

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

(WT/DS367)

**New Zealand's Closing Statement
for Second Substantive Meeting**

2 July 2009

Mr. Chairman, Members of the Panel,

1. New Zealand's closing statement will be brief. What New Zealand would like to do is come back to the fundamentals – the core of this case – because much has been said throughout this case by Australia to distract from that central core.
2. You have heard over the course of these proceedings many arguments by Australia about what should be taken into account in your assessment of the evidence in this case. These have included the notions of considerable deference, scientific uncertainty, and expert judgment. And in their opening statement yesterday, Australia tried to characterize New Zealand's position as one of requiring scientific certainty. And under the guise of considering the "practical realities of conducting risk assessments" Australia seemed to be asking you to roll back the disciplines of the SPS Agreement. But your task need not be trammled by these efforts to confound the issue.
3. The central question is one of sufficient scientific evidence. We have made arguments and produced evidence to show that it is lacking. You now have to consider all the evidence and the arguments presented, consider the experts reports and what the experts said in the meeting with them, and consider whether the Australian measures are based on sufficient scientific evidence, whether the alleged scientific basis for the measures is objective and credible, and whether the risk assessment is "objectively justifiable".
4. The essence of this case is that Australia has imposed measures on the importation of apples from New Zealand that are not based on sufficient scientific evidence, indeed in most instances not based on scientific evidence at all. You have seen the arguments of New Zealand where this has been set out. You have seen the reports of the experts that confirmed this and you heard them repeat that confirmation earlier this week.
5. And it is not surprising that this should be so. In respect of fire blight the matter was completely reviewed in *Japan-Apples*. The panel looked at the scientific evidence and found that there was nothing to support the view that apple fruit provide a pathway for the introduction of fire blight. That in substance was the same scientific evidence that was reviewed in the IRA and has been discussed throughout these proceedings. There was nothing new to consider. There was no scientific evidence then of a pathway for the transmission of fire blight by mature, symptomless apple fruit, and there is none today. Of course, as the experts said, it cannot be completely ruled out, but its likelihood is no greater than the movement of fire blight through natural dispersal. This means that measures on apple fruit provide no additional protection against fire blight.
6. In respect of European canker and ALCM the science has been less abundant, but that which exists does not support the Australian theory. More fundamentally, in arguing that European canker and ALCM could enter, establish and spread through trade in apple fruit, Australia is positing something that has never been shown to occur either through experimentation or in the real world. This was reiterated quite emphatically by the

experts on Tuesday. You heard Dr. Swinburne and Dr. Latorre say this about European canker, and Professor Cross speaking about ALCM. And, in respect of all of the pests we heard the same statement from the experts; transmission is not through mature fruit, it is through planting material.

7. In the face of this lack of the needed scientific evidence to support the measures for each of the pests, Australia is clearly in violation of its obligations under Article 2.2 of the SPS Agreement.

8. The lack of scientific support also goes to the heart of the deficiency of the IRA as a risk assessment. The only way the IRA could find that Australia's ALOP was not met was to apply a methodology in a way that is not objectively justifiable. This involved applying probability intervals to the notion of "negligible" risk that transformed events that would almost certainly not occur into events that would occur with some frequency. An event that almost certainly would not occur was now becoming an event that would occur once in every 2 million apples in a trade that would be in millions of apples per year. And, nothing we have heard today gives us any reason to alter our position in this regard.

9. If there had been the supporting scientific evidence, the IRA Team could have adopted a methodology that was objective and credible, and the result may well have been objectively justifiable. But in the absence of scientific support, the only way that measures could be justified was to apply a flawed methodology that arbitrarily magnifies risk and then multiplies that magnified risk by an inflated assumption of the volume of trade.

10. Thus, Australia is forced to significantly overestimate the likelihood of events that have never occurred and for which there is no scientific support. As a result of the probabilities assigned under particular import steps, highly speculative events become events that are predicted to produce thousands, sometimes tens of thousands, of infested or infected apples entering Australia each year, which are then multiplied by proximity and exposure values which themselves bear no relationship to the scientific evidence.

11. The result is not a risk assessment that meets the requirements of WTO disciplines and it places Australia in violation of its obligations under Article 5.1 of the SPS Agreement. Moreover, the failure of Australia to give appropriate consideration to the requirements of the SPS Agreement has equally placed Australia in violation of Article 5.2 of the SPS Agreement. These failings were confirmed by the experts consulted by the Panel. The only "support" Australia can claim for its measures requires an assumption of a zero-risk approach to the *importation* of "risk" apples. But of course, this is not consistent with Australia's ALOP, or the SPS Agreement which deals with the risk of entry, establishment, spread and associated consequences.

12. The IRA process took place, as we have described, in a highly charged political environment, and as a result it took over 8 years to complete. And while that political

context might explain the delay, it does not free Australia from its obligations under Article 8 and Annex C of the SPS Agreement.

13. The fact that Australia has imposed measures in respect of apples from New Zealand that it does not impose in circumstances of comparable risk, is illustrated by the way Australia has treated the importation of nashi pears from Japan in violation of its obligations under Article 5.5 of the SPS Agreement.

14. But, none of this needed to happen. There are measures, set out in New Zealand's submissions, that are reasonably available and less trade restrictive that would meet Australia's ALOP in respect of each of the pests at issue. Failure to apply such measures places Australia in violation of its obligations under Article 5.6 of the SPS Agreement.

15. Thus, Mr. Chairman, Members of the Panel, New Zealand has established that in applying the 17 measures to apples from New Zealand set out in New Zealand's First Written Submission Australia is in violation of its obligations under the SPS Agreement.

16. New Zealand would also take this opportunity to reaffirm all matters dealt with in our written submissions that have not been discussed in our oral statements in this hearing and to request the Panel to make the rulings for relief set out in New Zealand's First Written Submission.

17. Finally, New Zealand would like to take this opportunity to thank the Panel and the Secretariat for all of the time and care they have devoted to this case and no doubt will continue to do so over the next several months. We would also like to thank the experts for their important contribution to the dispute settlement process.

18. That concludes New Zealand's closing statement. We look forward to responding to any written questions that the Panel may have.