BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

Australia – Measures Affecting the Importation of Apples from New Zealand

(AB-2010-2 / DS367)

Other Appellant Submission of New Zealand

15 September 2010

CONTENTS

CASES CITED

Short Title	Full Case Title and Citation
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
Canada – Periodicals	Appellate Body Report, *Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR:I, 449.
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add. 1 to Add. 9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847.
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006;IX, 3791.
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3.

ABBREVIATIONS

AQIS	Australian Quarantine and Inspection Service (Australia)
DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
IRA	*Final Import Risk Analysis Report for Apples from New Zealand*, November 2006
SPS	Sanitary and phytosanitary
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
WTO	World Trade Organization

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. New Zealand seeks review by the Appellate Body of certain issues of law and legal interpretation relating to New Zealand's claim under Annex C(1)(a) and Article 8 of the *SPS Agreement* and Article 6.2 of the *DSU*.

2. New Zealand appeals the Panel's finding that New Zealand's claim under Annex C(1)(a) and its consequential claim under Article 8 of the *SPS Agreement* are outside of the Panel's terms of reference.[1] New Zealand submits that the Panel made a number of errors relating to the interpretation of Annex C(1)(a) of the *SPS Agreement* and Article 6.2 of the *DSU* which resulted in the erroneous conclusion that New Zealand had to challenge the completed "IRA process" as the measure at issue, in order to bring a challenge under Annex C(1)(a). The Panel erred in the following respects:

(a) The Panel's analysis proceeds from the erroneous assumption that the measure at issue must directly cause the violation of obligations;[2]

(b) The Panel blurs the distinction between measures at issue and claims;[3] and

(c) The Panel's analysis that the IRA process, although expired, is the only measure that can be challenged because it continues to "impair benefits", ignores the fact that it is the measures challenged by New Zealand that continue to impair benefits.[4]

3. New Zealand has challenged, under Annex C(1)(a), the undue delay in the development of the 17 requirements specified in the IRA set out in New Zealand's

[1] Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, 9 August 2010 (*Australia – Apples*), para. 8.1 (f) (hereinafter, Panel Report, *Australia – Apples*).
[2] Panel Report, *Australia – Apples*, see for example paras. 7.1457, 7.1459, 7.1468, 7.1469 and 7.1474.
[3] Panel Report, *Australia – Apples*, see for example paras. 7.1457 – 7.1474.
[4] Panel Report, *Australia – Apples*, paras. 7.1486 – 7.1489.

panel request.[5] These are measures that exist and continue to impair benefits. New Zealand does not consider that Annex C(1)(a), properly interpreted, precludes such a challenge, or requires that the measure at issue must necessarily be the expired IRA process. Nor does Article 6.2 of the *DSU* impose such a limitation. In ruling to the contrary, the Panel effectively sets a higher standard for panel requests as regards Annex C(1)(a) claims than it does for claims under other provisions in the *SPS Agreement.*

4. New Zealand respectfully requests that the Appellate Body reverse the relevant Panel findings and complete the analysis regarding New Zealand's undue delay claim.

II. THE PANEL ERRED IN FINDING THAT THE MEASURE AT ISSUE MUST BE THE "IRA PROCESS"

A. THE NATURE OF THE PANEL'S FINDING

5. At the outset, New Zealand observes that the Panel's finding on this issue relates to the Panel's terms of reference under Article 6.2 of the *DSU*. Specifically, the Panel found that New Zealand's claim under Annex C(1)(a) and its consequential claim under Article 8 of the *SPS Agreement* are outside of the Panel's terms of reference in this dispute.[6] The basis for this finding is that "New Zealand has not effectively identified the measure at issue in the context of its Annex C(1)(a) and Article 8 claims", and that therefore such claims do not form part of the matter covered by the Panel's terms of reference.[7]

[5] *Australia - Apples*, Request for the Establishment of a Panel by New Zealand (WT/DS367/5), 7 December 2007.
[6] Panel Report, *Australia – Apples*, para. 8.1(f).
[7] Panel Report, *Australia – Apples*, paras. 7.1477 and 7.1490.

6. New Zealand notes that the Panel's findings and reasoning relate to the matter of defining the Panel's terms of reference.[8] The Panel has not based its decision on due process grounds, or on any actual prejudice suffered by Australia. This is not surprising, as Australia can have been in no doubt that New Zealand's claim under Annex C(1)(a) would require a defence of the eight year delay in developing the measures at issue in this dispute. In addition to being a consistent feature of exchanges between Australia and New Zealand at all levels up to and including these dispute proceedings, the unreasonableness of the delay had been highlighted and commented on by an Australian government-mandated review of its quarantine system. The review identified a small number of so-called 'legacy' IRAs, including the IRA for New Zealand apples, which have 'done much to generate international perceptions' of 'trade restrictiveness, unreasonable delays, and questionable science'[9]. The review panel noted that the timeframes for these legacy IRAs were 'extraordinary compared to equally complex science-based decisions in other regulatory fields' and concluded that:

> 'While these IRAs may have involved complex scientific assessments, the [review] Panel's judgement is that the time taken *is difficult to justify*. The Panel notes that [in] other equally complex areas such as therapeutic goods and major project approvals involving environmental issues, the time taken has been much less than in the biosecurity context.'"[10]

7. In New Zealand's view, it is inconceivable that Australia would not have known to begin preparing a defence of this eight year delay in light of New Zealand's panel request. Accordingly, the Panel was correct not to deal with this as a matter of due process.

[8] See Panel Report, *Australia – Apples*, para. 7.1443: "The first and main question in regard to New Zealand's claims under Annex C(1)(a) and Article 8 of the SPS Agreement is whether these claims, in particular the measures to which the claims relate, are within the Panel's terms of reference."

[9] New Zealand's second written submission, para. 2.935.

[10] New Zealand's second written submission, para. 2.935.

B. THE ERRORS IN THE PANEL'S ANALYSIS

8. New Zealand submits that the Panel misinterpreted Annex C(1)(a) of the *SPS Agreement* and Article 6.2 of the *DSU* in concluding that New Zealand had to challenge the completed "IRA process", as a measure separate from the 17 measures specified in the IRA, in order to bring a challenge under Annex C(1)(a).[11] This conclusion is based on a number of errors of law and legal interpretation, as discussed below.

1. The Panel's analysis proceeds from the erroneous assumption that the measure at issue must directly cause the violation of obligations

9. The Panel frames its analysis in the following way:

> "As to the specific measure that New Zealand was supposed to identify in its panel request, *what* does New Zealand challenge under Annex (C)(1)(a)? *What*, according to New Zealand *causes* the violation of Annex C(1)(a)?"[12]

10. The Panel's subsequent analysis focuses on determining the measure that "causes the violation"[13] or "infringes the provision"[14]. The Panel appears to conclude that it is the IRA process that "causes" the violation, rather than the development of the 17 measures identified by New Zealand.[15]

11. New Zealand submits that the Panel has erred in framing the issue in this way. In New Zealand's view there is no requirement in the *SPS Agreement*, the *DSU* (including Article 6.2), or the other covered Agreements requiring that for every obligation, the measure at issue must necessarily directly cause the violation. For example, under Article 5.1 of the *SPS Agreement*, it is not the measure at issue that causes the breach, but rather the lack of an objectively justifiable risk assessment. Likewise, under Article X:1 of the *GATT 1994*, generally the measure at issue will not

[11] See, for example, Panel Report, *Australia – Apples*, paras. 7.1477 and 7.1489.
[12] Panel Report, *Australia – Apples*, para. 7.1459. (Emphasis added).
[13] Panel Report, *Australia – Apples*, para. 7.1467.
[14] Panel Report, *Australia – Apples*, para. 7.1469.
[15] See Panel Report, *Australia – Apples*, paras. 7.1471 – 7.1477.

be the action(s) or omission(s) that actually caused the delay in publication. In the safeguards context, the measures at issue will typically be the safeguard measures themselves, yet a number of provisions are violated by inadequacies in the underlying investigation.[16] The objectives of the *DSU* are framed in terms of measures that impair benefits, rather than measures that cause a violation of the covered Agreements.[17]

12. Although in *EC – Selected Customs Matters* the Appellate Body said that "the 'specific measure' to be identified in a panel request is the object of the challenge, namely the measure that is alleged to be causing the violation of an obligation contained in a covered agreement'[18], New Zealand submits that the Appellate Body in that case was not establishing a universally applicable limitation on what may constitute a "measure at issue" under WTO dispute settlement. Rather, it was doing the opposite. The Appellate Body's focus was on ensuring that "measures at issue" are not limited by the obligation being challenged. The Appellate Body went on to say that "a complainant is entitled to include in its panel request an allegation of inconsistency with a covered agreement of any measure that may be submitted to WTO dispute settlement."[19]

13. In New Zealand's view, the Panel erred in restricting claims under Annex C(1)(a) to situations where the measure at issue directly "causes" the violation. As will be elaborated in the next section, this resulted in the Panel blurring the distinction between the measures at issue and the obligation.

[16] See, for example, *Agreement on Safeguards*, Articles 3 and 4.

[17] See, for example, *DSU*, Article 3.3. Even assuming, however, that the Panel was correct that the measure at issue must cause the breach it is not clear to New Zealand in what sense the IRA process causes the undue delay. As New Zealand argued before the Panel, the actual causes of the delay were an intertwined political process and the acts and omissions of numerous actors within the Australian political and quarantine system that collectively resulted in an eight year delay. So, even assuming that a requirement of cause and effect is required – which it is not - the IRA process did not in fact *cause* the delay. The IRA process *was delayed* as a result of certain causes, it did not *cause* the delay.

[18] Panel Report, *Australia – Apples*, para. 7.1457.

[19] Appellate Body Report on *EC – Selected Customs Matters*, para. 133.

2. The Panel blurs the distinction between measures at issue and claims

14. The Panel found that the "procedure to check and ensure the fulfilment of sanitary and phytosanitary measures" referred to in the chapeau of the Annex C(1)(a) could refer to quarantine approval processes such as the IRA process. It stated that:

> the "SPS measure" referenced in the language of Annex C(1)(a) may be a requirement to conduct an import risk assessment prior to allowing for the importation of goods that might pose sanitary or phytosanitary risks. In that case, the actual import risk assessment conducted for a specific good might constitute the procedure to check and ensure the fulfilment of this "SPS measure".[20]

15. While New Zealand does not take issue with this statement,[21] the Panel went on to find that the measure at issue must necessarily be the "procedure" referred to in the chapeau of Annex C(1)(a). In doing so, the Panel erred.

16. New Zealand submits that the Panel has improperly limited the measure at issue by reference to the WTO obligation in question, blurring the distinction between measures at issue and claims. In *EC – Selected Customs Matters* the Appellate Body, faced with a similar issue, made the following findings:

> 127 We are thus called upon to determine whether the Panel erred in finding that, when a violation of Article X:3(a) of the GATT 1994 is being claimed, the "measure at issue" must necessarily be the "manner of administration" of the legal instruments of the kind described in Article X:1, and that such legal instruments cannot themselves be identified as the "measures at issue".
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> …
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> 132. At the heart of the Panel's reasoning stands the proposition that the term "measure at issue" in Article 6.2 of the DSU should be interpreted in the light of the specific

[20] Panel Report, *Australia – Apples*, para. 4.1463.

[21] See, for example, New Zealand's opening oral statement at the first substantive meeting of the Panel, para. 128; New Zealand's reply to Panel question 146 after the first substantive meeting, paras. 299 – 306; and New Zealand's second written submission, para. 2.930.

> WTO obligation that is raised in a particular claim. This reasoning appears to us to be flawed. The Panel's proposition would introduce uncertainty because the identification of the measure would vary depending on the substance of the legal provision invoked by a complainant and the interpretation that a panel might give to that provision. As we noted above, Article 6.2 of the DSU sets out "two distinct requirements" applicable to requests for the establishment of a panel: "identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*)" sufficient to present the problem clearly. These two requirements are conceptually different and they should not be confused. In finding that the term "measures at issue" in Article 6.2 should be interpreted in the light of the specific WTO obligation that is alleged to be violated, the Panel blurred the distinction between *measures* and *claims*.
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> 133. In our view, a complainant is entitled to include in its panel request an allegation of inconsistency with a covered agreement of any measure that may be submitted to WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body provided guidance on the types of measures that may be the subject of dispute settlement. Relying on, *inter alia*, Article 3.3 of the DSU, which refers to "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*", the Appellate Body stated that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings." As long as the specificity requirements of Article 6.2 are met, we see no reason why a Member should be precluded from setting out in a panel request "any act or omission" attributable to another Member as the measure at issue.[22]

17. According to the Panel in *Australia – Apples*, and contrary to this Appellate Body jurisprudence, with respect to its Annex C(1)(a) claim, New Zealand was not entitled to identify the 17 SPS requirements contained in the IRA as the measures at issue.[23] Instead, the Panel has found that the measure at issue must be the approval

[22] Appellate Body Report on *EC – Selected Customs Matters*, paras. 127 – 133 (footnotes omitted).

[23] Australia does not contest that these measures qualify as acts or omissions attributable to Australia which may be submitted to WTO dispute settlement.

procedures referred to in the chapeau of Annex C(1)(a). In doing so, the Panel has interpreted the phrase "measures at issue" in *DSU* Article 6.2 in light of the specific obligation being challenged. As the Appellate Body concluded in *EC – Selected Customs Matters*, under *GATT 1994* Article X:3, although the obligation relates to the "manner of administration" that does not mean that the manner of administration must be the measure at issue. In the same way, under Annex C(1)(a), although the obligation applies to approval procedures, these approval procedures do not necessarily have to be identified as the measure at issue. New Zealand considers that the Panel, by restricting the measure at issue under Annex C(1)(a) to the "procedure to check and ensure the fulfilment of sanitary and phytosanitary measures" (in this case, the IRA process), has blurred the measures at issue with the claim.

18. In this regard the Panel's finding is at odds with the finding of the Panel in *EC – Approval and Marketing of Biotech Products*. In that case the measure at issue was the *de facto* moratorium and expressly not the procedures referred to in the chapeau.[24] New Zealand considers that this inconsistency highlights the problem of taking a restrictive approach to the question of what may be considered "measures at issue" under Article 6.2 of the *DSU*, especially in light of the various circumstances that might give rise to a challenge under Annex C(1)(a).

3. The Panel's analysis that the IRA process, although expired, is the only measure that can be challenged because it continues to "impair benefits", ignores the fact that it is the measures challenged by New Zealand that continue to impair benefits

19. The Panel's conclusion that only the IRA process can be challenged under Annex C(1)(a) is "predicated"[25] on its further view that the IRA process could be challenged "even though that process had already been completed by the time the Panel

[24] See New Zealand's reply to Panel question 146 after the first substantive meeting of the Panel, para. 299; and the Panel Report on *EC – Approval and Marketing of Biotech Products*, paras. 7.1491 and 7.1492.

[25] Panel Report, *Australia – Apples*, para. 7.1478.

was established".[26] The Panel recognises the general rule that "measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel".[27] However, it finds support for the view that the expired IRA process can be challenged in this case on the basis that the IRA process continues to "affect the operation" of a covered Agreement, and more specifically is a measure "whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement."[28]

20. In further explaining how the IRA process continues to impair benefits, the Panel states the following:

> Using the same logic, an alleged undue delay in a completed approval process that might continue to impair benefits accruing to the complainant under Annex C(1)(a) of the SPS Agreement should not be excluded from WTO dispute settlement merely because the process has been completed. This is particularly the case when the complainant was prevented from exporting the goods subject to the approval process during that time, and the complainant *continues to feel jeopardized* from starting its exports *in the light of the SPS requirements resulting from the approval process.*[29]

21. But rather than support the position that the Panel ultimately takes, this statement neatly encapsulates why New Zealand challenged the 17 measures contained in the IRA rather than the expired "IRA process". As the Panel notes, the continuing impairment of benefits arises not from the expired IRA process, but from the "SPS requirements resulting from the approval process". That is precisely the reason that New Zealand made those measures the subject of its challenge. How does the IRA

[26] Panel Report, *Australia – Apples*, para. 7.1489.
[27] Panel Report, *Australia – Apples*, para. 7.1488.
[28] Panel Report, *Australia – Apples*, para. 7.1485 and 7.1486. The Panel also supports its reasoning by reference to the word "complete" in Annex C(1)(a). New Zealand agrees with the Panel that "[c]ommon sense dictates that the completion of an approval process shall be open to challenge under WTO dispute settlement after the completion has taken place." (para. 7.1482). It does not follow, however, that the IRA process must therefore be the measure at issue. As New Zealand argues, where SPS measures have been developed and adopted in the context of an unduly delayed approval process, such measures can be the basis of a challenge of that undue delay, particularly where the IRA process has expired and the measures developed continue to impair benefits.
[29] Panel Report, *Australia – Apples*, para. 7.1486. (Emphasis added).

process continue to impair benefits if not through the SPS measures that resulted from it? The SPS measures are inextricably linked to the process by which they were developed; they were not developed without undue delay, and they continue to impair benefits. In these circumstances, New Zealand submits that they are an appropriate target of challenge under Annex C(1)(a).

22. The Panel has implicitly recognised as much in the passage quoted above. Unfortunately, the Panel did not follow this reasoning through to its logical conclusion, namely that the measures that are actually continuing to impair benefits can be the measures at issue. Instead, the Panel ruled that the *only* way to challenge an unduly delayed but completed approvals process is through an expired measure at issue. For the reasons noted above, the Panel has not substantiated why Annex C(1)(a) should be interpreted in such a restrictive manner.

4. The Panel's conclusion that the approval process is the *only* measure that can be challenged goes too far

23. In New Zealand's view, the Panel was incorrect to consider that the *only* measure that could be challenged in the circumstances of this case was the expired IRA process. As argued before the Panel, New Zealand considers that Annex C(1)(a) of the *SPS Agreement* is, among other things, an obligation to develop SPS measures without undue delay.[30] Where SPS measures have been developed and adopted in the context of an unduly delayed approval process, such measures can be the basis of a challenge of that undue delay. These are the measures that are in existence, and these are the measures that continue to impair benefits.

24. However, this does not mean that this is the only way to challenge an unduly delayed approval process. For example, where an approval process is ongoing, New Zealand considers that the approval process itself, or the acts or omissions leading to

[30] See, for example, New Zealand's opening oral statement at the first substantive meeting of the Panel, para. 130; New Zealand's reply to Panel question 143 after the first substantive meeting with the Panel, para. 298.

such delays, could be challenged as the measures at issue. In this respect, New Zealand agrees with the Panel that it would be inappropriate to prevent a claim being brought to WTO dispute settlement merely because the risk assessment process is ongoing.[31]

25. Similarly, New Zealand also agrees with the Panel that it may be possible to characterise the substantive SPS measures that are developed as part of an approval process, and the approval process itself, as separate SPS measures.[32] However, in New Zealand's view it does not follow from this that *only* the approval process can be challenged under Annex C(1)(a), even when it has expired.

26. Finally, New Zealand notes that one consequence of the Panel's ruling is the creation of a dual standard under Article 6.2 of the *DSU*. With respect to New Zealand's claims under Articles 2.2, 5.1, 5.2, 5.5 and 5.6 it was sufficient to identify the measures at issue and the specific obligation breached, yet according to the Panel, for a claim under Article 8 and Annex C(1)(a) something more is required. The Panel has not adequately justified this difference in treatment.

III. COMPLETING THE ANALYSIS

27. In light of the errors of law and legal interpretation outlined above, New Zealand considers that the Panel's finding that New Zealand did not identify the measure at issue in its panel request should be reversed.[33] New Zealand further requests the Appellate Body to complete the analysis of New Zealand's undue delay claim.

28. The panel in *EC – Approval and Marketing of Biotech Products* found that a delay would be "undue" if the time taken to complete an approval procedure "exceeds the time that is reasonably needed to check and ensure the fulfilment of its relevant SPS

[31] Panel Report, *Australia – Apples*, para. 7.1472.
[32] Panel Report, *Australia – Apples*, para. 7.1463.
[33] The Appellate Body has completed the analysis in a number of previous cases in which there were sufficient factual findings or undisputed facts on the record to do so. See, for example, Appellate Body Report on *Canada – Periodicals*, para.24; Appellate Body Report on *EC – Hormones*, para. 222; Appellate Body Report on *Australia – Salmon*, para. 118.

requirements".[34] The key factual matters that establish that the time taken to complete the apples IRA exceeded the time that was reasonably needed are uncontested. In particular:

- the eight year period it took to complete the IRA;[35]

- letters from Australia's quarantine service at the outset of the process that indicated that "the risk analysis will take approximately twelve months to complete", and that it would conduct a routine process "based on consideration that this proposal is technically less complex and does not require assessment of significantly greater or different risks than those AQIS previously examined";[36]

- the recognition, in an Australian government-mandated review of Australia's quarantine system, that the delay is "difficult to justify"[37]; and

- the absence of any explanation (let alone justification) by Australia of this delay.

IV. CONCLUSION

29. For the reasons outlined above, New Zealand respectfully requests that the Appellate Body reverse the Panel's finding that New Zealand's claims under Annex C(1)(a) and Article 8 of the *SPS Agreement* fall outside the Panel's terms of reference, and complete the analysis with regard to New Zealand's claim of undue delay.

[34] Panel Report on *EC – Biotech Products*, para 7.1499.

[35] Panel Report, *Australia – Apples*, para. 2.31-2.32. See also Annex 1 of Australia's first written submission.

[36] See Letter from Australian Quarantine and Inspection Service to New Zealand Ministry of Agriculture and Forestry, dated 25 February 1999; including additional letters to Stakeholders regarding Import Risk Analysis for apples from New Zealand, dated 15 April 1999 and 28 June 1999, in Exhibit NZ-104.

[37] New Zealand's second written submission, para. 2.935 quoting *One Biosecurity: A Working Partnership, the Independent Review of Australia's Quarantine and Biosecurity Arrangements, Report to the Australia Government*, 30 September 2008, p. 100.