WORLD TRADE ORGANISATION

Third Party Submission to the Panel

EUROPEAN COMMUNITIES – MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS (WT/DS291, WT/DS292, WT/DS293)

THIRD PARTY SUBMISSION OF NEW ZEALAND

24 May 2004

CONTENTS

I INTRODUCTION

1.01 The Panel in this dispute is asked to determine whether certain measures adopted by the European Communities (EC) affecting the approval and marketing of biotech products[1] meet the requirements of the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures* (the *SPS Agreement*). For the reasons set out in this submission, New Zealand considers that the measures at issue are sanitary and phytosanitary measures and as such are subject to the jurisdiction of the *SPS Agreement.*

1.02 New Zealand is one of many WTO Members that has exercised its right under the *SPS Agreement* to adopt measures to regulate the entry and release of new organisms, including genetically modified organisms, necessary for protection from any adverse effects of those organisms. The *SPS Agreement* guarantees to WTO Members the right to take measures for the protection of human, animal and plant life or health.[2] The Complainants in this dispute do not contest that right.[3] In fact they endorse a Member's right to take measures to regulate the import and marketing of biotech products.

1.03 However sanitary and phytosanitary measures adopted by WTO Members are subject to the disciplines set out in the *SPS Agreement.*[4] Those disciplines seek to ensure that such measures do not restrict trade unnecessarily. At issue in this dispute is whether the EC has complied with those disciplines.

1.04 As both a significant producer and exporter of agricultural products, New Zealand has a strong interest in ensuring that the delicate balance of rights and obligations set out in the WTO Agreements, especially the *SPS Agreement*, is

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[1] New Zealand uses this term throughout the submission in the same sense as it is used by Canada, First Written Submission of Canada, 21 April 2004 ("Submission of Canada"), para 27.

[2] Article 2.1.

[3] First Submission of the United States, April 21, 2004 ("Submission of the US"), para 68, First Submission of the Argentine Republic, 21 April 2004 ("Submission of Argentina"), para 195.

[4] Article 2.1.

maintained. New Zealand has pursued this systemic interest through its participation as a third party in a number of other disputes that have sought to clarify the provisions of the *SPS Agreement*.

1.05 This dispute raises a number of specific issues regarding the interpretation of the *SPS Agreement* upon which New Zealand will comment. This submission will first argue that the EC's moratorium and its product-specific marketing bans[5] are "measures" within the meaning of the *SPS Agreement* and thus are subject to scrutiny for compliance with the disciplines of the *SPS Agreement*.

1.06 Second, this submission will discuss the procedural requirements that Members must comply with in adopting sanitary and phytosanitary measures, particularly under Articles 7 and 8 of the *SPS Agreement*. And third this submission will comment on issues relating to the right of Members to adopt measures in accordance with the *SPS Agreement* and to determine their appropriate level of protection from risks to human, animal or plant life or health under the *SPS Agreement*.

1.07 Insofar as the EC's product-specific marketing bans may not be subject to the provisions of the *SPS Agreement*, the *Agreement on Technical Barriers to Trade* (the *TBT Agreement*) would apply as argued in the alternative by Canada and Argentina. New Zealand has chosen not to address arguments concerning the *TBT Agreement* in this submission, but reserves the right to do so in the Third Party Session of the Panel.

1.08 Given the limited time that New Zealand has had to consider the First Written Submission by the EC,[6] New Zealand reserves the right to make any further comment on it during the Third Party Session of the Panel.

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[5] New Zealand uses the terms "moratorium" and "product-specific marketing bans" in the same sense as they are used by Canada (Submission of Canada, para 1). New Zealand will not address issues relating to the national measures adopted by particular EC member states.

[6] First Written Submission by the European Communities, 17 May 2004 (Submission of the EC).

1.09 New Zealand will not comment on the EC's presentation in Part II of the EC submission ("Factual Part"), including the EC's presentation of aspects of New Zealand's legislation or policy which are not in issue in this dispute.[7]

[7] This should not be read, however, as endorsing the EC's representation of any aspect of New Zealand's policy or legislation.

II LEGAL ARGUMENTS

1 The moratorium and product-specific marketing bans are "measures" for the purposes of the *SPS Agreement*

2.01 Annex A paragraph 1 of the *SPS Agreement* defines what are "sanitary or phytosanitary measures" and are therefore subject to the provisions of the *SPS Agreement*. What distinguishes sanitary and phytosanitary measures from other measures that affect international trade is their purpose, that is, they seek to provide protection from certain sanitary and phytosanitary risks.

2.02 Sanitary or phytosanitary measures include, *inter alia*, measures applied to protect plant life from risks arising from the entry, establishment or spread of pests, and measures applied to protect human or animal life or health from risks arising from contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs. The evidence of the Complainants[8] shows that the EC's regulatory approvals processes have been adopted by the EC for the purpose of providing protection from one or more of these risks. Both the moratorium and the product-specific marketing bans which affect the implementation of these processes are thus sanitary or phytosanitary measures within the meaning of the *SPS Agreement*.

2.03 An illustrative list of the types of sanitary and phytosanitary measures that a member might adopt is also provided in paragraph 1 of Annex A of the *SPS Agreement*. It is clear from the drafting of paragraph 1 that this list is not exhaustive and that a measure of a type not listed, but which is adopted for one of the purposes listed, would still be a sanitary and phytosanitary measure falling within the jurisdiction of the *SPS Agreement*.

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[8] Submission of Argentina, paras 36-63, Submission of the US, paras 74-80, Submission of Canada, paras 160-174.

2.04 WTO jurisprudence has clarified that the term "measure" in the context of the WTO Agreements has a broad content. Accordingly it captures not just acts, but also omissions;[9] and not just legally binding or mandatory acts or policies, but non-mandatory measures.[10]

2.05 The reason for interpreting the term "measure" as having such a broad content is clear. Primarily, it means that actions of a Member that affect trade, whether formal or informal, are comprehensively subject to scrutiny for consistency with their WTO obligations. This requires looking beyond what might otherwise appear to be "discrete steps in an internal decision-making process"[11] to assess overall the nature and impact of a Member's actions that impact on trade. Such an approach is essential to the effective functioning of a rules-based trading system where Members act on the basis of a carefully negotiated balance of rights and obligations.

2.06 A broad interpretation of "measure" is also specifically consistent with the object and purpose of the *SPS Agreement*. The *SPS Agreement* imposes disciplines on WTO Members' use of sanitary and phytosanitary measures in order to avoid unnecessarily restricting trade. A narrow approach to the interpretation of "measure", that, for example, would limit scrutiny of Members' actions to legislative or other clearly identifiable formal action, would clearly undermine that objective.

2.07 A narrow interpretation of "measure" would allow WTO Members to circumvent their WTO obligations simply by resorting to less direct means than transparent, formally adopted laws or procedures. It would also mean that so long as the formal laws or regulations that a Member has adopted comply with the *SPS Agreement*, a Member could act with impunity when it comes to applying or implementing those laws or regulations inconsistently with WTO rules.

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[9] Report of the Appellate Body, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Fat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para 81.

[10] Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, para 8.111.

[11] Submission of the EC, para 552.

2.08 As acknowledged by the Complainants, the existence of the EC's moratorium and product-specific marketing bans has to be inferred from the actions and statements of the EC. That is because the EC has issued no written document, regulation or legislative provision establishing either the moratorium or the marketing bans. In the present dispute a narrow interpretation of the term "measures" would allow the EC to avoid scrutiny of its actions that impact on trade in biotech products because the Panel could look no further than the legislated approvals process that the EC has in place. New Zealand submits that such an interpretation and approach must be rejected. The *SPS Agreement* and WTO jurisprudence provides sufficient basis for the Panel in this dispute to consider the EC's moratorium and product-specific marketing bans to be "measures" and therefore must submit them to scrutiny for compliance with the EC's WTO obligations under the *SPS Agreement*.

2.09 Any other conclusion would significantly undermine not only the disciplines of the *SPS Agreement*, but of all the WTO Agreements, and substantially impair the ability of other Members to enforce effectively the commitments made therein.

2 Procedural requirements of the *SPS Agreement*

(i) Failure to "publish promptly"

2.10 The need for transparency in the adoption and application of sanitary and phytosanitary measures is an important aspect of the protections provided by the *SPS Agreement* against undisguised restrictions on trade. Under Article 7 Members are required to meet the requirements for transparency set out in Annex B, including the requirement in paragraph 1 to "publish promptly" all sanitary or phytosanitary regulations that they adopt.

2.11 Applying Appellate Body jurisprudence regarding the interpretation of the term "sanitary or phytosanitary regulations",[12] it is clear that the EC's moratorium and product-specific marketing bans are subject to the requirement that they be "published promptly". As presented by the Complainants, the EC has failed to publish the existence of either the moratorium or the bans, and thus has also failed to do so "promptly" as required.

(ii) Undue delay

2.12 Under Article 8 of the *SPS Agreement* WTO Members must observe the provisions of Annex C in the operation of their approval procedures associated with sanitary and phytosanitary measures, including the requirement in paragraph 1(a) of Annex C that approval procedures are "undertaken and completed without undue delay". In their submissions the Complainants discuss the meaning of the term "undue delay" and conclude that in the context of paragraph 1(a) of Annex C it refers to "the 'unjustifiable' and 'excessive' 'hindrance' in undertaking or completing an approval procedure."[13] As the EC acknowledges,[14] both the reason for the delay and its duration are relevant considerations in determining whether the delay is undue.

2.13 Thus whether there has been "undue delay" within the meaning of paragraph 1(a) must be determined on a case by case basis. In New Zealand's view there must be a strong presumption that "undue delay" has occurred where a Member has in fact suspended the operation of the approval procedures provided for in its own legislation without providing any justification in terms of the *SPS Agreement* for doing so. The absence of such justification for the delay, or of a clear timeframe for completion of the approval processes, are characteristic of an "undue delay". Accordingly in the present dispute the EC has acted with "undue delay" in undertaking or completing its approval procedures for biotech products.

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[12] Report of the Appellate Body, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, para 105.

[13] Submission of the US, para 89, Submission of Canada, para 239, Submission of Argentina, para 315.

[14] Submission of the EC, para 479.

3 Substantive Requirements of the *SPS Agreement*

2.14 The *SPS Agreement* imposes substantive, as well as procedural, disciplines on the use of sanitary and phytosanitary measures. Article 2.1 gives Members the right to establish measures, including for biotech products, that are necessary for the protection of human, animal or plant life or health and that are not inconsistent with the provisions of the *SPS Agreement*. Article 2.2 sets out the basic requirement that such measures must be based on scientific principles and may not be maintained without sufficient scientific evidence.

2.15 Successive Panels and the Appellate Body have now provided considerable guidance on the interpretation of provisions of the *SPS Agreement* that are relevant to this dispute. In considering the arguments before it the Panel should apply that guidance in order to ensure that the balance is maintained between a Member's right to adopt sanitary and phytosanitary measures on the one hand, and its obligation not to unnecessarily restrict trade on the other.

2.16 This balance is evident in the provisions of the Agreement relating to a Member's determination of its appropriate level of sanitary or phytosanitary protection. Annex A, paragraph 5, of the *SPS Agreement* defines the "appropriate level of sanitary or phytosanitary protection" as that "deemed appropriate by the Member establishing a … measure". However, Members may not adopt measures that are more trade restrictive than necessary to achieve their desired level of protection, taking into account technical and economic feasibility. The *SPS Agreement* also provides guidance as to when a measure could be considered to be more trade restrictive than necessary, namely where another significantly less trade restrictive measure is technically or economically feasible that would achieve the same level of protection.[15]

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[15] Footnote 3, Article 5.6.

2.17 It is not necessary in this case to examine in great detail the level of protection afforded by the EC's legislated approvals processes. The legislative framework adopted by the EC must be taken to represent at least the level of protection deemed appropriate by the EC to manage risks arising from biotech products. If the measure actually applied is more trade restrictive than that, then the *SPS Agreement*, and basic logic, supports the conclusion that the measure applied is more trade restrictive than necessary to achieve the level of protection deemed appropriate. The EC's moratorium and product-specific marketing bans are measures that are clearly more trade restrictive than necessary to meet the level of protection that the EC itself has deemed to be appropriate in respect of biotech products. Accordingly, the moratorium and product-specific marketing bans are measures that are more trade restrictive than necessary for the protection of human, animal or plant life or health and thus are inconsistent with the provisions of the *SPS Agreement*.

III CONCLUSION

3.01 In conclusion, the *SPS Agreement* guarantees to WTO Members the right to adopt measures for the protection of human, animal or plant life or health from sanitary or phytosanitary risks, including risks arising from trade in biotech products. The *SPS Agreement* reflects a delicate balance between protecting this right, and ensuring that such measures do not restrict trade unnecessarily.

3.02 The EC's measures, the moratorium and product-specific marketing bans, are sanitary or phytosanitary measures that are subject to the disciplines of the *SPS Agreement*. These measures fail to meet the procedural requirements of Articles 7 and 8 of the *SPS Agreement*. The measures are also more trade restrictive than necessary to achieve the appropriate level of protection from risks which may arise from biotech products. Accordingly the Panel should find that the EC has failed to comply with its obligations under the *SPS Agreement*.