Australia – Measures Affecting the Importation of Apples from New Zealand

(WT/DS367)

Oral Statement of New Zealand for First Substantive Meeting with the Parties

2 September 2008

Mr Chairman, Members of the Panel:

Introduction

1. This dispute is about access of apples from New Zealand into the Australian market. For over 80 years, Australia's market has been closed to New Zealand apples. Finally in 2007, some eight years after New Zealand had made a fourth request for entry, apples from New Zealand were permitted access to Australia but subject to measures that meant that effectively the market was still closed. New Zealand has challenged 17 of those measures relating specifically to fire blight, to European canker, and to apple leafcurling midge as well as certain general measures applicable to all three pests. As New Zealand pointed out in its First Written Submission, these measures do not conform to Australia's obligations under the *SPS Agreement*.

2. The essence of the New Zealand case is quite straightforward. Among the core requirements of the *SPS Agreement* are the obligations that sanitary and phytosanitary measures not be maintained without sufficient scientific evidence (Article 2.2) and that such measures are based on a risk assessment (Article 5.1). In both of these fundamental respects Australia has failed to meet its obligations under the *SPS Agreement*.

3. In respect of each of the three pests the Australian theory that mature symptomless apples can be a vector for the entry, establishment or spread of the disease is based on supposition, not scientific evidence, let alone sufficient scientific evidence. In the case of fire blight, the conclusion that mature symptomless apples could not be a vector for the transmission of the *E. amylovora* pathogen was reached by the Panel in *Japan – Apples* on the basis of expert analysis of the relevant science. Australia has made a number of arguments about *Japan – Apples*, but it does not contest that the conclusion reached by the Panel was correct on the basis of the scientific evidence before the Panel. It simply argues that the conclusions were particular to that case.

4. But the science has not changed. There is no new science to contradict the conclusions in *Japan – Apples*. All that has changed are the parties. How is it that mature, symptomless apples shipped from the United States to Japan cannot be a vector for the transmission of fire blight, but when mature symptomless apples are shipped from New Zealand to Australia the science mysteriously changes and they suddenly become capable of transmitting fire blight? But, of course, the science does not change. There is simply no scientific evidence to support Australia's position. Australia's measures therefore are designed to deal with events that have never been shown to occur either in the scientific literature or in the real world.

5. Equally, in the case of European canker, Australia's theory that latent internal infection of mature symptomless apple fruit or external fruit surface contamination could subsequently infect apple, pear and other trees after the arrival of the fruit in Australia is based on hypothetical scenarios that have never been demonstrated to occur. There is no support in the literature for the Australian supposition about a pathway for transmitting *N. galligena* via mature apple fruit nor has it been observed anywhere in the world.

6. Similarly, in the case of ALCM, Australia's theory about the survival of pupae on imported apples and the emergence in Australia of a female midge that could mate and lay eggs on a receptive apple tree has not been established in the laboratory or observed in practice. It rests on the supposition of a confluence of events that has never been shown to occur.

7. Australia's risk analysis, the IRA, does not meet the requirements for a risk assessment under the *SPS Agreement*. It does not evaluate "likelihood" as the Agreement requires. The IRA applies a semi-quantitative method of analysis in a way that inflates rather than assesses risk. By assigning "probability values" to events that have never occurred nor have the remotest possibility of occurring, weighting that value by the use of a "uniform distribution", and then multiplying this by overestimated volumes of trade, the IRA manages to reach conclusions about probability of occurrence that are vastly in excess of what could happen in the real world. Under the IRA methodology remote possibilities are conjured into probabilities, merely by assigning them a probability value. But the semblance of precision that those values imply cannot disguise the fact that there is no underlying science to support them. The IRA is an assessment based on speculation not science. It is not one that is "objective and credible" and it does not constitute an evaluation of likelihood within the meaning of the *SPS Agreement.*

8. Australia's analysis of the importation steps with respect to each of the pests does not conform to accepted international standards for risk analysis. Relying on the supposition of hypothetical events, without any scientific basis for such supposition, the IRA finds pathways that do not exist and does not terminate its analysis where there is no scientific evidence that an important event in the pathway could occur.

9. As New Zealand has also pointed out in its First Written Submission, Australia is in breach of further obligations under the *SPS Agreement*, in respect of Article 5.2, 5.5, 2.3, 5.6 and Article 8 and Annex C. New Zealand will elaborate on those breaches in the course of this oral statement.

10. What has been Australia's response to New Zealand's arguments in the course of its First Written Submission? I have already mentioned Australia's dismissal of the conclusions in *Japan – Apples*. But Australia tries to do much more than that.

11. First, Australia attempts to rewrite the *SPS Agreement*, and indeed the DSU. No longer is a Panel to make an objective assessment of the matter as required in DSU Article 11. It is instead to give "considerable deference" to the risk assessment conducted by the domestic agency concerned. This standard of "considerable deference" finds no basis in the text of the *SPS Agreement* or the DSU and it finds no basis in the jurisprudence of the Appellate Body and WTO panels. It is a convenient invention of Australia.

12. Second, the "considerable deference" standard articulated by Australia is essential to another part of Australia's attempt to rewrite the *SPS Agreement*. Taking the accepted wisdom that Article 2.2 and Article 5.1 are constantly to be read together, Australia tries to invert the relationship of the two provisions. Instead of being a specific application of Article 2.2, Article 5.1 becomes, under the Australian canon, the primary provision. The consequence of this, according to Australia, is that compliance with Article 5.1 constitutes compliance with Article 2.2.

13. In this regard, Australia's objectives are transparent. If Article 5.1 can be complied with by according "considerable deference" to a domestic risk assessment, and Article 2.2 is consequential with no independent effect, Australia's measures can escape any real scrutiny. In effect, Australia has sought to downgrade Article 5.1 and write Article 2.2 out of the *SPS Agreement* completely. Of course, none of this finds any support in the law of the WTO, and the Panel should reject it.

14. Second, not content with rewriting the *SPS Agreement*, Australia also attempts to rewrite the IRA. As New Zealand will point out in the course of this oral statement, care has to be taken in reading the Australian First Written Submission to separate what the IRA said and what Australia now claims that it said. For example, Australia's First Written Submission has "discovered" that the Tasmanian strain of *N. galligena* was unique, an idea that was too imaginative even for the IRA Team, although for good reasons as we shall point out.

15. Australia also seeks to patch up the IRA with evidence not considered by the IRA Team. In the context of European canker, New Zealand introduced an analysis of climate data to show that the IRA had used irrelevant climate information to assess the risk of establishment and spread of European canker. In response, Australia introduced an alternative climate analysis, which purports to contradict New Zealand's climate analysis, thereby acknowledging the inadequacy of the original climatic risk assessment in the IRA.

16. However, in doing so, Australia misses the point. It is too late for Australia to provide, through evidence in this case, the risk assessment that the IRA did not provide. Australia's climate analysis is simply irrelevant to the question of whether the "IRA Team" properly conducted a risk analysis. In any event,

Australia's climate analysis is both opaque and flawed. Even if it were relevant, it would have to be rejected.

17. The third element of Australia's response is to attempt to confuse the issues at stake. With its argument that New Zealand is attempting in its First Written Submission to provide its own preferred risk analysis and its claim about reliance on divergent scientific opinion, Australia seeks to create the impression that this is a case of conflicting scientific evidence about the entry, establishment and spread of these pests. But on closer analysis, these arguments are no more than a smokescreen.

18. As New Zealand has pointed out in its First Written Submission, there is either no scientific evidence or no sufficient scientific evidence supporting the measures adopted by the IRA for any of the three pests in contention. It is not a case of competing scientific views, one of which was supported by the IRA. The IRA simply does not cite any such divergent scientific view, nor does Australia in its First Written Submission disclose the existence of any scientific view either that was ignored or overlooked by the IRA, or come to light subsequently. Any subsequent scientific evidence simply supports the view that there is no basis for the suppositions on which the Australian measures are based.

19. A fourth key element in Australia's response in its First Written Submission, is to try and shift the emphasis of a risk assessment from the likelihood of entry, establishment and spread to the consequences of establishment. Australia argues vehemently in its First Written Submission that risk assessment involves more than science; it involves economic and technical factors. But in making this argument, Australia, once again, misses the central point. There is no basis under the *SPS Agreement* for the application of SPS measures to deal with the consequences of an event if, on the basis of the relevant scientific evidence, the event itself has no likelihood of occurring. Australia's arguments on consequences are thus simply misguided.

20. There is a further element to Australia's response – or, rather it is Australia's non-response. In respect of New Zealand's arguments with respect to Article 2.2, Australia relies principally on its contention that consistency with Article 5.1 constitutes consistency with Article 2.2. Thus, Australia does not make a serious attempt to rebut New Zealand's arguments relating to Article 2.2.

21. In respect of Article 8 and Annex C, Australia goes further. Putting aside the question of the terms of reference, without any substantive argument, Australia simply states that New Zealand's factual assertions are unfounded and "reserves its right to address these assertions at a later time if necessary". But, good faith engagement in proceedings does not permit a responding party to reserve to itself a right to decide when it will make arguments. Since Australia has failed to make responsive arguments in respect of important aspects of both Article 2.2 and Article 8 and Annex C, the Panel is fully entitled to draw the conclusion that New

Zealand's position on these issues has not been challenged by reasoned argument and thus should be accepted.

Synopsis of the Facts – The Pests at Issue

22. Since the biology of the pests at issue was set out clearly in the written submissions of the parties, I will refrain from repeating it in this Submission. New Zealand is, however, ready to provide any further information that the Panel needs and to respond to any questions.

Product at issue

23. The product at issue in this case is apples imported from New Zealand into Australia. In practice, New Zealand would export mature, symptomless apples in accordance with the class 1 export quality standard.[1] Australia is incorrect to suggest that the product at issue in this dispute should be determined by reference to the scope of the IRA. The product at issue is determined by the terms of reference of the Panel. In short, New Zealand does not believe that there is any issue here.

Measures at Issue

24. In its Panel request, New Zealand identified seventeen specific measures that New Zealand considers are inconsistent with Australia's obligations under the *SPS Agreement*. These measures fall into two categories; those of general application to all three pests, and those specific to each of the pests.

25. In its First Written Submission, Australia argues that there are only 15 measures at issue.

26. First, Australia submits that it does not impose a measure requiring that an orchard/block be suspended on the basis that any evidence of pruning or other activities carried out before inspection could constitute an attempt to remove or hide symptoms of European canker. New Zealand's understanding of the IRA, as confirmed in subsequent bilateral consultations, was that such a measure was a requirement. However, in the light of Australia's statement in its First Written Submission that there is no pruning requirement with regard to European Canker, New Zealand will not pursue its claim that this is a measure. However, it asks the Panel to record Australia's position and New Zealand's response in its report.

27. Second, Australia argues that New Zealand mischaracterises the measure relating to AQIS involvement. It submits that the AQIS involvement envisaged by the IRA is indistinguishable from systems audits, as that term is understood by both New Zealand and Australia, and accordingly there is no measure "at issue"

[1] New Zealand's First Written Submission (hereafter NZFWS) paras 3.44-3.45.

between the parties. However, New Zealand considers that any type of AQIS involvement in orchard inspections for European canker and fire blight, in direct verification of packing house procedures, and in fruit inspection and treatment for ALCM is without scientific support, and accordingly there is very much a live dispute between the parties. Furthermore, a 100% audit of survey teams and packing houses in the first year by the officials of an importing country does not conform to any notion of a systems audit as understood by New Zealand.

28. In addition, Australia has sought to "clarify" in its First Written Submission the description of a number of the remaining measures, although fundamentally it does not disagree that these are measures at issue. New Zealand does not consider that the arguments raised by Australia in this regard are of any consequence. New Zealand notes that Australia does not attempt to develop later in its submission any of the points of clarification it seeks to raise under measures at issue.

29. Finally, Australia's distinction between principal and ancillary measures (measures which "support, verify or operationalise" the principal risk reduction measure) is spurious. It has no textual basis in the *SPS Agreement*. Neither Annex A nor any of the substantive obligations make any distinction between types of measures.

30. Australia's reliance on *US – Export Restraints* is also misplaced. That is a case about subsidies under the SCM Agreement, not a case about SPS measures under the *SPS Agreement*. The panel in that case was considering whether documents which merely *interpreted* requirements set down elsewhere could themselves constitute "measures". For example, the panel looked at the preamble to regulations and found that the preamble could not be said to be a measure in itself because it did not "do anything" except interpret other provisions[2] – it did not "operate in some concrete way in its own right." There is no suggestion that the so-called "ancillary measures" identified by Australia merely *interpret* the so-called "principal" SPS measures in this case. Each operates in a concrete way in its own right.

31. Australia thus uses the principal/ancillary distinction as a vehicle to avoid scrutiny under Articles 2.2 and 5.1 of this class of "ancillary" measures. New Zealand submits that such an approach should be resisted.

The Applicable Law

Standard of Review

32. In New Zealand's view the appropriate standard of review in this case is set out in Article 11 of the DSU. This requires the Panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case

[2] Panel Report, *US – Export Restraints*, para 8.99.

and the applicability of and conformity with relevant covered agreements…". This standard of review has been applied in every WTO SPS case to date.

33. Australia's claim that an alternative standard of review should be applied, based on "considerable deference" to risk assessments, is wholly without merit. The Appellate Body has twice rejected similar arguments in previous SPS cases. In *EC – Hormones* the Appellate Body rejected the European Communities suggestion that a "deferential reasonableness standard" be applied.[3] In the *Japan – Apples* case the Appellate Body rejected Japan's claim that "a certain degree of discretion" be accorded to the importing Member in the manner in which it chooses, weighs, and evaluates scientific evidence. The Appellate Body noted that to do so would not be compatible with the panel's margin of discretion in assessing the value of evidence.[4]

34. So the suggestion that some degree of special deference be accorded to SPS risk assessments has already been considered and rejected. Australia's suggestion of "considerable" deference should be similarly rejected. Any other approach would fundamentally alter the "finely drawn balance" of jurisdictional competencies reflected in the *SPS Agreement*.[5] To the extent that the European Community Third Party Submission can be interpreted as agreeing with Australia on this point, New Zealand disagrees with those views.

Order of Analysis

35. Australia is wrong to assert that there is a single "correct" way to order the analysis in SPS cases involving claims under both Article 2.2 and Article 5.1. Specifically, Australia is wrong to suggest that "the question of whether Australia has maintained measures "without scientific evidence" under Article 2.2 *can only be answered* by considering whether Australia's measures are based on a valid risk assessment under Article 5.1".[6]

36. Article 5.1 is a specific application of Article 2.2.[7] There is nothing in the text of the *SPS Agreement* that suggests that an analysis of Article 5.1 should logically precede an analysis of Article 2.2, much less that it *must* do so in every instance. On the contrary, the Appellate Body in *EC – Hormones* considered that an approach that started with the "Basic Rights and Obligations" in Article 2 was "logically attractive".[8] New Zealand agrees.

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3 AB Report, *EC – Hormones*, para 119.

4 AB Report, *Japan – Apples* para 166.

5 AB Report, *EC – Hormones*, para 115.

6 Australia's First Written Submission (hereafter AFWS) para 219.

7 AB Report, *EC – Hormones*, para 186.

8 AB Report, *EC – Hormones*, para 250.

37. Moreover, in *Japan – Agricultural Products II* the Appellate Body stated that *EC – Hormones* "cannot possibly be interpreted as support for *limiting the scope of Article 2.2 "in favour" of Article 5.1*." (Emphasis added.)

38. In arguing that the question of compliance with Article 2.2 *can only be answered* by considering whether Australia's measures are based on a valid risk assessment under Article 5.1, Australia is attempting to limit the scope of Article 2.2 "in favour" of Article 5.1.

39. According to Australia, a risk assessment conducted by a competent authority should be afforded "considerable deference". It therefore follows that a panel *cannot be allowed* to consider whether a "rational or objective" relationship exists between the science and the SPS measures under Article 2.2.

40. Thus, Australia's view on the relationship between Article 2.2 and 5.1 *subsumes* the third requirement of Article 2.2 within Article 5.1, and then through its standard of review *drains it of any substantive content*. The consequence would be that the panel would have no mandate to assess whether there is "rational or objective" relationship between the science and the SPS measures.

41. Such a radical departure from the existing jurisprudence should be rejected by the Panel.

Burden of Proof

42. The issue of burden of proof should not be contentious in these proceedings. However, in a number of places in its First Written Submission, Australia misapplies the burden of proof. For example, in the context of Article 2.2, Australia contends that the negative formulation of the obligation not to maintain measures without sufficient scientific evidence means that "the burden is on New Zealand to show that the scientific evidence *relied on by Australia, as evaluated by the IRA Team in the risk assessment*, is insufficient…New Zealand must show that *the IRA Team's evaluation of the scientific evidence* was not objective and credible."[9] (Emphasis added.)

43. According to this view, New Zealand is limited under Article 2.2 to the scientific evidence "as evaluated by the IRA Team in the risk assessment", and is required to show that "the IRA Team's evaluation of the scientific evidence was not objective and credible". Thus, in a process that better resembles alchemy than legal interpretation, Australia uses the notion of "burden of proof" to transform the obligation not to maintain measures without scientific evidence in Article 2.2, into its own watered-down version of Article 5.1. Australia's use of "burden of proof" as a stalking horse for its views on the standard of review should be rejected.

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[9] AFWS paras 924 and 925.

Article 2.2

44. In its First Written Submission New Zealand argued that Australia's measures violated Article 2.2, in particular the third requirement of Article 2.2.

45. The core of New Zealand's argument is that there is no scientific evidence to support the view that mature, symptomless apples provide a pathway for fire blight and European canker and the likelihood of the existence of a pathway for ALCM is negligible.

46. Though Australia does not rebut New Zealand's Article 2.2 claim directly, there is a continuing refrain that Australia is entitled to rely on "divergent scientific opinion".[10] But, when one examines the Australian First Written Submission, or the IRA for that matter, for the divergent scientific opinions suggesting the existence of pathways for each of the pests in question on which Australia claims to have relied, they simply cannot be found. Both the IRA and the Australian First Written Submission do refer to what they regard as conflicting scientific views about particular steps in the alleged pathway but neither is able to cite diverging scientific opinion on whether a pathway for the transmission of fire blight, European canker and ALCM exists. This is hardly surprising because there is no diverging scientific opinion on this point. No such pathway exists for the two diseases and the likelihood of a pathway for ALCM is negligible.

47. Even in respect of the allegedly diverging scientific opinion relating to specific steps in the alleged pathway, on closer analysis there is no true divergent opinion. It is hardly diverging scientific opinion when what is being relied on is speculation unsupported by research as in the Billing and Berrie paper relied on by Australia in its First Written Submission, but wisely ignored in the IRA.[11] Nor is it truly diverging scientific opinion when what is relied on is a study done under laboratory or greenhouse conditions that does not reflect the conditions in real orchards, as in the unpublished work by Ordax *et al.* on VBNC bacteria cited by Australia in its First Written Submission.[12]

48. And, even if there had been divergent scientific opinion, this would not mean that Australia could automatically rely on it. The divergent science must be of a nature that there is a rational and objective relationship between the scientific opinion and the measures in question. None of the alleged divergent opinion meets that requirement.

49. Australia's arguments in support of its claim that it has complied with Article 2.2 reviews the conclusions of the IRA as if those conclusions in themselves amount to a divergence in scientific opinion. But while the IRA purports to base its

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[10] E.g. at AFWS paras 23, 212, 287, 347, 922, 923.

[11] AFWS para 358.

[12] AFWS paras 405, 425.

conclusions on scientific evidence it does not itself constitute independent scientific opinion or scientific evidence.

50. In short, Australia's oft-repeated claim that it has relied on divergent scientific opinion is neither substantiated nor capable of being so.

Fire Blight

51. Australia has no direct rebuttal of New Zealand's claim that there is no scientific support for the view that mature symptomless apples provide a pathway. Instead, it seems to argue that "there *is no direct evidence* that apples do not spread fire blight"[13] and that it is up to New Zealand to produce such direct evidence, thereby rewriting the burden of proof and requiring New Zealand to prove a negative. But, Article 2.2 does not permit a Member to maintain measures in relation to a hypothetical pathway as long as there is no scientific evidence disproving the hypothesis. Rather it prevents a Member from maintaining measures without sufficient scientific evidence. Australia's argument seeks to turn Article 2.2 on its head.

52. Much of Australia's criticism of New Zealand's contention that there is no pathway for the transmission of fire blights rests on the claim that the Roberts and Sawyer 2008 study is not relevant to this dispute and that its findings are "unreliable and inappropriate".[14] But when the reasons advanced by Australia for disregarding Roberts and Sawyer are analyzed they turn out to be without substance. The US Third Party Submission has pointed this out in detail[15] and New Zealand fully agrees with its analysis.

53. At the heart of Australia's critique of Roberts and Sawyer 2008 is the fanciful claim that since the probability value used by Roberts and Sawyer in respect of the transfer of *E. amylovora* to a new host and the initiation of an infection is higher than that of the IRA, the study supports the conclusions in the IRA.[16] Such a claim is designed to draw attention away from the fact that the overall conclusion of Roberts and Sawyer was that the risk of importing *E. amylovora* on commercial apple fruit and of establishing new outbreaks of fire blight is so small as to be insignificant – the opposite conclusion from that reached by the IRA.[17] According to the IRA the likelihood of the transmission of fire blight is once in every 29 years; applying the method of Roberts and Sawyer it is once in every 29,000 years, 29,057 to be exact.[18] In its Second Written Submission New

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13 AFWS para 354.

14 AFWS para 364.

15 US Third Party Submission paras 22-27.

16 For example at AFWS paras 371 and 478.

17 NZFWS para 4.26.

18 NZFWS, para 4.251.

Zealand will point out how Australia's other criticisms of Roberts and Sawyer also have no foundation.

54. In short, New Zealand's arguments in respect of fire blight have not been rebutted. Australia's measures in respect of fire blight are not supported by sufficient scientific evidence and Australia is thus in violation of its obligations under Article 2.2.

European canker

55. Australia's attempted rebuttal of the New Zealand case on European canker focuses on the incidence of European canker fruit rot in New Zealand.[19] However, while fruit rots caused by *N. galligena* are not unknown, they are very rare in New Zealand where summer conditions are generally not conducive to fruit infection.[20]

56. Further, fruit that is infected early in the season rots on the tree and is therefore not harvested. Accordingly, the Australian pathway theory is premised on the infection remaining latent in the mature apple fruit at harvest. Australia reiterates the view of the IRA that the Braithwaite paper is evidence of latent fruit infection even though the reference in Braithwaite is not to research but to an anecdotal personal communication.[21] And the claim has never been substantiated. Nor was the Braithwaite paper "endorsed" by the New Zealand Chief Plants Officer as Australia on several occasions alleges.[22] A letter simply noting the conclusions of the Braithwaite paper does not constitute an endorsement.

57. The assumption in Braithwaite as to the existence of a pathway was just speculation. As the IRA itself says, "there is no evidence in the literature that indicates that long-distance spread of the disease is due to the movement of fruit".[23]

58. A good portion of the Australian First Written Submission is devoted to attempting to discredit New Zealand's argument that the climatic conditions in Australia are simply not conducive to the establishment and spread of European canker.[24] As New Zealand has pointed out, the IRA's assumptions about the climatic similarity of Australian apple-producing regions to other regions of the world where European canker is present are not based on scientific evidence.[25]

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19 AFWS paras 536-537, 943.

20 NZFWS paras 4.57-4.59, 4.271.

21 AFWS para 539.

22 AFWS paras 543-546, 942.

23 IRA p 142.

24 AFWS paras 531-534, 627-628, 657, Annex 2.

25 NZFWS Annex 3.

59. Australia seeks to rebut this by presenting its own analysis of climate data, an analysis that was completely missing in the IRA.[26] But this new analysis fails to contradict New Zealand's position. First, the Australian paper claims to rely on climate matching with areas of known European canker, but it does not provide the methodological information necessary to allow an appraisal of the climate matching procedure used. The analysis cannot, therefore, be independently repeated or verified, or even fully understood.

60. Moreover, the flaws in the Australian climate paper analysis are demonstrated in its risk maps of New Zealand, which indicate high European canker risk along the east coast of the South Island (Marlborough, Canterbury and coastal north Otago) and in central Otago. In fact, these are areas where European canker is virtually non-existent. This is a clear expression of the unreliability of the Australian analysis as an accurate predictor of European canker incidence.

61. A further problem with the Australian claim that European canker would establish and spread in Australia is that even though European canker existed for a period of time in Tasmania, it did not spread. As New Zealand has pointed out, this, too is a probable consequence of climatic conditions.[27] To contradict this, Australia tries to argue that the Tasmanian strain of *N. galligena* was a "unique" strain.[28] This is novel speculation. It was not suggested at the time of the Tasmanian European canker outbreak, or in the IRA, even though the concept of heterothallism was well understood then. The Australian First Written Submission tries to support this by citing a voluminous amount of largely irrelevant literature.[29]

62. But there is no scientific evidence to support Australia's speculation that the *N. galligena* found in Tasmania was a heterothallic strain or that a New Zealand "strain" of *N. galligena* would produce ascospores if introduced into Australia.

63. Australia's attempt to discount the importance of apple trade from Tasmania throughout the time that European canker existed there is unconvincing.[30] That the uncontrolled movement of thousands of tonnes of apple fruit (and millions of apples) from the affected farms and region failed to vector the disease even within Tasmania let alone to the mainland is convincing evidence of the lack of a pathway for the spread of European canker in Australia.

64. The lack of scientific evidence in support of the existence of a pathway for the transmission of European canker to Australia means that the measures established

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[26] AFWS Annex 2.

[27] NZFWS para 4.91.

[28] AFWS paras 631-632, 664, 691.

[29] AFWS para 631.

[30] AFWS paras 667-668.

by the IRA in respect of European canker are not based on sufficient scientific evidence and hence Australia is in violation of Article 2.2.

ALCM

65. The key flaw in the assumption of the IRA that New Zealand apples could be a pathway for the transmission of ALCM to Australia is that there is no scientific support for suggesting that the likelihood of establishment of ALCM in Australia as a result of trade in apples is anything other than negligible.

66. A major problem with Australia's analysis of ALCM is that the great majority of cocoons on New Zealand apples are not viable, either because the midge inside has already developed into an adult and left the cocoon, or because it has died inside the cocoon. Australia's arguments in its First Written Submission disputing New Zealand's estimates on the proportion of ALCM cocoons containing viable pupae are based on Australia's faulty reading of the research into the mortality rate of cocoons set out in Rogers *et al.* 2006.[31]

67. Australia claims that the conclusions in Rogers *et al.* 2006 were limited to those cocoons that were occupied[32] and that New Zealand's estimations on mortality are incorrect.[33] However, a letter from the author of that study, attached as an exhibit to this oral statement, confirms that the mortality rate of cocoons in Rogers *et al.* 2006 related to the total number of cocoons *both* occupied and unoccupied. The author confirms that when unoccupied cocoons are removed, the mortality rate increases to 75%. Thus, only 25% of occupied cocoons actually contain live ALCM and thus the overall viability rate of 15% set out in the New Zealand First Written Submission is correct.[34]

68. For establishment of ALCM to take place in Australia a female ALCM would need to emerge find a male and mate, all within the very short life span of the ALCM, and within 30m of apple trees with young actively growing leaves, since that is the only place a female ALCM will lay her eggs.[35]

69. Given the viability rate based on the Rogers *et al.* 2006 study several thousands of fruit would need to be deposited in one place at the same time in order to obtain three live ALCM in order to give a reasonable chance for mating to occur.[36] The only fruit that could conceivably be deposited in one place at the same time near apple trees in conditions allowing ALCM emergence to occur is waste from an

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31 AFWS para 735.

32 AFWS para 731

33 AFWS para 736

34 NZFWS para 4.107.

35 NZFWS para 4.121-4.124.

36 NZFWS para 4.107.

orchard packing house.[37] Moreover, unless apples are left outside of cold storage for a minimum of 13 days, ALCM emergence is simply not possible.[38] Australia's arguments on this in its First Written Submission are simply incorrect.

70. If the low level of viable cocoons on NZ apples, the ALCM's biology and normal trade practices are all taken into account, the unavoidable conclusion is that the likelihood of ALCM establishment in Australia from the importation of NZ apples is negligible.[39] The scenario on which Australia relies in its First Written Submission to rebut this is simply implausible.

71. In sum, New Zealand's claim that Australia is in violation of its obligations under Article 2.2 stand unrebutted.

Article 5.1

72. New Zealand demonstrated in its First Written Submission that Australia's IRA is not a risk assessment within the meaning of Article 5.1 and Annex A(4) of the *SPS Agreement*. Australia neither "evaluated the likelihood" of entry, establishment or spread of the relevant pests, nor has it evaluated this likelihood "according to the SPS measures which might be applied."

1. Australia has not evaluated the likelihood of entry, establishment or spread

73. In this case, Australia has, for only the second time, applied a semi-quantitative methodology to its risk assessment for plant products, apparently in response to a proposal by a Senate Inquiry into the IRA process for apples. There are however, inherent risks and limitations in a semi-quantitative methodology, including as noted in the OIE's Handbook on Import Risk Analysis, the risk of giving "a misleading impression of objectivity and precision." And a misleading impression of objectivity and precision is exactly what the IRA provides.

74. The IRA approached what were often the remotest of possibilities, and ascribed them inflated numerical values. Australia argues in its First Written Submission that "precision" is all that is required in a risk assessment to turn a "possibility" into a "probability". The IRA certainly creates an impression of precision. But impressions can be misleading and nowhere are the distortionary effects of Australia's approach more obvious than in the IRA's three fundamental methodological flaws.

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37 NZFWS para 4.361.

38 NZFWS para 4.361.

39 NZFWS paras 4.132 and 4.362.

a) Fundamental flaws in the IRA

75. In its First Written Submission, New Zealand identified three fundamental methodological flaws.[40] These are not, as the Australian First Written Submission attempts to suggest, mere "methodological difference[s]."[41] They are methodological errors, with the result that it is impossible to have any degree of confidence in the levels of risk ascribed in the IRA.

76. First, Australia has adopted an inflated maximum value for the probability of events with a "negligible" likelihood of occurring. Notably, this figure is applied on a per apple basis. Negligible is, by Australia's own qualitative definition, an event that would almost certainly not occur, yet in expressing this in quantitative terms, Australia chooses a maximum value of 1 in a million (apples). This bears no relation to real world events. As the example of Chinese Taipei dealt with in New Zealand's First Written Submission shows, a maximum probability value of 1 in a million is substantially greater (indeed 1,000 times greater) than can be concluded on the basis of known data.[42] Australia's attempts to distinguish the Chinese-Taipei example are superficial at best.[43]

77. This flaw is compounded by the inappropriate use of the uniform distribution to model the likelihood of various events. The effect of Australia's choice of a maximum value of 1 in a million (apples) combined with Australia's choice of uniform distribution to model events with a negligible likelihood of occurring is that outcomes are skewed towards higher values and "negligible likelihoods" occur on average once in two million apples.

78. New Zealand will elaborate on this in its Second Written Submission.

79. The third fundamental flaw in Australia's risk assessment is that its estimate of the likely volume of trade inflates the assessed level of risk by a factor of at least three.[44] This flaw has a significant impact on Australia's assessment of risk because the higher the estimated volume of trade, the higher the overall assessed risk.

80. The IRA represented the annual trade volume with a most likely value of 150 million apples (15% of the Australian market), rather than a lower figure advocated by New Zealand of 50 million apples. In doing so the IRA pays insufficient regard to the analysis by ABARE which shows that prices in the Australian apple market are highly sensitive to volume and that it is unlikely that

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40 NZFWS paras 4.159-4.203.

41 AFWS para 285.

42 NZFWS paras 4.182-4.186.

43 AFWS paras 308-311.

44 NZFWS paras 4.194-4.204.

New Zealand imports would make up a significant proportion of Australian domestic sales.

81. In short, Australia has failed to rebut New Zealand's arguments that the volume of trade will be significantly lower than that identified in the Final IRA. This will be dealt with more fully in New Zealand's Second Written Submission.

82. The overall effect of these three fundamental methodological flaws has been to overestimate seriously the likelihood of events whose probability of occurring is negligible with the result that the levels of risk ascribed in the IRA have no credibility.

b) New Zealand does not conduct its own risk assessment nor has Australia identified "very significant deficiencies"

83. A frequent refrain in Australia's First Written Submission is that New Zealand has conducted its own risk assessment and merely sets out its own alternative view of the science. This view flows from Australia's views on considerable deference. According to Australia, each time New Zealand points to the absence of scientific evidence, New Zealand is conducting its own risk assessment. In fact New Zealand is doing no more than discharging its burden of proof in accordance with the correct standard of review. New Zealand has not conducted its own risk assessment – it has pointed out methodological flaws, and the absence of scientific evidence, which result in it being impossible to have any degree of confidence in the levels of risk ascribed in the IRA.

84. Australia identifies what it claims are two "very significant deficiencies" in New Zealand's First Written Submission. The first is that New Zealand failed to acknowledge that risk assessments must be "appropriate to the circumstances". The second is the status attached to the *Japan – Apples* findings.

85. Very little guidance has been provided in previous cases on precisely what is meant by the phrase "appropriate to the circumstances". Australia selectively quotes the Appellate Body in *EC – Hormones* for the proposition that the phrase gives Members a "certain degree of flexibility". But Australia quotes only a part of the relevant paragraph, omitting the fact that the "flexibility" applied only to pre-existing measures.

86. The panel in *Australia – Salmon* noted that the phrase "appropriate to the circumstances" cannot

> "annul or supersede the substantive obligation resting on Australia to base the sanitary measure in dispute (irrespective of the products that measure may cover) on a risk assessment. We consider that the reference "as appropriate to the circumstances" relates, rather, to the way in which such risk assessment has to be carried out."

87. New Zealand agrees.

88. The second alleged deficiency is that New Zealand simply "deferred" to the findings in *Japan – Apples*. That, too, is specious.

89. *Japan – Apples* dealt with measures imposed in respect of the importation of mature symptomless apple fruit, and in relation to fire blight. The central scientific issue that was resolved in *Japan – Apples* was whether apples serve as a vector for transmission of fire blight. Due to this combination of similarities it is beyond any doubt that the reports in that case are highly relevant in the present case, in particular the Panel's central finding that:

> …the scientific evidence presented to the Panel show[s] that, with respect to mature, symptomless apple fruits, the risk that the transmission pathway be completed is "negligible".[45]

90. The present case deals with precisely the same product and precisely the same pest as *Japan-Apples*. The Panel in that case reviewed precisely the same science as in this case. The decision in that case must of necessity, therefore, be of the greatest interest to the Panel in this case.

c) There are important errors in the IRA's analysis of the entry, establishment and spread in respect of each pest

Fire Blight

91. In its First Written Submission, New Zealand established that the analysis of the importation steps for fire blight by the IRA ignored or misapplied relevant scientific data and assigned probability values to events that would certainly not occur as if those events occur with relative frequency.[46] Australia's attempt to rebut this relies substantially on a critique of the Roberts and Sawyer 2008 study, which as was already pointed out in the discussion of Article 2.2 is completely misplaced. Roberts and Sawyer's conclusion, that the likelihood of there being a pathway for the transmission of fire blight through trade in apples is negligible, by which they meant "so small as to be insignificant", stands.

92. Australia relies on the theory that only a small number of bacteria present on an imported apple would be sufficient to initiate a fire blight infection. But this theory, in turn, is entirely dependent upon the results of laboratory studies. The single orchard-based experiment Australia refers to does not support its contention that low populations would cause an infection. There is no scientific evidence that in a real orchard environment low numbers of bacteria can initiate infections.

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[45] Para 8.153. Australia misstates this finding at AFWS fn 227.

[46] NZFWS paras 4.208-4.237

93. Australia also relies heavily on an assessment of the consequences of establishment and spread of the disease. But the consequences of a fire blight outbreak, no matter how serious, do not increase the chances of the pathway being completed. The hypothetical scenario against which the consequences are being assessed simply does not exist in the real world. How can there be real consequences of an "event" that is purely hypothetical?

94. For that ultimately is the flaw in Australia's arguments about the entry, establishment and spread of fire blight. The pathway for the transmission of fire blight is only hypothetical. The likelihood of fire blight being transmitted through trade in apples is negligible. Thus, the IRA's risk assessment in respect of fire blight does not conform with Australia's obligations under Article 5.1 of the *SPS Agreement*.

European Canker

95. In its First Written Submission New Zealand pointed out that the IRA's analysis of the importation steps for European canker had assigned probability values to steps which often were no more than remote possibilities, resulting in the conclusion of a pathway for the transmission of European canker for which there is no support in scientific evidence or which has never been shown to exist in fact.

96. Australia's attempt to rebut New Zealand's arguments focuses principally on New Zealand's argument that the IRA had failed to consider properly the effect of climate on the establishment and spread of European canker.[47] New Zealand established that the climatic conditions in Australia were not suitable for the establishment and spread of European canker. Australia's attempted rebuttal of this consists of its own, new analysis of the implications of climate for European canker.[48] This attempted rebuttal fails, as Australia's climate analysis is seriously flawed and unreliable.

97. But, even if Australia's climate analysis were not flawed, it would simply be irrelevant. Australia cannot now remedy this failure of the IRA to consider climate in its risk assessment. If Australia has failed to conduct a risk assessment that meets the requirements of Article 5.1, it cannot remedy that defect by trying to shore up a defective IRA in these proceedings.

98. Equally, the IRA's arguments about alternative hosts in its analysis of the likelihood of establishment and spread are not based on scientific evidence.[49] It is not consistent with the real world experience in New Zealand, where, despite the presence of the pathogen in New Zealand for more than 80 years and the

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47 AFWS paras 531-534, 627-628, 657.

48 AFWS Annex 2.

49 NZFWS paras 4.318-4.320.

unrestricted movement of apple fruit around the country, there is no evidence of *N. galligena* causing disease on these hosts.

99. Furthermore, as pointed out in the discussion of Article 2.2, Australia's arguments minimizing the implications of the outbreak of European canker in Tasmania do not stand up to analysis. There is no better indication of the inability of European canker to spread in Australia than the Tasmania experience.

100. Thus, New Zealand's arguments about the failure of the IRA to assess the risks in respect of European canker from the importation of apples from New Zealand stands unrebutted.

ALCM

101. In its First Written Submission, New Zealand pointed out that there was no scientific evidence to support the IRA's conclusions about the likelihood of entry, establishment and spread of ALCM.

102. As New Zealand pointed out, the IRA only assessed the likelihood that apples are infested with cocoons, not whether the cocoons were viable.[50] However, it is only viable cocoons that are a risk factor for ALCM.[51]

103. The fact that the IRA ignored viability data is obvious from the text of the IRA where it is stated that its estimate is "based on the evidence that contamination rates for pupae or larvae of ALCM range from 1 – 11.5%"[52]. That data and estimate are taken from Tomkins 1994 whose figure of 0 – 11.5% did not distinguish between viable and non-viable or empty cocoons. Australia also tries to justify its failure to take into account viability by trying to discredit Rogers *et al.* 2006.[53] However, as pointed out in the discussion of Article 2.2, Australia's analysis of Rogers is simply wrong.

104. New Zealand also pointed out in its First Written Submission that in evaluating the likelihood that ALCM survives and remains with fruit after on-arrival minimum border procedures Australia disregarded the effect of AQIS inspection at the border.[54]

105. Australia claims that taking account of AQIS border inspection measures was not necessary because the IRA was assessing unrestricted risk.[55] But, the importation

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50 NZFWS para 4.337.

51 NZFWS para 4.337.

52 IRA, p 160.

53 AFWS para 731.

54 NZFWS paras 4.344-4.348.

55 AFWS para 751.

step in question was one which the IRA itself said factored in "minimum on-arrival border procedures",[56] and since all fruit and vegetables imported into Australia are subject to AQIS inspection, surely this is a "minimum on-arrival border procedure" that had to be taken into account.

106. Australia's claim in its First Written Submission that adult emergence could occur at any point in Australia, including transportation, and re-packing[57] is simply incorrect. As already pointed out in the discussion of Article 2.2, the scenario on which Australia relies for the establishment of ACLM in Australia has never occurred in the real world and is simply implausible.

107. There was thus no basis in science for the assumption of the IRA about the establishment of ALCM in Australia and the Australian First Written Submission fails to rebut New Zealand's arguments on this point.

2. Australia has not evaluated likelihood "according to the SPS measures which might be applied."

108. Finally, Article 5.1 requires that there be an evaluation of the likelihood of entry, establishment and spread of the three pests "according to SPS measures that might be applied". Some evaluation is not enough.[58] Additionally, a risk assessment must not be limited to an examination of the measures already in place or favoured by the importing country.[59]

109. In respect of seven of the measures at issue there is no evaluation at all in the IRA of their effect on the risk factors identified in the IRA; that is no evaluation of the impact they would have, either on their own or as part of a systems approach, on the assessed level of risk.[60] Indeed, the IRA makes clear that these measures are imposed *in addition* to those measures recognised as necessary to bring the level of risk to within Australia's ALOP[61].

110. Australia acknowledges that it failed to assess those seven measures but claims that the requirement to evaluate measures is limited to only "principal" measures, and that the seven it failed to evaluate are "ancillary" measures.[62] However, as I have already explained, there is no basis for Australia's distinction between "principal" and "ancillary" measures. The obligations in Article 5.1 are imposed in relation to "measures". Australia's distinction is spurious.

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56 IRA, p 165.

57 AFWS para 759.

58 Appellate Body Report, *Australia Salmon*, para. 134

59 Appellate Body Report, *Japan Apples*, para. 208

60 NZFWS paras 4.387, 4.396, and 4.401.

61 IRA pp 112 and 155

62 AFWS para 863 - 865

111. The IRA also failed to evaluate a measure requiring that apples be imported retail ready even though specifically requested to do so by New Zealand.[63] Australia argues that it had no obligation to do so.[64] But, at a minimum, importing countries should consider reasonable alternatives proposed by exporting countries. Australia did not do this.

112. The cumulative result of all the matters raised by New Zealand in respect of the risk assessment conducted by the IRA is that Australia has failed to comply with its obligations under Article 5.1 of the *SPS Agreement*.

Article 5.2

113. As New Zealand pointed out in its First Written Submission Australia failed to take into account factors set out in Article 5.2 of the *SPS Agreement*. As New Zealand there explained, the obligation to "take into account" is an obligation of substance that requires giving genuine consideration to available scientific evidence and the other factors set out in Article 5.2. Giving "genuine consideration" to available scientific evidence is not the same as "conforming actions to" a particular result as Australia tries to argue in its First Written Submission.[65] It simply requires that there be evidence that the matters concerned were taken into account.

114. When as in this case, the measures adopted fly in the face of available scientific evidence, then the Panel needs some evidence to show that the available scientific evidence and the other relevant factors were taken into account. But Australia provides no evidence to establish that it has in fact acted consistently with its obligations under Article 5.2.

Article 5.5

115. Australia's measures for the importation of New Zealand apples are inconsistent with its obligations under Article 5.5 which require a Member to avoid arbitrary or unjustifiable distinctions in the levels of protection it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

116. As New Zealand has pointed out in its First Written Submission, the three limbs of the test in Article 5.5 are all met. The different situations are comparable; there are arbitrary and unjustifiable differences in the ALOP applied; all of which result in discrimination and a disguised restriction on international trade. Australia's attempt to contradict the New Zealand arguments on the basis of alleged measures that do not exist or volumes of trade are not convincing, and its objections to the

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63 NZFWS paras 4.397-4.399.

64 AFWS para 873.

65 AFWS paras 879-880.

warning signals and additional factors identified by New Zealand are misguided. New Zealand will elaborate on this in its Second Written Submission.

Article 5.6

117. Article 5.6 requires that a Member must not establish or maintain measures that are more trade restrictive than required to achieve its ALOP. However, that is exactly what Australia has done. In respect of both fire blight and European canker, a less trade restrictive alternative would be a measure requiring that New Zealand apples imported into Australia be mature, symptomless fruit. In respect of ALCM, there is also a less trade restrictive alternative available – a 600-unit sample inspection.

118. All of these measures are reasonably available, would meet Australia's ALOP and would be less trade restrictive. New Zealand will elaborate on this in its Second Written Submission. Thus, the measures at issue in this dispute are inconsistent with Australia's obligations under Article 5.6.

Article 8 and Annex C

119. Australia has acted in breach of its obligations under Annex C(1)(a), and consequently under Article 8, of the *SPS Agreement*. The completion of the IRA process was delayed well beyond any reasonable period of time for considering New Zealand's request for apples access. As New Zealand noted in its First Written Submission, "[m]easures resulting from such a delayed process have not been imposed in accordance with the *SPS Agreement*."[66]

120. There is no reason relating to the approval process itself that the IRA process should have taken the time that it did. There was no difficulty in gaining access to scientific information and there had been no significant evolution in the science. Indeed, the delay can only be understood in the context of the parallel and interlinked political process, including two separate Senate inquiries conducted contemporaneously with the IRA process.

121. Australia has not responded to New Zealand's substantive arguments under Annex C(1)(a). It has not even attempted to rebut New Zealand's *prima facie* case that the IRA approval process involved undue delay. Instead Australia limits its response to the contention that New Zealand's claim under Annex C(1)(a) and Article 8 falls outside the terms of reference of the Panel. On this basis the Panel is entitled to treat New Zealand's arguments on undue delay as unrebutted.

122. This would have been the end of New Zealand's oral statement, but since Australia has requested a preliminary ruling on whether Article 8 and Annex C fall within the Panel's terms of reference, I will now address that issue.

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[66] NZFWS para 1.18.

123. New Zealand rejects Australia's claim and sees no need for a preliminary ruling on this matter or any good cause for deviating from the agreed rules of procedure.

124. In its Preliminary Ruling in this case the Panel concluded that the proceeding would continue "with respect to the 17 measures specifically identified in New Zealand's panel request and to the alleged inconsistency of such measures with the provisions of the *SPS Agreement* cited therein." Two of the provisions cited therein are Article 8 and Annex C(1)(a).

125. Australia's arguments are based on the false assumption that the measure at issue under New Zealand's Annex C(1)(a) claim is the "IRA process". New Zealand has never claimed that the IRA process is a measure at issue in this dispute. Quite apart from the Preliminary Ruling by the Panel, New Zealand did not refer to the IRA process in its panel request.

126. The measures at issue under New Zealand's Annex C(1)(a) and Article 8 claim are the 17 measures identified in New Zealand's panel request. Australia appears to believe that the "measure at issue" under Annex C(1) must be the "procedures to check and ensure the fulfilment of SPS measures" referred to in the chapeau of Annex C(1). Once again, Australia is mistaken.

127. As was clarified in *EC – Approval and Marketing of Biotech Products* the "measures at issue" do not themselves need to satisfy the chapeau of Annex C(1). In that case the procedures to check and ensure the fulfilment of SPS measures were the procedures contained in the EC's generic approval legislation relating to GMOs.[67] That approval legislation was expressly *not* a measure at issue in that case. Rather, the measure at issue was the *de facto* moratorium on approvals. This was not, in itself, a "procedure to ensure the fulfilment of" SPS measures.

128. By analogy to the present case, each measure at issue does not have to be a "procedure to ensure the fulfilment of SPS measures". In New Zealand's view, the procedure to check and ensure the fulfilment of SPS measures in the present case is the IRA process relating to apples from New Zealand. The IRA process is a specific application of Australia's more general approval requirements relating to the importation of fresh fruit or vegetables. These are set out in Australia's Quarantine Proclamation 1998, and Australia's Import Risk Analysis Handbook. New Zealand has provided as exhibits to this oral statement, excerpts of the Quarantine Proclamation and a series of AQIS letters, advising that the Import Risk Assessment would follow the IRA process outlined in Australia's Import Risk Analysis Handbook.

129. And it is *these* approval procedures that, pursuant to Article C(1)(a), must be undertaken and completed without undue delay. It was in this context that New

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[67] Namely, the EC Directive 2001/18 (and its predecessor EC Directive 90/220) governing "the deliberate release into the environment of genetically modified organisms," and EC Regulation 258/97 regulating "novel foods and novel food ingredients."

Zealand referred to "the IRA process" in its First Written Submission. So while the IRA process is certainly relevant to New Zealand's claim, it is not the measure at issue. It is the procedure to ensure fulfilment of Australia's SPS requirements relating to importation of fresh fruit and vegetables. Indeed, the IRA process is better thought of as the subject of the *obligation*. The obligation is to undertake and complete the IRA process without undue delay, and New Zealand's *claim* is that Australia failed to do this. Australia's argument blurs the distinction between *legal claims* and *measures at issue*.

130. In New Zealand's view, measures resulting from such a delayed process have not been imposed in accordance with the *SPS Agreement*. New Zealand submits that Article C(1)(a) should be read in the context of the General Provisions of the *SPS Agreement*. Article 1.1 establishes the general proposition that the *SPS Agreement* "applies to SPS measures" and that "*such measures* shall be *developed and applied* in accordance with the provisions of this Agreement." The obligation to undertake and complete approval procedures without undue delay is an obligation that relates directly to the *development* of SPS measures. As Australia's SPS measures at issue have not been developed in accordance with Annex C(1)(a) they should be found to be in violation of that provision.

131. Indeed it is unclear to New Zealand how the "IRA process" could sensibly be regarded as a "measure at issue".

132. Where substantive SPS measures have been adopted following an approval process, the approval process itself will have ceased to exist. In *US – Certain EC Products* the Appellate Body said it would be an error for a panel to make recommendations under DSU Article 19.1 where a measure has ceased to exist. [68]

133. In New Zealand's view, an interpretation of Annex C(1)(a) that requires a complaining Party to challenge measures that have ceased to exist does not accord with the DSU's aim of securing a positive solution to the dispute. This is especially so in circumstances where a substantive SPS measure resulting from an approval process does exist, and is available to be challenged. These are the circumstances in the present case.

134. For these reasons, Australia's procedural objection to New Zealand's claims under Annex C(1)(a) and Article 8 should be rejected.

135. Finally, New Zealand reaffirms all matters dealt with in its First Written Submission that have not been discussed in this oral statement and requests the Panel to make the rulings set out in its request for relief in its First Written Submission.

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[68] AB, *US – Certain EC Products*, para 81.