Australia – Measures Affecting the Importation of Apples from New Zealand

(WT/DS367)

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

3 September 2008

Mr. Chairman, Members of the Panel,

1 In the light of the first written submissions and oral statements, New Zealand thought that it would be helpful for the Panel for New Zealand briefly to identify in this concluding statement the issues in dispute between the parties.

2 First, this is not a case about the right of Australia to set its ALOP. In its oral statement yesterday Australia made much of the fact that it is entitled to set its own ALOP. New Zealand has not and does not dispute this. New Zealand makes no challenge to Australia's ALOP in this case or its right to set its ALOP.

3 Second, this is not a case about the burden of proof. Again, Australia frequently claims that New Zealand has not met its burden of proof, often more as a rhetorical device than as a real argument. But, the issue between the parties is not about whether sufficient evidence has been adduced to establish a *prima facie* case or whether New Zealand must prove a negative – that pathways for the transmission of fire blight, European canker and ALCM do not exist.

4 Third, this is not really a case about the applicable law. The basic obligations relating to SPS measures have been clarified through dispute settlement in several cases so there should be little dispute about them. Australia has tried to introduce a "considerable deference" standard of review, apparently as a kind of *lex specialis* for SPS cases, or perhaps as we heard yesterday in response to questions for Article 5.1 alone. But attempts like this in other SPS cases have been rejected in the past and they should not be given any credence in this case.

5 Equally Australia's attempt to give Article 5.1 primacy so that consistency with Article 5.1 constitutes consistency with Article 2.2 provides a gloss on the law which, when combined with a deferential standard of review, is really an attempt to shield its measures from serious review in the light of the standards of the SPS agreement. It is a claim for exemption from the agreement. Under the

guise of maintaining a balance in the rights and obligations of the SPS agreement, Australia is seeking to re-order those rights and obligations.

6 Fourth, the fundamental question in this case and the fundamental issue that divides the parties is whether the measures imposed by Australia are maintained with sufficient scientific evidence. This can be expressed in terms of Article 2.2 as whether there is a "rational or objective relationship" between the measures and scientific evidence, and in terms of Article 5.1 whether there has been a proper assessment of the "likelihood of entry, establishment and spread" of the three pests.

7 This, in fact, is the heart of this case.

8 The claim by Australia that the importation of mature symptomless apples provides a pathway for the transmission of the fire blight and European canker diseases and the ALCM pest, is based on conjecture and supposition, not on scientific evidence. At critical points along these alleged pathways, as New Zealand has pointed out, scientific evidence in support of the Australian position simply does not exist. The resolution of this difference between the parties is ultimately the issue that the Panel has to decide.

9 Measures that can be shown to have a rational or objective relationship with scientific evidence meet the requirements of Article 2.2. A risk assessment that evaluates the likelihood of entry, establishment and spread of a disease on the basis of scientific evidence about that risk, not on the basis of supposition or speculation about risk, complies with Article 5.1. But an assessment of risk cannot take negligible risk and multiply it up into higher risk by the use of numerical probability values that have no relationship to real world experience. And, while it is true that minority scientific opinion can be taken into account, such minority science must exist; it cannot just be claimed to exist.

10 In short, Mr. Chairman, Members of the Panel, the task for you in this case is ultimately to determine whether the Australian measures are grounded in

sufficient scientific evidence, that is, whether there is a rational or objective relationship between the measures and scientific evidence, and whether that risk was properly evaluated in the IRA on the basis of scientific evidence. New Zealand is confident that, when you do so, you will find Australia lacking on both counts.

11 Australia's failure to find a basis in science for its measures have certain further consequences in terms of its obligations under Articles 5.2, 5.5, 2.3 and 5.6. In those instances, too, Australia is in breach of its obligations under the SPS Agreement. In addition, behind all of this are Australia's intermingled political process and its lengthy, undue delay which results in a breach of Annex C and Article 8, and also provides an important background and context for considering Australia's measures in this case.

12 Mr. Chairman, Members of the Panel, this concludes New Zealand's closing statement. I thank the Panel for its attention in this first oral hearing. New Zealand looks forward to responding in due course to the Panel's written questions.