



Your complimentary
use period has ended.
Thank you for using
PDF Complete.

[Click Here to upgrade to
Unlimited Pages and Expanded Features](#)

WORLD TRADE ORGANIZATION

*Panel established pursuant to Article 6 of the
Understanding on Rules and Procedures Governing the Settlement of Disputes*

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

Executive Summary:

First Written Submission of Australia

Geneva, 25 July 2008



Your complimentary
use period has ended.
Thank you for using
PDF Complete.

[Click Here to upgrade to
Unlimited Pages and Expanded Features](#)

I. INTRODUCTION

1. Australia opened its market to New Zealand apples in 2007. This followed an extensive import risk analysis which recommended that a number of measures were required to mitigate the risk that the causal agents of fire blight and European canker, and apple leafcurling midge (ALCM), *inter alia*, could enter Australia with serious and irreversible consequences. In requiring such measures, Australia is exercising its basic right under the *SPS Agreement* to protect its plant life and health from risks arising from the introduction of pests not present in Australia but endemic to New Zealand, at the appropriate level of protection (ALOP) determined by Australia.

2. New Zealand's challenge to the trade liberalising, science-based measures, fails to demonstrate any breach by Australia of its WTO obligations. Australia also completely rejects New Zealand's unsubstantiated allegations that the preparation of the *Final Import Risk Analysis Report for Apples from New Zealand*, November 2006 (the Final IRA Report) was tainted by political interference. Australia requests the Panel to disregard these allegations in their entirety.

II. LEGAL FRAMEWORK

3. As complainant in this dispute, New Zealand must establish a *prima facie* case based on both evidence and legal argument, in relation to each of its claims and each of the measures challenged, before the evidentiary burden shifts to Australia. However, New Zealand's submission makes flawed legal arguments and bald, and sometimes misleading, assertions, without submitting evidence to support many of its claims. These failings mean that New Zealand has not discharged its burden of proof and, therefore, the presumption that Australia's measures are WTO-consistent has not been overturned. Australia nonetheless demonstrates, through solid scientific evidence and legal argument, that its measures are fully consistent with the relevant provisions of the *SPS Agreement*. While New Zealand is entitled to rebut Australia's arguments, it is not entitled to remedy its failure to provide sufficient factual evidence in support of its claims in its first written submission, by introducing new evidence in the rebuttal stage of these proceedings.

4. The product and measures at issue limit the scope of this dispute. First, the product at issue, as set out in the Final IRA Report, is 'mature apple fruit free of trash, either packed or



Your complimentary use period has ended.
Thank you for using PDF Complete.

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

sorted and graded bulk fruit from New Zealand. New Zealand's attempts to mischaracterise the product at issue should be rejected by the Panel.

5. New Zealand purports to challenge the 17 "measures" specifically identified in its panel request, but several of those measures do not exist as New Zealand has described them. Australia does not impose the orchard-suspension following pruning requirement for European canker alleged by New Zealand. Australia also considers that there is no live dispute regarding the requirement for involvement of Australian Quarantine and Inspection Service officers in inspections, because New Zealand's challenge results from a misunderstanding of the actual requirement. Accordingly, there are only 15 measures at issue in this dispute. In addition, a large number of the "measures" identified by New Zealand are not challengeable on an individual basis, and should only be assessed by the Panel when "taken as a whole" with the principal risk reduction measures applied by Australia.

6. Australia also draws the Panel's attention to the critical threshold issue of standard of review. The Panel should be mindful of the appropriate standard(s) of review in its evaluation of the basis for Australia's measures. The nature of what is required of a panel to conduct an "objective assessment of the facts" pursuant to Article 11 of the DSU varies depending on the particular provision at issue. Under the *SPS Agreement*, Australia submits that a panel's jurisdictional competence is most limited in respect of its review of risk assessments, because the obligation to base SPS measures on a risk assessment means that a thorough expert evaluation of the relevant technical issues compulsorily precedes a panel's analysis of the issues.

7. In Australia's view, Article 5.1 requires a panel to examine whether the risk assessment relied upon by a Member is objective and credible. Guidance from past cases indicates that a panel may not conduct its own risk assessment, attempt to settle a scientific debate or substitute its own judgment for that contained in a risk assessment, without appropriate cause. Australia submits that, only if the complainant establishes flaws in a risk assessment which are so serious that they would prevent a panel from having reasonable confidence in that assessment will the panel's duty extend to scrutiny of the relevant scientific evidence and intervention in the findings or conclusions of a risk assessment.

8. In addition, the nature of the relationship between Article 2.2 and Article 5.1 of the *SPS Agreement* warrants careful consideration by the Panel. The Appellate Body has explained that



Your complimentary use period has ended.
Thank you for using PDF Complete.

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

these two provisions should constantly be read together and that the elements of each inform and impart meaning to the other. New Zealand effectively ignores this guidance by artificially dividing the substantive matters to be addressed under the two provisions.

9. In Australia's view, the obligation that SPS measures not be maintained without sufficient scientific evidence (Article 2.2) and the obligation to base measures on a valid risk assessment (Article 5.1) cannot be meaningfully separated. Article 5.1 is a specific application of Article 2.2. This means that Article 5.1 and its associated provisions elaborate specific conditions which, if met, will establish the consistency of the relevant measures with Article 2.2.

10. Australia's view is supported by the text of the *SPS Agreement*. Both Article 2.2 and Article 5.1 are concerned with whether the available evidence supports the establishment of *risk*, which provides an underlying justification for the adoption of SPS measures. Risk assessments under Article 5.1 involve the expert evaluation of scientific evidence, as well as technical and economic factors, in accordance with an appropriate methodology. They must also be appropriate to the circumstances. Accordingly, if measures are based on a valid risk assessment under Article 5.1, the requirement of Article 2.2 that measures not be maintained without sufficient scientific evidence is satisfied. Australia has therefore addressed New Zealand's technical and scientific claims together under Article 5.1 and encourages the Panel to similarly commence its analysis of Australia's measures under Article 5.1.

III. LEGAL AND FACTUAL REBUTTAL

A. AUSTRALIA'S MEASURES ARE CONSISTENT WITH ARTICLE 5.1, AND ACCORDINGLY, WITH ARTICLE 2.2

1. New Zealand misunderstands what is required of a valid risk assessment

11. Australia's measures are consistent with Article 5.1 and, accordingly, with Article 2.2 of the *SPS Agreement*. They are based on a comprehensive risk assessment, which is appropriate to the circumstances and is consistent with the criteria set out in Articles 5.1, 5.2, 5.3 and Annex A(4) of the *SPS Agreement*. The Final IRA Report expresses the conclusions of qualified and respected scientists and technical experts (the IRA Team). The IRA Team concluded on the basis of available evidence that, in order to meet Australia's ALOP, measures would be



Your complimentary
use period has ended.
Thank you for using
PDF Complete.

[Click Here to upgrade to
Unlimited Pages and Expanded Features](#)

necessary to protect plant life and health from fire blight, European canker and ALCM, as well as a range of measures for other pests that are not the subject of dispute by New Zealand.

12. New Zealand misunderstands the nature of the risk assessment required by Article 5.1.
13. For example, New Zealand argues that, instead of obtaining a proper risk assessment appropriate to the circumstances, Australia should have based its measures on the findings in the *Japan – Apples* dispute. However, the findings in *Japan – Apples* clearly do not constitute a risk assessment within the meaning of the *SPS Agreement*. Those findings do not take account of Australian conditions including its ALOP, consumption and distribution patterns, environmental conditions, host distributions or the potential commercial volume of New Zealand apples which may be exported to Australia. Australia does not accept that the panels in *Japan – Apples* envisaged that their *legal* conclusions should be considered a “global” risk assessment that could be substituted for a proper risk assessment applying to an entirely different set of circumstances. In any event, *Japan – Apples* is concerned with risks associated with only one of the three pests at issue in this dispute – fire blight.
14. New Zealand’s criticisms of the IRA Team’s analysis of the available scientific evidence is often based on selective reliance upon particular pieces of evidence and is also based on multiple erroneous calculations and assumptions. New Zealand relies on the superficially attractive notion of scientific “certainty” around the transfer and spread of the pests at issue. This conveniently ignores the range of credible scientific views on these issues. The IRA Team, in exercising its expert judgment, was entitled to rely on the full spectrum of scientific evidence drawn from qualified and respected sources. Members regularly take measures to mitigate the potentially significant consequences of low probability events. This is good risk management practice and does not mean that Australia has over-estimated or exaggerated the risks. It is for Australia to set its own ALOP.
15. The flaws in New Zealand’s critique are compounded by errors of law. Pursuant to the relevant provisions of the *SPS Agreement*, a valid assessment of phytosanitary risk must evaluate both the *likelihood* of entry, establishment or spread of a pest, *as well as* the associated potential biological and economic *consequences*. New Zealand wrongly implies that the notion of “risk” should be confined to the likelihood of entry, establishment or spread. New Zealand also inappropriately conflates the notion of mere “possibility” with events that may only have a very



Your complimentary use period has ended.
Thank you for using PDF Complete.

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

small or negligible probability of occurring. This effectively amounts to an assertion that risk assessments are required to identify a minimum magnitude of risk – a proposition which has been expressly rejected by the Appellate Body.

16. New Zealand also wrongly claims that there are flaws in the semi-quantitative methodology used by the IRA Team. The IRA Team rigorously applied sound methodology, as is scrupulously detailed in the Final IRA Report. Its approach was commensurate with best practice risk assessments worldwide, including the *International Plant Protection Convention* standards (ISPMs). Furthermore, the *SPS Agreement* is not prescriptive as to methodology and Australia cannot be required to use New Zealand's own methodology.

17. The use of distributions by the IRA Team in estimating probability reflects the range and variability of available scientific evidence, accommodating small but significant probabilities as well as uncertainties, consistent with ISPM No.11. New Zealand's claims that the volume of trade is overestimated in the Final IRA Report are based on faulty suppositions about Australian consumer preferences, distribution channels, price responses and exporter behaviour.

2. New Zealand's claims in respect of fire blight are unsubstantiated

18. The Final IRA Report outlines in precise detail the analysis of the IRA Team, which arrived at the conclusion that there is an identifiable risk that the causal agent of fire blight, *Erwinia amylovora*, could find a pathway into Australia on mature New Zealand apples and result in serious consequences. The findings in *Japan – Apples* do not amount to scientific evidence, or a valid risk assessment, therefore undermining New Zealand's claims in this dispute. New Zealand also attempts to substitute the Final IRA Report with the scientific study by Roberts and Sawyer (2008), which is based on outdated data largely concerning trade between the United States and Japan under conditions that are no longer relevant.

19. New Zealand relies on purported evidence about the "long history of trade" between exporting countries with fire blight and those countries without the disease, as well as scientific studies which speculate about the causes of fire blight spread, to support its claim that mature apples do not spread fire blight. Australia shows to the contrary that there is no direct evidence which establishes this "fact". Many fire blight incursions around the world remain unexplained. Members other than Australia also share the concern that apple fruit may transmit *E. amylovora*, evidenced by the risk management measures that they impose on imported apples. Some of New



Your complimentary
use period has ended.
Thank you for using
PDF Complete.

[Click Here to upgrade to
Unlimited Pages and Expanded Features](#)

Zealand's other trading partners impose measures very similar to those adopted by Australia on New Zealand apples. New Zealand also argues that the pathway for fire blight could never be completed because there would be insufficient quantities of *E. amylovora* bacteria to initiate an infection in Australia. In Australia's view, these arguments are based on an unbalanced and selective view of the evidence.

20. Finally, New Zealand's assertion that the consequences of a fire blight incursion in Australia would be the same as in New Zealand is without basis. The Final IRA Report demonstrates that fire blight is a highly variable disease and is not likely to be experienced in the same way in different places. In any case, there is ample evidence from New Zealand and the United States to show that fire blight disease has very serious consequences.

3. New Zealand's claims in respect of European canker are unsubstantiated

21. In respect of European canker, the Final IRA Report outlines in similarly precise detail the IRA Team's analysis to arrive at the conclusion that there is an identifiable risk that mature fruit could provide a pathway for the entry, establishment and spread of the disease, with serious potential consequences. New Zealand seeks to overturn the IRA Team's meticulous approach through a series of ill-founded arguments. However, it cannot escape the explicit acknowledgement by the Chief Plants Officer of the New Zealand Ministry of Agriculture that "apple fruit are a potential pathway for the introduction of European canker, as the fruit can develop latent or storage rots."

22. Australia shows that New Zealand's climate analysis is too narrow as it focuses solely on a few environmental criteria relevant to commercial apple and pear production, and it overlooks the biology of the pathogen and its wide range of hosts distributed throughout large areas of Australia. This leads to incorrect predictions as to the potential distribution of European canker. Australia's modelling shows that the potential distribution of European canker in Australia covers a much larger area than that suggested by New Zealand.

23. Contrary to New Zealand's suggestion, the IRA Team identified four relevant studies in relation to fruit rot caused by *Neonectria galligena* in New Zealand, as well as scientific evidence regarding spore dispersal and survival. Further, Australia has clearly articulated the reasons for the limited spread during the Tasmanian outbreak of European canker. These



Your complimentary
use period has ended.
Thank you for using
PDF Complete.

[Click Here to upgrade to
Unlimited Pages and Expanded Features](#)

reasons include a rigorous eradication program and a unique strain of *N. galligena* which required another mating type for reproduction.

24. Finally, New Zealand's claim in relation to the assessment of potential consequences of European canker is superficial and confused.

4. New Zealand's claims in respect of ALCM are unsubstantiated

25. The Final IRA Report also represents an objective and credible analysis of the risks associated with the entry, establishment or spread of ALCM in Australia associated with New Zealand apples. New Zealand acknowledges that viable ALCM on imported New Zealand apples pose a risk for Australia. But New Zealand fails to appreciate that the mobility of the insects required the IRA Team to adjust its methodology and consider a much more complex pathway than for fire blight and European canker. New Zealand demonstrates its misunderstanding of the IRA Team's approach to assessing *unrestricted* risk by arguing that the IRA Team should have taken into account the affect of risk management measures in its importation analysis. Also, New Zealand's reliance upon pieces of scientific evidence is highly selective, failing to take into account the range of scientific data available.

26. Particularly detrimental to New Zealand's arguments on ALCM is its clear misinterpretation of the results of the paper by Rogers *et al.* (2006), upon which it relies heavily in respect of the proportion of fruit likely to be infested with viable ALCM. This misinterpretation irredeemably taints New Zealand's claims in respect of the probability of entry, establishment and spread of ALCM. New Zealand also asserts that most of its apples will be exported "retail ready", suggesting that only relatively few would require repacking at orchard packing houses, and therefore insufficient quantities of infested apples would be situated together near susceptible hosts. However, this "retail ready" assertion is unsupported by any evidence relevant to the conditions of the Australian market. In any event, the IRA Team's analysis makes clear that, even if a relatively small proportion of New Zealand apples are sent to orchard packing houses, there would still be sufficient quantities of infested apples for ALCM to establish on the basis of the estimated volume of imported apples.

27. New Zealand's claim that the necessary sequence of events to enable ALCM to enter, establish and spread in Australia could never occur in the "real world" is undermined by the clearly successful spread of ALCM and other insect pests across the world.



Your complimentary use period has ended.
Thank you for using PDF Complete.

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

28. New Zealand's claims in relation to the IRA Team's assessment of potential consequences of an ALCM incursion are imprecise and unsubstantiated.

5. Conclusion on the risk assessment for fire blight, European canker and ALCM

29. New Zealand fails to demonstrate any flaws in the Final IRA Report, let alone flaws that are "so serious" that they should prevent the Panel from having reasonable confidence in the risk assessment. In any event, Australia has demonstrated that the IRA Team properly evaluated risk and applied its expert judgment rigorously to arrive at an objective assessment in relation to fire blight, European canker and ALCM.

6. The IRA Team properly evaluated those SPS measures which might be applied

30. Australia rejects New Zealand's assertion that the IRA Team failed to evaluate the SPS measures which might be applied. It is clear from the Final IRA Report that each of the principal risk reduction measures and alternatives were evaluated for each of the pests at issue. Australia submits that there is no obligation in the *SPS Agreement* to evaluate any and every potential measure that might be applied to address a particular risk; such an obligation would be impossible for any Member to satisfy.

7. Conclusion

31. For the above reasons, Australia submits that the Final IRA Report is a valid risk assessment within the meaning of Article 5.1 and related provisions of the *SPS Agreement*. As New Zealand has not challenged whether Australia's measures are "based" on the risk assessment in question, Australia submits that its measures are consistent with Article 5.1 of the *SPS Agreement* and, accordingly, with the requirement that measures not be maintained without sufficient scientific evidence under Article 2.2.

B. AUSTRALIA HAS ACTED CONSISTENTLY WITH ARTICLE 5.2

32. The IRA Team took into account all of the factors listed in Article 5.2, including those identified by New Zealand: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; and relevant ecological and environmental condition. New Zealand has failed to demonstrate otherwise. Moreover, New Zealand's attempt to convert Article 5.2 to an obligation



to give genuine consideration to these factors is not grounded in the text of the provision and is instead merely a complaint that the IRA Team took a different view to New Zealand's own view of these factors.

C. ALTERNATIVELY, AUSTRALIA'S MEASURES ARE NONETHELESS CONSISTENT WITH ARTICLE 2.2

33. Australia considers that New Zealand has effectively abandoned any claims in relation to the Article 2.2 requirement that measures be based on scientific principles.

34. If the Panel does not accept Australia's primary submission that consistency with Article 5.1 establishes consistency under Article 2.2, Australia submits that New Zealand has nevertheless failed to establish that Australia's measures are maintained without sufficient scientific evidence in violation of Article 2.2. In any event, Australia has demonstrated that, on the basis of the comprehensive analysis of the evidence in the Final IRA Report, there is a rational and objective relationship between Australia's measures and the scientific evidence.

D. AUSTRALIA'S MEASURES ARE CONSISTENT WITH ARTICLE 5.5 AND ARTICLE 2.3

35. Australia applies its explicitly stated ALOP consistently, including with respect to New Zealand apples and Japanese nashi pears. New Zealand has failed to establish that Australia applies different levels of protection under Article 5.5. New Zealand's simplistic comparison of the respective *measures* applied in relation to New Zealand apples and Japanese nashi pears ignores the fact that the *risks* associated with the two products are markedly different. Therefore, the measures required to meet Australia's ALOP differ. Accordingly, the application of Australia's ALOP does not exhibit arbitrary or unjustifiable distinctions in the treatment of different situations which result in discrimination or a disguised restriction on international trade. New Zealand has failed to substantiate any of the so-called "warning signals" and "additional factors" in relation to the third element of Article 5.5.

36. As New Zealand fails to establish a violation of Article 5.5, its consequential claims under Article 2.3 must also fail.



Your complimentary use period has ended.
Thank you for using PDF Complete.

[Click Here to upgrade to Unlimited Pages and Expanded Features](#)

E. AUSTRALIA'S MEASURES ARE CONSISTENT WITH ARTICLE 5.6

37. Australia's measures are not more trade restrictive than required to achieve its ALOP under Article 5.6. New Zealand's claims under Article 5.6 rest entirely on its contention that the unrestricted risks associated with the importation of New Zealand apples are lower than the levels established in the Final IRA Report; a claim which New Zealand has failed to substantiate. New Zealand has failed to satisfy its burden under Article 5.6 to show that any of the "alternative" measures identified would achieve Australia's ALOP. Nor, in the case of ALCM, has New Zealand shown that the "alternative" measure would be *significantly* less trade restrictive. New Zealand has also failed to identify any alternatives to the general measures.

38. Australia considers that New Zealand has abandoned any claim that Australia's measures are not "applied only to the extent necessary to protect human, animal or plant life or health" under Article 2.2.

F. NEW ZEALAND'S CLAIM UNDER ARTICLE 8 AND ANNEX C(1)(A) IS OUTSIDE THE PANEL'S TERMS OF REFERENCE

39. New Zealand's claim under Article 8 and Annex C(1)(a) depends on the "IRA process" being a measure at issue in this dispute. In its preliminary ruling, the Panel concluded that the scope of this dispute is confined to the 17 measures specifically listed in New Zealand's panel request, which do not include the IRA process. New Zealand's claim that Australia is in breach of Article 8 and Annex C(1)(a) is therefore outside the scope of this dispute.

IV. CONCLUSION

40. For the above reasons, Australia asks the Panel to find that New Zealand has not established a *prima facie* case that any of Australia's measures are inconsistent with its obligations under the *SPS Agreement*. Alternatively, if the Panel considers New Zealand has established a *prima facie* case in respect of one or more measures, then Australia requests the Panel find that it has rebutted that case on the basis of its evidence and legal argument.