BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION

AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF APPLES FROM NEW ZEALAND

(AB-2010-2 / DS367)

Appellee Submission of Australia

September 27, 2010

TABLE OF CONTENTS

TABLE OF CASES CITED IN THIS SUBMISSION iii
LIST OF ABBREVIATIONS USED IN THIS SUBMISSION iv

I. INTRODUCTION AND EXECUTIVE SUMMARY 1
II. LIMITED SCOPE OF OTHER APPEAL 1
III. GROUNDS FOR OPPOSING OTHER APPEAL 2
A. The Panel asked itself the correct question 2
B. The Panel correctly answered the question 3
C. In any event, New Zealand's claim is based on a misinterpretation of Annex C(1) of the SPS Agreement 6
IV. THE APPELLATE BODY SHOULD NOT COMPLETE THE ANALYSIS 7
V. CONCLUSION 7

ANNEX I 8

TABLE OF CASES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
US – Carbon Steel	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, DSR 2002:IX, 3779

LIST OF ABBREVIATIONS USED IN THIS SUBMISSION

Abbreviation	**Description**
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
IRA	Biosecurity Australia, Final Import Risk Analysis Report for Apples from New Zealand, November 2006
Panel request	Request for the Establishment of a Panel by New Zealand, WT/DS367/5 (7 December 2007)
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures,* opened for signature 15 April 1994, 1867 UNTS 493 (entered into force 1 January 1995)
SPS measure	Sanitary or Phytosanitary Measure as defined in Art 1 of Annex A to the SPS Agreement

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. New Zealand has appealed the Panel's finding at [8.1](f) of the Panel Report that its claim of undue delay under Annex C(1)(a), and its consequential claim under Art 8, of the SPS Agreement were outside the Panel's terms of reference. It contends that the Panel arrived at "the erroneous conclusion that New Zealand had to challenge the completed 'IRA process' as the measure at issue, in order to bring a challenge under Annex C(1)(a)": Other Appellant Submission at [2].

2. In making that contention (repeated at [3], [8], [15], [17], [22] and [23]), that the Panel *required* New Zealand to challenge the "IRA process" in order to bring a claim under Annex C(1)(a), or that New Zealand was not entitled to bring a challenge against the 17 measures identified in its panel request, New Zealand mischaracterises the Panel's conclusion. The Panel properly determined that the object of New Zealand's claim under Annex C(1)(a), as articulated by New Zealand itself during the panel proceedings, was not identified in New Zealand's panel request: the Panel found (at, e.g., [7.1468], [7.1469], [7.1471] and [7.1474]) that the object of the claim was the "IRA process" (or the development of the SPS measures in issue), as distinct from the 17 measures in fact identified in the panel request.

3. The Panel's finding rests upon the orthodox application of settled Appellate Body guidance, especially *EC – Selected Customs Matters* and *US – Carbon Steel*, to New Zealand's own panel request and articulation of its claims under Annex C(1)(a) and Art 8. Australia requests that the Appellate Body uphold the finding.

II. LIMITED SCOPE OF OTHER APPEAL

4. In a preliminary ruling of 6 June 2008, the Panel concluded in respect of New Zealand's panel request: (a) that it properly identified as specific measures at issue the 17 items listed in bullet point form; (b) that it did not identify with sufficient precision any other measures and, accordingly, that any other measures were outside the Panel's terms of reference; and (c) that it contained sufficient information regarding the legal basis of the complaint only with respect to the 17 identified items: Panel Report, Annex A-2 at [13].

5. New Zealand does not claim that the preliminary ruling of 6 June 2008 was affected by legal error. It makes no reference to the preliminary ruling, or Annex A-2, in its Notice of Other Appeal or Other Appellant Submission. New Zealand's claim on appeal is expressly confined to the reasoning and conclusions of the Panel set out in its final report (at [7.1443]-[7.1490] and [8.1](f)), specific to whether New Zealand's claims under Annex C(1)(a) and Art 8 were within the Panel's terms of reference. The Panel's preliminary ruling that the measures at issue in this dispute were limited to the 17 specific measures listed in bullet point form in New Zealand's panel request is not, therefore, within the scope of New Zealand's Other Appeal.

6. Accordingly, in order to succeed in its claim on appeal consistently with the Panel's unchallenged preliminary ruling, New Zealand must demonstrate that the Panel erred in finding that the object of its Annex C(1)(a) and Art 8 claims was not one or more of the 17 specific measures identified in the panel request.

III. GROUNDS FOR OPPOSING OTHER APPEAL

A. The Panel asked itself the correct question

7. Contrary to New Zealand's submission at [9]-[12], the Panel correctly identified, consistently with *EC – Selected Customs Matters* at [130], that in order to determine whether it had jurisdiction to examine New Zealand's claim under Annex C(1)(a) and Art 8 of the SPS Agreement, it was required to ask whether the measure at issue relevant to that claim – i.e. the *object* of the claim – fell within the Panel's terms of reference. After setting out at [7.1457]-[7.1458] the relevant guidance from *EC – Selected Customs Matters*, it asked itself at [7.1459]:

> *[W]hat* does New Zealand challenge under Annex C(1)(a)? *What*, according to New Zealand, causes the violation of Annex C(1)(a)?
>
> (*original emphasis*; emphasis added)

8. The Panel's questions make clear that the Panel, contrary to New Zealand's assertions (at [2], [3], [8], [15], [17], [22], [23]) that it required New Zealand to challenge the "IRA process", sought simply to determine *the nature* of New Zealand's claim as in fact articulated and whether that claim was within the Panel's terms of reference as defined by the panel request.

9. In determining whether the claim was within the terms of reference, the Panel correctly required New Zealand to identify in its panel request the "procedure" which it alleged to infringe the obligation under Annex C(1)(a). Contrary to New Zealand's submission at [15], the Panel did not err by finding "that the measure at issue *must necessarily be* the 'procedure' referred to in the *chapeau* of Annex C(1)(a)" of the SPS Agreement: the "procedure" referred to in the *chapeau* of Annex C(1) is the subject of the various obligations set out in sub-paragraphs (a)-(i). It is that "procedure" which is required to satisfy those obligations. Therefore, a complainant must, in accordance with Art 6.2 of the DSU, identify in its panel request the measure it alleges corresponds to the "procedure" within the meaning of Annex C(1). Whether or not a particular measure could validly be categorised as a "procedure to check and ensure the fulfilment of [SPS] measures", for the purposes of determining a violation of Annex C(1), is separate from identifying *what* the complainant in fact alleges to be the "procedure" which is the object of its undue delay claim.

10. New Zealand's submission at [2] that the Panel "erroneous[ly] assum[ed] that the measure at issue must directly cause the violation of obligations" seeks to contrive a distinction between the object of a claimed violation and a measure at issue, when they are the same thing. Moreover, New Zealand builds on this artifice when it claims, at [14]-[18], that the Panel erred by blurring the distinction between the measures at issue and the claim. Contrary to New Zealand's submission at [16], the Panel did not interpret the phrase "measure at issue" in the light of the specific obligation; it simply found that the object of New Zealand's claim was absent from its panel request. New Zealand submits at [21] that the 17 measures were an appropriate target of challenge under Annex C(1)(a). The Panel did not find otherwise. It did not, as New Zealand submits at [22]-[23], find that the "*only* way to challenge an unduly delayed but completed approvals process is through an expired measure at issue" or that "the *only* measure that could be challenged in the circumstances of this case was the expired IRA process." Its conclusion concerned simply the way in which New Zealand in fact articulated its claims under Annex C(1)(a) and Art 8.

B. The Panel correctly answered the question

11. Australia sets out at Annex I to this submission the various ways in which New Zealand has formulated and reformulated its Annex C(1)(a) and Art 8 claims. On any view, New Zealand did not claim that the 17 measures themselves violated Annex C(1)(a)

and Art 8. Instead, the object of its claim was the IRA process, or the development of the 17 specified measures. It suffices to observe that in its submission of 7 April 2008 on Australia's request for a preliminary ruling, New Zealand stated at [2.9]:

> … the Final IRA as a whole is inconsistent with Australia's obligations under the *SPS Agreement*. That is the essence of New Zealand's Article 8 and Annex C(1)(a) claim.
>
> (emphasis added)

In its first written submission to the Panel at [4.546], New Zealand focussed on the "IRA process", arguing that "Australia was under an obligation to undertake and complete the IRA process without undue delay" because it was an "approval procedure" that was subject to the obligation established by Annex C(1)(a). Later, it argued that:

> [T]he 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.
>
> (New Zealand's opening statement at the first Panel meeting, [127]; emphasis added)

12. In light of New Zealand's own submissions, which were summarised in the Panel Report at [7.1413], [7.1422], [7.1427]-[7.1431] and [7.1459], the Panel correctly identified the object of New Zealand's challenge under Annex C(1)(a) and Art 8 as the "unjustifiably delayed development and adoption of the 17 SPS measures at issue": Panel Report at [7.1459]; also [7.1468] and [7.1471]. (This "development" of the 17 measures was also referred to by New Zealand as the "IRA process": New Zealand's responses to the Panel's questions after the first meeting at [298].)

13. The Panel further recognised, again correctly in Australia's submission, that the development of the 17 measures was conceptually distinct from the measures themselves: Panel Report at [7.1469]. The Panel explained at [7.1468] of its report that:

> New Zealand is not challenging the content of the 17 requirements as such. Rather, it is the procedure leading to the adoption of these 17 requirements, and more precisely the alleged delay in this procedure that in New Zealand's

> view violates Annex C(1)(a). Or, in New Zealand's words, the "development" of these 17 measures.

As such, the Panel reasoned that the development of the 17 measures was not captured by merely identifying the 17 measures in the panel request: Panel Report at [7.1473]. And, as the Panel found in its unchallenged preliminary ruling, the measures at issue were limited to those 17 measures. The "development" of the measures, or the "IRA as a whole" or the "IRA process" were outside the terms of reference: see Panel Report at [7.1452] and [7.1473].

14. New Zealand seeks to draw support at [12] from the Appellate Body's guidance in *EC – Selected Customs Matters* at [133] that "a complainant is entitled to include in its panel request an allegation of inconsistency with a covered agreement of any measure that may be submitted to WTO dispute settlement". Nothing in the Panel's reasoning can be interpreted as a restriction of New Zealand's right in this regard. The important condition on a complainant's entitlement to challenge any measure, which New Zealand has consistently overlooked, is that the allegation of inconsistency in respect of the *relevant measure* must be set out in the panel request. It is not sufficient for the relevant measure to be identified in subsequent submissions; indeed, the Panel would have erred had it permitted New Zealand to "cure" its failure to identify in the panel request the measure it sought to challenge by its undue delay claim by submissions: as the Appellate Body explained in *US – Carbon Steel* at [127]:

> … compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.

15. To the extent that the Panel examined additional issues in its analysis, it did not do so to the detriment of the legal validity of its reasoning on the material point that the "IRA process" was the object of New Zealand's claim, and since the "IRA process" had not been identified as a measure at issue in the panel request, it could not form part of the Panel's terms of reference.

C. In any event, New Zealand's claim is based on a misinterpretation of Annex C(1) of the SPS Agreement

16. In any event, New Zealand's substantive undue delay claim is based on a misinterpretation of Annex C(1).

17. Annex C(1) provides in relevant part:

> Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
>
> (a) such procedures are undertaken and completed without undue delay.

18. In claiming that there was undue delay in the development of the 17 measures listed in its panel request, New Zealand contends that Annex C(1)(a) is "an obligation to develop SPS measures without undue delay": Other Appellant Submission at [23]. However, the ordinary meaning of a procedure "to check and ensure the fulfilment" of SPS measures, referred to in the *chapeau* of Annex C(1), cannot be the equivalent of a procedure which "develops" SPS measures. As acknowledged by New Zealand, "[t]he IRA process was the process by which the measures at issue were developed": New Zealand's responses to the Panel's questions after the first meeting at [298]. The 17 measures were adopted *following* and as a result of the IRA process. As such, the IRA process cannot be considered as a process intended to check or ensure the fulfilment of the 17 measures within the scope of the *chapeau* to Annex C(1).

19. Before the Panel, New Zealand submitted that "the 'sanitary and phytosanitary measures' referred to in the chapeau are Australia's regime relating to the approval of fresh fruit or vegetables": New Zealand's responses to the Panel's questions after the first meeting at [301]. That concession makes even more explicit that the object of New Zealand's undue delay claim (or measure at issue) was not set out in its panel request: in New Zealand's own submissions, the 17 identified measures within the Panel's terms of reference corresponded neither to the "procedure" nor to the "[SPS] measures" referred to in the *chapeau* of Annex C(1).

IV. THE APPELLATE BODY SHOULD NOT COMPLETE THE ANALYSIS

20. New Zealand has requested the Appellate Body to complete the analysis in the event that the Appellate Body reverses the Panel's finding about its terms of reference: Other Appellant submission at [27]-[28]. Among the four "key factual matters" which New Zealand relies upon in this context is "the absence of any explanation (let alone justification) by Australia of this delay". That issue is relevant to whether any delay was "undue". Australia recalls that New Zealand relied heavily on alleged political interference in the IRA process in support of its claim that the delay was "undue": New Zealand's first written submission at [4.554]-[4.559]. The allegations of political interference were refuted by Australia in its first written submission at [27]-[32] and [1125]. As to New Zealand's reliance upon certain statements made in the domestic review of Australia's quarantine system, Australia explained the context of those statements in its response to question 127 from the Panel after the second meeting. Accordingly, and in light of the absence of any relevant factual findings made by the Panel, the Appellate Body should not complete the analysis of New Zealand's undue delay claim.

V. CONCLUSION

21. For the reasons set out above, the Appellate Body should dismiss New Zealand's other appeal and uphold the Panel's finding at [8.1](f) of its Report that New Zealand's claim of undue delay under Annex C(1)(a), and its consequential claim under Art 8, of the SPS Agreement were outside the Panel's terms of reference.

Dated: September 27, 2010

ANNEX I

Chronological digest of New Zealand's statements before the Panel relating to its undue delay claim

Relevant New Zealand submission to the Panel	**New Zealand's statement**
New Zealand's submission on Australia's request for a preliminary ruling (7 April 2008), at [2.9]	New Zealand considers that the Final IRA as a whole is inconsistent with Australia's obligations under the *SPS Agreement*. That is the essence of New Zealand's Article 8 and Annex C(1)(a) claim.
New Zealand's first written submission (20 June 2008), at [4.541], [4.546]	Australia's process for considering New Zealand's request for access for New Zealand apples to the Australian market was delayed well beyond any reasonable period of time for considering the request. … The IRA process conducted by Australia to assess the conditions under which New Zealand apples could be exported to Australia was such an "approval procedure". Thus, Australia was under an obligation to undertake and complete the IRA process without undue delay.
New Zealand's opening statement at the first substantive meeting (2 September 2008), at [119], [125], [126], [128], [129], [130]	The completion of the IRA process was delayed well beyond any reasonable period of time for considering New Zealand's request for apples access. … 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. … 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. … 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. … 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 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 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.
New Zealand's responses to the Panel's questions after the first substantive meeting (23 September 2008), at [298], [300], [301], [306]	New Zealand agrees that there is a very close relationship between the IRA process and the measures at issue. The IRA process was the process by which the measures at issue were developed. Of course, New Zealand is not arguing that the undue delay is itself a measure at issue. Rather, the 17 measures listed in New Zealand's panel request are the measures at issue, and it is New Zealand's contention that these were not developed and adopted without undue delay ... In New Zealand's view, the procedure to check and ensure the fulfilment of SPS measures is the IRA process relating to apples from New Zealand. And it is these procedures that, pursuant to Annex C(1)(a), must be undertaken and completed without undue delay. … In the circumstances of this case, the "sanitary and phytosanitary measures" referred to in the chapeau are Australia's regime relating to the approval of fresh fruit or vegetables. Under this regime the importation of fresh fruit or vegetables is prohibited unless a Director of Quarantine has granted a permit to import into Australia. … For these reasons New Zealand submits that the IRA process in this case was a "procedure to check and ensure the fulfilment of an SPS measure".
New Zealand's rebuttal submission (21 April 2009), at [2.928], [2.930]	New Zealand does not, and has never, claimed that the IRA process is a measure at issue in this dispute. As made clear in New Zealand's first written submission and oral statement for first substantive meeting with the parties, New Zealand's claim is that the measures resulting from the IRA process are the measures at issue under Article 8 and Annex C(1)(a). In New Zealand's view, SPS measures resulting from an unduly delayed process have not been imposed in accordance with the *SPS Agreement*. … The reference to SPS measures in the chapeau refers to Australia's generic approval regime for the approval of fresh

	fruit and vegetables. This is not a measure at issue and New Zealand is not claiming that Article C(1) relates to the development of that SPS measure. However, the completion of these approval procedures as applied to New Zealand's request for apples access resulted in the adoption of the measures at issue in this dispute. In these circumstances, Article C(1)(a) relates directly to the development of SPS measures. Such measures must be developed without undue delay.
New Zealand's opening statement at the second substantive meeting (1 July 2009), at [113]	The IRA process is the subject of the obligation, it is not the measure at issue. The measures at issue in this case are the 17 measures identified in New Zealand's panel request.
New Zealand's closing statement at the second substantive meeting (2 July 2009), at [12]	The IRA process took place, as we have described, in a highly charged political environment, and as a result it took over 8 years to complete. And while that political context might explain the delay, it does not free Australia from its obligations under Article 8 and Annex C of the SPS Agreement.
New Zealand's responses to Australia's questions after the second substantive meeting (24 July 2009), at [43], [44]	With the exception of the SPS measures identified in New Zealand's panel request, the IRA process was no longer in existence at the time that New Zealand requested that a panel be established. In accordance with the general rule that measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel, it was not open to New Zealand to identify the "IRA process" as a measure at issue. … The IRA process is relevant to New Zealand's claim because it is the "procedure to check and ensure the fulfilment of sanitary and phytosanitary measures" according to the chapeau of Annex C(1).
New Zealand's comments on Australia's responses to the Panel's questions after the second substantive meeting (31 July 2009), at [286]	The IRA process did not "cause" the undue delay; it did not delay itself. Rather the IRA process was delayed. That is, it is the subject of the obligation to not unduly delay approval procedures.