

**WORLD TRADE ORGANISATION**

*Submission to the Panel*

***AUSTRALIA – MEASURES AFFECTING THE  
IMPORTATION OF APPLES FROM NEW ZEALAND  
(WT/DS367)***

**REQUEST FOR A PRELIMINARY PROCEDURAL RULING IN  
RELATION TO THE CONSISTENCY OF NEW ZEALAND'S PANEL  
REQUEST WITH ARTICLE 6.2 OF THE *DSU***

**RESPONSE BY NEW ZEALAND TO THE THIRD PARTY SUBMISSIONS**

**9 May 2008**

## CONTENTS

I.	INTRODUCTION	1
II.	MEASURES AT ISSUE	2
III.	LEGAL BASIS OF THE COMPLAINT	3
IV.	CONCLUSION	6

## I. INTRODUCTION

1.1 New Zealand thanks the Panel for the opportunity to respond to the third party submissions on Australia’s request for a preliminary ruling regarding New Zealand’s request for the establishment of a panel.<sup>1</sup> Chile and the European Communities have provided their views on this issue.

1.2 New Zealand supports the points made by Chile and in particular its concern regarding the implications of Australia’s arguments for the standard to be met under Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the *DSU*). New Zealand notes that Chile does not believe that its rights as a third party have been impaired by the panel request in this case.<sup>2</sup>

1.3 With regard to the submission of the European Communities, New Zealand notes that it covers ground similar to that covered in Australia’s two written submissions. New Zealand has already provided a comprehensive response in New Zealand’s First Submission to the Panel.<sup>3</sup> Rather than repeating those points here, in this submission New Zealand will elaborate on a few key points.

1.4 The European Communities argues that the panel request “only partially satisfies the requirement of identifying the specific measures at issue, and does not meet the requirement of providing a brief summary of the legal basis of the complaint to present the problem clearly”.<sup>4</sup> The European Communities’ arguments suffer many of the same shortcomings as the arguments made by Australia. The European Communities misconstrues Appellate Body jurisprudence and fails to address cases of clear and direct relevance. In doing so the European Communities, like Australia, proposes an interpretation that departs from approaches taken in previous cases (often involving the European Communities as respondent), and would raise the bar in terms of the standard required of complaining parties under Article 6.2 of the *DSU*.

---

<sup>1</sup> Request for the Establishment of a Panel by New Zealand, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/5, 7 December 2007 (“the panel request”).

<sup>2</sup> Chile’s Letter to the Panel, 2 May 2008.

<sup>3</sup> Written Submission of New Zealand, *Request for a preliminary procedural ruling in relation to the consistency of New Zealand’s panel request with Article 6.2 of the DSU*, WT/DS367, 7 April 2008 (“New Zealand’s First Submission”).

<sup>4</sup> Third Party Submission of the European Communities on Australia’s Request for a Preliminary Ruling, 30 April 2008, (“EC Submission”), para. 42.

## II. MEASURES AT ISSUE

2.1 The European Communities appears to agree with Australia that the measures listed in bullet point form in the panel request are sufficiently precise.<sup>5</sup> However, the European Communities further contends that “a general reference to the Final IRA Report with an indication of the measures of *particular concern*” creates “considerable uncertainty” as regards the identification of the measures at issue.<sup>6</sup> New Zealand does not agree.

2.2 It is clear from the panel request that the measures at issue are those “specified in and required by Australia pursuant to the [Final IRA]”. To borrow a phrase from Australia’s Second Submission, “the language and syntax of paragraph 2 of the panel request clearly indicate that the measures that are the object of challenge are those “measures” set out in the Final IRA Report”.<sup>7</sup> This constitutes a discrete and “clearly defined group”<sup>8</sup> of measures at issue. As New Zealand pointed out in its First Submission to the Panel, New Zealand should not be penalised because it also identified in its panel request the measures of particular concern to it.

2.3 The European Communities appears to consider that a reference to the measures in the Final IRA is not sufficiently precise because the Final IRA contains “a number of *different and distinct* obligations”.<sup>9</sup> However, the mere fact that there are a “variety of different *measures*”<sup>10</sup> in the Final IRA is not grounds in itself for a finding of imprecision. As the jurisprudence makes clear in an analogous context, the legal standard of clarity is the same irrespective of the number of potential claims being made.<sup>11</sup>

---

<sup>5</sup> EC Submission, para. 24; see also Written Submission of Australia in Response to New Zealand’s Submission, 14 April 2008, (“Australia’s Second Submission”), paras. 21-25.

<sup>6</sup> EC Submission, para. 23. Emphasis original.

<sup>7</sup> Australia’s Second Submission, para. 10. The full sentence reads: “In this case, the language and syntax of paragraph 2 of the panel request clearly indicate that the measures that are the object of challenge are those “measures” *set out in* the Final IRA Report, rather than the Final IRA Report *itself*.” Concerning the claim being made in this part of Australia’s Second Submission, New Zealand notes that the words “the Final IRA *itself*” appear neither in New Zealand’s panel request nor in its First Written Submission. This claim by Australia was addressed in New Zealand’s letter to the Panel dated 16 April 2008.

<sup>8</sup> Australia’s Second Submission, para. 20.

<sup>9</sup> EC Submission, para. 22. Emphasis original.

<sup>10</sup> EC Submission, para. 22. Emphasis original.

<sup>11</sup> See, for example, Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (EC – Approval and Marketing of Biotech Products), where at para. 7.47-101 the Panel states that: “The European Communities has noted that if the panel requests are read to mean that each of the measures identified is alleged to violate each of the provisions listed, the European Communities might have to begin to prepare a defence against a large number of claims. We agree. However, we do not think that this fact supports a

2.4 Finally, the European Communities' submission does not address the findings of the Panel in *EC – Trademarks and Geographical Indications*.<sup>12</sup> In that case the European Communities itself was the respondent, and made similar arguments with respect to the adequacy of the panel request. As outlined in New Zealand's First Submission, these arguments were rejected by the Panel in that case.<sup>13</sup> In its Second Submission, Australia alleges that New Zealand's reliance on *EC – Trademarks and Geographical Indications* is "misplaced"<sup>14</sup> and that New Zealand attempts to re-characterise "measures" as "aspects of measures".<sup>15</sup> This is not the case. The relevance of *EC – Trademarks and Geographical Indications* lies in the similarity of the underlying factual circumstances. Both cases involve one primary document that contains numerous specific requirements. In *EC – Trademarks and Geographical Indications*, the EC regulation at issue was characterised as "the measure", and this broad reference to the measure was deemed sufficient to meet the specificity requirements of Article 6.2. While it was open to New Zealand to simply characterise the Final IRA as "the measure" and treat the further pest and disease requirements within it as "aspects of the measure" in its panel request, New Zealand chose to be more specific.

### III. LEGAL BASIS OF THE COMPLAINT

3.1 The European Communities supports Australia's suggestion that the panel request does not "meet the requirement of providing a brief summary of the legal basis of the complaint to present the problem clearly."<sup>16</sup> However, in arguing this claim the European Communities misconstrues the requirements of Article 6.2, and in particular the Appellate Body's jurisprudence in *Korea – Dairy* and its relevance to the present case.

3.2 The Appellate Body in *Korea – Dairy* considered the circumstances under which a "mere reference" to WTO treaty provisions may suffice to meet the standard of clarity in the

---

different reading of the panel requests. Nor do we think that this means that the legal standard of clarity against which these panel requests must be measured is higher than it would have been had the panel requests identified fewer claims."

<sup>12</sup> Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, adopted 20 April 2005, (*EC – Trademarks and Geographical Indications*).

<sup>13</sup> New Zealand's First Submission, paras. 2.12-2.15.

<sup>14</sup> Australia's Second Submission, para. 20.

<sup>15</sup> Australia's Second Submission, para. 19.

<sup>16</sup> EC Submission, para. 42.

statement of the legal basis of the complaint.<sup>17</sup> According to the European Communities, *Korea – Dairy* supports the proposition that a “mere reference” to treaty provisions can be sufficient, but only where “e.g. the claims appear clear from the circumstances of the case or from the explanations provided during the consultation phase or in other submissions”.<sup>18</sup> In making this statement the European Communities appears to be confusing the requirement to provide a summary of the legal basis of the complaint with the separate requirement to show prejudice. In fact, with respect to the former, the jurisprudence is clear that a panel request must be judged on its face and cannot be cured by subsequent, or precedent, communications by the parties to the dispute.<sup>19</sup> Such communications may however be relevant in assessing whether actual prejudice has resulted.

3.3 Rather, as the Appellate Body made clear in *Korea – Dairy*, whether or not the “mere listing of treaty articles”<sup>20</sup> will satisfy the standard of Article 6.2 will depend on the nature of the obligations involved. The example given by the Appellate Body of a situation where the listing of treaty articles may not be sufficient was where “the articles listed establish not one single, distinct, obligation but rather multiple obligations.”<sup>21</sup> As noted in its First Submission, New Zealand has not “merely listed” treaty provisions in the sense contemplated in *Korea – Dairy*. In *Korea – Dairy* the panel request made references to provisions at the article level. In contrast, the panel request in this case cites the relevant provisions not just at the article level, but at the paragraph and sub-paragraph level, and even, where appropriate, identifies the relevant sentences within those sub-provisions. In so doing New Zealand has identified the “distinct obligations” at issue rather than “multiple obligations”.<sup>22</sup> In New Zealand’s view this “presents the problem clearly” and meets the standard of clarity required in Article 6.2 as interpreted by the Appellate Body.

---

<sup>17</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, (*Korea – Dairy*), para. 124.

<sup>18</sup> EC Submission, para. 36.

<sup>19</sup> See, for example, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, adopted 19 December 2002, (*US – Carbon Steel*), para. 127.

<sup>20</sup> Appellate Body Report, *Korea- Dairy*, para. 124.

<sup>21</sup> Appellate Body Report, *Korea – Dairy*, para. 124.

<sup>22</sup> New Zealand notes that Australia did not, in its Second Submission, attempt to substantiate the claim made in its First Submission that all the provisions cited by New Zealand contain two or more obligations (see para. 52 of Australia’s First Written Submission). As New Zealand showed in its First Submission, this assertion is factually inaccurate.

3.4 Rather than focus on the nature of the obligations cited in the panel request to determine whether the legal basis of the complaint is sufficiently clear, the European Communities appears to argue that in order to “present the problem clearly” it is necessary in all cases to provide some kind of descriptive narrative of the legal basis of the complaint in the panel request.<sup>23</sup> In light of well-known jurisprudence, the European Communities cannot be suggesting that New Zealand provide, in its panel request, the arguments in support of its claims.<sup>24</sup> But it is difficult to know what the European Communities does have in mind, as it provides no reference to examples of panel requests that it considers meet its standard. New Zealand notes in this regard, however, that Australia in its Second Submission highlighted the panel request in *Brazil – Retreaded Tyres*.<sup>25</sup> It appears to New Zealand that the panel request in that case simply gave a very slightly abridged paraphrasing of the obligation in Article XI:1 of the *GATT 1994*. This does not provide any further information about the legal basis of the complaint.<sup>26</sup>

3.5 In any event, New Zealand can find no basis in the text of Article 6.2, or the relevant jurisprudence, for reading into Article 6.2 a requirement to provide some kind of descriptive narrative of the legal basis of the complaint in the panel request. To the contrary, as shown above, the jurisprudence appears to expressly contemplate situations where the listing of treaty provisions will suffice to meet the requirements of Article 6.2.

3.6 In addition to misconstruing the relevant Appellate Body jurisprudence, the European Communities also overlooks a case of clear and direct relevance, namely *EC – Approval and Marketing of Biotech Products*.<sup>27</sup> Australia, likewise, has failed adequately to explain, in either of its submissions, why the Panel in this case should not find relevant the findings and

---

<sup>23</sup> See, for example, para. 35 of the EC Submission, which implies a need to provide an “explanation” as to “why those provisions of the SPS Agreement would be breached”.

<sup>24</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, (*EC – Bananas III*), para. 141.

<sup>25</sup> Australia’s Second Submission, para. 47. Request for the Establishment of a Panel by the European Communities, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/4, 18 November 2005.

<sup>26</sup> Australia also refers in this regard to panel requests in so-called “zeroing” cases (see paras. 45-46 of Australia’s Second Submission). Zeroing is a technical issue specific to one area of trade remedies jurisprudence, namely the calculation of dumping margins. New Zealand fails to see the relevance of the cases cited by Australia. Moreover, as the practice of “zeroing” is not explicitly addressed in the provisions of the Anti-Dumping Agreement, it is not surprising that in the circumstances of those cases complainants have chosen to provide additional detail with respect to the legal claims in order to present the problem clearly.

<sup>27</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R, adopted 21 November 2006 (*EC – Approval and Marketing of Biotech Products*).

reasoning of the Panel in *EC – Approval and Marketing of Biotech Products*. While New Zealand does not treat that Panel report as “dispositive”,<sup>28</sup> it does find it highly relevant given that it involved many of the same legal provisions as in the present case. As noted above, the nature of the obligations at issue is crucial in assessing whether the standard of clarity in Article 6.2 has been met. In New Zealand’s view the approach of the Panel in *EC – Approval and Marketing of Biotech Products* is fully consistent with relevant Appellate Body jurisprudence regarding the statement of the legal basis of the complaint.

3.7 Finally, New Zealand disputes the European Communities’ assertion that the panel request in this case would only be sufficient if it “enables Australia to present its case”.<sup>29</sup> In fact, the standard as expressed in relevant jurisprudence is that the panel request must be sufficiently clear so as to allow Australia to “begin preparing its defence”.<sup>30</sup> While some respondents may wish for a standard that allows them to put the finishing touches to their rebuttal before the first substantive submission has even been filed, that is not the standard required under Article 6.2.

#### **IV. CONCLUSION**

For the reasons provided above and in its First Submission, New Zealand considers that Australia’s claim, supported by the European Communities, that the panel request does not meet the requirements of Article 6.2 should be rejected.

---

<sup>28</sup> Australia’s Second Submission, para. 32.

<sup>29</sup> EC Submission, para. 39.

<sup>30</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, (*Thailand – H-Beams*), para. 88.