Article 5.6

43 Australia’s primary objection to the alternative measures identified by New Zealand is that they would not meet Australia’s ALOP, based on the assessments of risk contained in the IRA. However, New Zealand challenges these assessments of risk. There is no scientific evidence that mature, symptomless apples can provide a pathway for the introduction of fire blight or European canker into Australia, or that their importation would result in ALCM establishment and spread. New Zealand’s alternative measures therefore meet Australia’s ALOP.

44 Australia’s proposed general measures are not required in respect of any other New Zealand exports. Australia has not provided any explanation as to why these are necessary to meet Australia’s ALOP, and its efforts to downplay their restrictiveness are incorrect. New Zealand’s proposed alternative (audits of WTO compliant measures) is consistent with existing arrangements between Australia and New Zealand and meets Australia’s ALOP.

J. Australia’s measures are inconsistent with Article 8 and Annex C(1)(a)

45 Australia has not responded to New Zealand’s substantive arguments regarding “undue delay”, arguing only that the “IRA process” is not a measure at issue. However, New Zealand’s claim is that the measures resulting from the IRA process are the measures at issue under this claim.

46 The 8 years (94 months) taken to complete the IRA clearly exceed what was reasonably necessary given: Australian officials originally expected the process to take 12 months; Australian IRAs must now be completed within 24-30 months; similar IRAs had been conducted previously; there was no difficulty gaining access to the scientific information; there was no significant evolution of the science during this period; and there is no reasonable explanation that would justify the time taken to complete the IRA. Australia has not rebutted the evidence provided by New Zealand of a parallel and intertwined political process that helps to explain, but not justify, this delay.

III. CONCLUSION

47 For these reasons, further developed in the body of its second written submission, New Zealand reaffirms the request in its first written submission that the Panel find that Australia’s measures are inconsistent with the *SPS Agreement*.