**BEFORE THE**
**WORLD TRADE ORGANIZATION**
**APPELLATE BODY**

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

**(AB-2010-2 / WT/DS367)**

## Executive Summary of Appellee Submission of New Zealand

**27 September 2010**

## I. INTRODUCTION

1. In response to Australia's appeal against the decision of the Panel in *Australia – Measures Affecting the Importation of Apples from New Zealand*, New Zealand will demonstrate that the Panel was correct in finding that Australia's measures at issue in the dispute, both as a whole and individually, are inconsistent with Articles 5.1, 5.2, 2.2, and 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement). New Zealand accordingly requests that the Panel's findings on these matters be upheld by the Appellate Body.

## II. DETAILED REBUTTAL OF AUSTRALIA'S ARGUMENTS

### A. MISINTERPRETATION OF ANNEX A(1) TO THE SPS AGREEMENT: GROUND A

2. Australia argues that the Panel erred in reaching the conclusion that the 16 measures at issue, both as a whole and individually, constitute SPS measures within the meaning of the definition in Annex A(1) of the SPS Agreement.

3. In its appellant submission, Australia revives its flawed distinction between "ancillary" and "principal" measures, and its argument that ancillary measures are not in themselves "SPS measures". The Panel did not "see the relevance or validity" of Australia's argument, and New Zealand submits that Australia's arguments on appeal should be similarly rejected.

4. Australia does not provide any interpretative basis for its argument that "'ancillary' administrative processes or procedures" should not be identified as separate SPS measures. Nor is there any basis for Australia's assertion that the Panel was required to ask whether the measures met three "essential characteristics" under Annex A(1). The Panel approached the issue in accordance with the text of the SPS Agreement and the relevant jurisprudence, and in fact responded to all of the points that Australia now suggests that the Panel did not address. Australia's additional argument that the second part of the definition in Annex A(1) (*nature* and *form*) does not "add anything", ignores basic principles of treaty interpretation and previous

jurisprudence. Australia's efforts to carve so-called "ancillary" measures out from the disciplines of the SPS Agreement should be rejected.

## B. MISINTERPRETATION AND MISAPPLICATION OF ARTS 2.2, 5.1, AND 5.2: GROUND B

5. In appealing the Panel's finding under Articles 5.1, 5.2, and 2.2, Australia claims that, rather than apply the guidance of the Appellate Body in *US/Canada – Continued Suspension* (which the Panel did), the Panel should have applied a different test devised by Australia. The new test proposed by Australia (that expert judgement falls within "a range considered legitimate by the standards of the scientific community") is simply the latest incarnation of Australia's efforts to shield the IRA from effective review.

6. Australia seeks support for its reformulation of *US/Canada – Continued Suspension* in Articles 2.2, 5.1, 5.2, 5.3 of the SPS Agreement and in ISPM No. 2 and ISPM No. 11. But none of these provisions justify a departure from the Appellate Body's clear guidance, or support reading down the obligations in the SPS Agreement. All risk assessments involve a degree of scientific uncertainty and expert judgement. The requirement under the third criterion in *US/Canada – Continued Suspension* (that reasoning in a risk assessment is "objective and coherent" and conclusions "find sufficient support in the scientific evidence") applies equally to reasoning and conclusions that are based in part on expert judgement. As recognised by the Panel in this case, a claim to have relied on expert judgement cannot shelter a risk assessment from review.

7. In reformulating *US/Canada – Continued Suspension* Australia relies on four flawed propositions. The first proposition, that the third criterion in *US/Canada – Continued Suspension* applies only to conclusions 'ultimately reached" and not "intermediate conclusions", has no basis in the jurisprudence. Moreover, under the IRA the "ultimate conclusion reached" is no more than a combination of intermediate conclusions. Thus Australia is effectively arguing that significant parts of the IRA cannot be reviewed. The second proposition, that the third criterion should be rewritten to ask whether the expert judgement "was within a range that could be considered

legitimate by the standards of the scientific community", finds no support in the jurisprudence, and severs the link between the scientific evidence relied upon and the reasoning and conclusions in a risk assessment. Yet the "sufficiency" of this relationship lies at the heart of Articles 5.1 and 2.2. Australia's third proposition, that the Panel was required and failed to assess "materiality" either cumulatively or at individual steps, overlooks the fact that the Panel appropriately considered the effects of the numerous flaws in the IRA. The fourth proposition, that the Panel imposed a "free-standing transparency obligation" distorts what the Panel actually did, namely, indicated that where there is no apparent relationship between the scientific evidence and conclusions in a risk assessment, simply claiming that "expert judgement" has been applied does not render the assessment "objectively justifiable".

8. Australia sets out a number of examples of the Panel's findings in relation to fire blight and ALCM. Australia claims that these examples show that the Panel failed to consider whether the IRA's conclusions were within the range that could be considered legitimate by the standards of the scientific community, failed to assess the materiality of the purported flaws in the IRA and, with respect to fire blight, misapplied the required standard of scientific "sufficiency". Australia's claims are based on its flawed interpretation of *US/Canada – Continued Suspension* and a misunderstanding of the Panel's essential findings.

9. Australia's assertion that the Panel failed to assess materiality is simply incorrect and amounts in effect to a claim that the Panel failed to conduct a *de novo* review. In any event, contrary to Australia's assertions, the Panel was very clearly focused on the issue of materiality and, throughout its analysis, considered the flaws it found in the IRA's risk assessment relating to fire blight and ALCM to be material, whether considered alone or cumulatively. Nor has Australia demonstrated that the Panel failed to engage with any significant evidence that was favourable to Australia.

10. Australia also claims that "the Panel's findings that the intermediate conclusions drawn in the course of the IRA's analysis of fire blight are flawed are, in fact, not well founded and the Panel has erred in significant respects." But in respect of this claim too,

Australia has failed to establish any "errors of interpretation and application" in the Panel's analysis of the IRA's assessment of fire blight.

## C. FAILURE TO MAKE AN OBJECTIVE ASSESSMENT: GROUND C

11. Australia's claims that the Panel failed to make an "objective assessment of the matter" under Article 11 of the DSU, because it did not understand the "matter before it", and "failed to engage with all of the important evidence", should be rejected. The Panel both understood the matter and engaged appropriately with the evidence. Moreover, Australia's submissions under Article 11 ignore the jurisprudence establishing that a panel has a substantial margin of discretion as trier of fact. Australia's arguments also overlook the fact that the expert testimony strongly supports New Zealand's case that the IRA is not objectively justifiable.

12. Australia claims that the Panel disregarded "important evidence" relating to fire blight and ALCM and that this constitutes a failure to make an objective assessment of the facts, contrary to Article 11 of the DSU. However, the Panel did not disregard expert testimony that was favourable to Australia's case. Rather, even according to the test Australia itself articulates, the Panel carefully demonstrated that it understood the "matter before it" and that it engaged with all the evidence before it that was relevant to that matter. Furthermore, Australia has misconstrued the experts' comments by taking them out of context.

13. Accordingly, Australia has not demonstrated any failure by the Panel to make an objective assessment of the facts in relation to its analysis of the IRA's conclusions on fire blight or ALCM.

14. Australia's claim that the Panel failed to understand the interval of 0 to $10^{-6}$ (zero to one in a million) with a mid-point of one in two million when a uniform distribution is used, should be rejected.

15. Australia suggests that the Panel was wrong to focus on the lack of "definitional correspondence" between the term "negligible" (an event that "would almost certainly

not occur") and its "corresponding" interval in Table 12 of the IRA. This ignores how the interval was used in the IRA. The "negligible" interval, assigned (without deviation) to over a third of all the intervals used, modelled the lowest probability events considered in the IRA. The IRA provides no assessment of why this interval (transposed directly from a different context), which predicts an event occurring on average once in every two million apples, is appropriate to model negligible events, when 150 million apples are predicted to be imported each year. The Panel correctly noted that the midpoint is "a relatively high probability value" and that the negligible interval combined with a uniform distribution "would tend to overestimate the likelihood of such negligible events". The Panel recognised that the lack of correspondence between the term "negligible" and the interval and distribution used to represent it, constitutes a fundamental flaw in the IRA.

16. Australia's suggestion that the Panel did not understand that the relevant "population" varied at different steps in the pathway, is directly contradicted by Australia's own statements to the Panel. Similarly, there is nothing to suggest that the Panel believed that the negligible interval always represented events "occurring relatively frequently each year". Rather, the Panel correctly found that it "results in the likelihood of so-called 'negligible' events estimated to occur more frequently" than should be the case for events that would "almost certainly not occur". Finally, Australia's suggestion that the Panel dealt with this flaw "in the abstract" ignores the critical role this interval plays in the IRA.

## D. MISINTERPRETATION OR MISAPPLICATION OF ARTICLE 5.6: GROUND D

17. Australia's claim that the Panel misapplied the burden of proof is based on the flawed contention that the Panel's conclusions on Article 5.6 relied "virtually entirely" on its findings under Article 5.1. This ignores the second step in the Panel's two-step analysis where the Panel assessed whether New Zealand has raised a presumption, not specifically rebutted by Australia, that its alternative measure meets ALOP.

18. The Panel considered New Zealand's argument that "there is no scientific evidence that mature, symptomless apples can provide a pathway" for fire blight, and

Australia's rebuttal which relied exclusively on the validity of the IRA. In light of the experts' views that the IRA does not contain any scientific evidence that mature, symptomless apples could transmit fire blight, the Panel concluded that New Zealand had raised a sufficiently convincing presumption, not rebutted by Australia. Similarly, the Panel concluded that New Zealand had demonstrated that the conditions for ALCM entry, establishment or spread will likely "almost never occur". In making these findings there was no "shifting" of the burden of proof as Australia claims. Australia's objection to the Panel's consideration of the IRA overlooks the fact that Australia relied exclusively on the validity of the IRA under this claim, and did not point to any evidence *outside* the IRA, to counter New Zealand's claims.

19. Australia is incorrect to suggest that the Panel misinterpreted the phrase "appropriate level of sanitary or phytosanitary protection" by failing to consider "potential biological and economic consequences". The Panel considered consequences in the first step of its analysis; and in the second step it found that New Zealand had raised a sufficiently convincing presumption that the risk of entry, establishment and spread posed by mature, symptomless apples was sufficiently low that a requirement limiting trade to such apples would meet ALOP. In these circumstances the Panel was not required to go further, and clearly was not permitted to conduct a *de novo* review of actual consequences.

20. Finally, there is no basis for Australia's claim the Panel wrongly interpreted the phrase "would achieve" to mean "could" or "might". Australia's suggestion that in order to properly apply Article 5.6 the Panel should have, in effect, conducted a *de novo* review, merely reinforces the appropriateness of what the Panel actually did.

## III. CONCLUSION

21. For the reasons set out above, New Zealand respectfully requests that the Appellate Body dismiss Australia's appeal against the decision of the Panel in *Australia – Measures Affecting the Importation of Apples from New Zealand*.