

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)**

Panel's Second Substantive Meeting with the Parties:

Closing Statement of Australia

Geneva, 2 July 2009

Introduction

1. It is beyond dispute that this case raises a large number of complex scientific questions. There are three risk assessments at issue: one each on a bacterium, a fungus and an arthropod. Given the complexity of the issues, it is clear why your role is not to undertake your own risk assessment.

Standard of Review

2. Australia submits that this means that you must find serious flaws in the Final IRA Report if you are to decide that Australia has acted inconsistently with its obligations. New Zealand has provided no serious alternatives to the “serious flaws” burden of proof. In this regard, the Panel should follow the clear guidance that the Appellate Body has provided on the role of experts in SPS cases.

3. In any event, New Zealand has not established any such serious flaws that would impugn the objective justifiability of the three risk assessments at issue. Accordingly, its challenge against Australia’s measures must fail.

Transparency

4. New Zealand repeatedly claims that the Final IRA Report is not transparent. But New Zealand fails to acknowledge that the Final IRA Report is among the most transparent plant risk assessments prepared by any WTO Member. The very fact that New Zealand has been able to challenge its reasoning and conclusions in such detail testifies to its transparency. New Zealand’s own risk assessments – which in many cases remain entirely unpublished – contain far less detail about the reasoning and conclusions than the Final IRA Report.

5. New Zealand has been unable to point to any obligation in the *SPS Agreement* that requires transparency in risk assessments beyond that provided in the Final IRA Report. WTO Members agreed on a range of disciplines to apply to risk assessments, and they are set out clearly in the *SPS Agreement*. On the issue of transparency, the Final IRA Report exceeds the standards required.

Methodology

6. Australia considers that this week there has been a valuable examination of the issues relating to the methodology used in the Final IRA Report. Australia has shown that New Zealand's assertions on methodology are deeply and irretrievably flawed.

7. Australia has identified a fundamental contradiction in New Zealand's case that, on the one hand, it seeks to support its own case with trade data, yet, on the other hand, it requires the Final IRA Report to be judged strictly against experimental evidence. New Zealand has not addressed this contradiction.

8. Australia also notes the discussion of the interval $0-10^{-6}$, in particular, the exchanges between the Panel and the parties this morning. In this regard, Australia recalls the fundamental difference between the total population and the relevant population. The Chairman's funnel was a useful analogy.

Fire blight

9. Mr Chairman and members of the Panel, the Final IRA Report is the scientific basis of Australia's measures, and therefore, the fate of those measures, stand or fall with its validity.

10. Before you get to the question of whether the risk assessment is valid, you must first be satisfied that New Zealand has made out a convincing case on fire blight. If you think it has, then you must ask whether Australia has provided an appropriate defence of its measures. But if you do not think it has made out its case, if you have doubts about whether it has led adequate evidence and argument to prove that the fire blight risk assessment is seriously flawed, then you must dismiss New Zealand's case for failure to meet its burden of proof.

11. In the case of fire blight, there is a genuine question about whether New Zealand has met its burden of proof. Its primary contention – that there is no pathway for fire blight through mature apples – has been shown to be wholly without basis by Australia and confirmed by Dr Deckers and Dr Paulin. The three key evidentiary pillars of New Zealand's case, have been discredited and shown to be irrelevant. In its opening statement, New Zealand attempted once again to elevate the findings in *Japan – Apples* to the status of scientific evidence¹ and has done so again today. However, New Zealand still ignores the critical point that legal findings on the sufficiency of evidence led by the parties in dispute cannot be converted into scientific facts.²

12. This is not a case of expert equivocation or doubt. All of the experts agreed that fire blight has serious consequences. Indeed, Dr Schrader noted that where the impact of a pest is high and there are open questions about entry, then uncertainties in the data should not prevent the application of measures. As New Zealand has put no substantive argument on this issue of consequences either in its second written submission, or in this hearing, Australia now considers that this point is undisputed.

¹ Despite its claim that *Japan – Apples* is not scientific evidence, and not a risk assessment. See: New Zealand's replies to the Panel's questions after the first meeting, q. 116.

² Australia notes that Japan did not lead sufficient evidence in its risk assessment on many of the scientific issues in *Japan – Apples*. This had a material impact on the evidentiary findings in that case, as is evident from the Panel Report itself (see: Panel Report, *Japan – Apples*, paras. 8.147, 8.167 & 8.175). See: Australia's first written submission, paras. 257-259.

13. Even more significantly, Dr Deckers and Dr Paulin both confirmed clearly that the risk of fire blight through mature apples is a real one – a risk worth assessing, and more importantly, one that necessitates risk management. Australia’s principal risk management measures have been endorsed without qualification, and neither expert adjusted their view that mature, symptomless apples will not meet Australia’s ALOP. In Australia’s view, these comments must bear significant weight in determining whether the ultimate conclusion in the fire blight risk assessment meets acceptance within the scientific community.

14. As Australia stated, only one step in the risk assessment is subject to any real degree of uncertainty. And on this issue, the Panel has heard extensively from the experts. The experts confirmed that the scientific evidence on this issue is highly uncertain and only tells us directly about what is probable, but not what might happen exceptionally. Thus, it is easy to see how WTO Members concerned only with common risks could be satisfied on the evidence that the risk, for them, would be insignificant.

15. But for WTO Members such as Australia, who are concerned with rare events, the evidence discloses no such certainties. Therefore, the IRA Team had to exercise expert judgment to extrapolate from the available evidence to draw a conclusion about whether a rare event could occur. Dr Paulin has told us clearly that these sorts of inferences are “not outside science”. Accordingly, the key question is whether you are satisfied that the IRA Team’s judgment that this event could occur is a rational inference from the evidence.

16. Australia does not have to establish that mature apples *have been* the vehicle for transmission of fire blight. Nor do we have to show it is *likely* to happen. When talking about a potential pathway, all that has to be shown is that it can rationally happen, that the probability range assigned to that step is acceptable, and that the potential risk is above Australia’s ALOP.

17. On each of these points, the IRA Team’s analysis was directly vindicated by the experts. When asked directly whether the IRA Team had presented evidence which shows that mature fruit can transmit fire blight, both Dr Paulin and Dr Deckers said “yes”. When asked directly whether the probability range assigned to this step – that is, $(0-10^{-6})$ – was acceptable, both experts said “yes”. Finally, when asked directly whether there was a risk of fire blight through mature apples, both experts again said “yes”. Dr Deckers was very clear on this point – for him, the risk was real and not exaggerated.

18. Mr Chairman and members of the Panel, Australia considers that the exposure analysis in the Final IRA Report has been shown to be rational and to constitute legitimate science according to the standards of the scientific community. In deciding whether you can accept this view, it may be worth considering the alternative view of this evidence that New Zealand has put before you in its arguments. New Zealand asserts, on the basis of evidence including Hale *et al.* (1996) and Taylor *et al.* (2003a) that transmission does not occur, and will never occur. The experts unanimously confirmed that this view is incorrect. Thus, to the extent that there is any choice between the two positions put before you, it is important to keep in mind that while Australia’s position is rational on the available science, New Zealand’s position is not.

19. This is the only real step in contention as New Zealand has failed to make a case on the key importation steps, through failure to lead any credible evidence of its own. This was highlighted this afternoon in New Zealand’s responses to questions put by Australia where New Zealand had failed to point to any evidence apart from the experts’ replies.³ But as New Zealand itself acknowledged, experts replies are not evidence in themselves, but can only verify the arguments and evidence of the Parties. Accordingly, as Australia considers that the experts have

³ Australia notes that para. 4.228 of New Zealand’s first written submission and para. 2.426 of New Zealand’s second written submission (as referred to by New Zealand this afternoon) do not refer to dump tank contamination and do not refer to any scientific evidence.

supported the key elements of the IRA Team’s reasoning, Australia considers that New Zealand’s case on fire blight fails.

European canker

20. Mr Chairman and members of the Panel, the foundation of New Zealand’s case on European canker is that Australia’s climatic conditions are unsuitable for the development of the disease. However, there are areas of Australia, including commercial apple growing regions, which have climatic conditions suitable for the establishment and spread of European canker.

21. The practical reality is that climate analysis is a complex area necessitating expert judgment. In the real world there is no single universally accepted epidemiological model for predicting the establishment and spread of European canker. Accordingly, there is no reason why New Zealand’s climate analysis should be regarded as the only legitimate scientific view.

22. After reviewing a wide range of scientific evidence the IRA Team concluded that there was a risk of introducing European canker into Australia associated with the importation of latently infected New Zealand apple fruit. Both European canker experts appointed in this dispute agree that this is so. The only contested issue relates to the level of this risk.

23. The risk associated with introducing European canker certainly exceeds Australia’s ALOP. The IRA Team determined that it was necessary to source apples from New Zealand export orchards or blocks free from the disease. This is a reasonable and practical risk mitigation measure considering the serious consequences of the disease which is absent in Australia; both European canker experts agree that a measure simply requiring “mature symptomless apples” would not achieve Australia’s ALOP.

ALCM

24. As Australia has pointed out on ALCM, it is not possible to be definitive as to the important issue of mode of trade in advance of trade commencing. New Zealand’s most recent “evidence” in this regard (Exhibit NZ-136) relates only to kiwi fruit and not to apples. Further, it indicates that only a “portion” of New Zealand kiwi fruit are exported to Australia in “retail ready” condition. This is far from the guaranteed “majority” of New Zealand apples that New Zealand would have the Panel uncritically accept. In any event, even if the “majority” of New Zealand apples *were* imported in “retail ready” condition, the IRA Team still found that more than enough ALCM-infested apples would end up at orchard packing houses together to pose an establishment risk⁴.

25. As Australia has already acknowledged, there is a significant lack of data available in relation to ALCM, including on viability. Any change in this regard largely depends on New Zealand – unless it provides further data or carries out further research, the lack of data means significant uncertainty will remain. Australia notes that New Zealand was unable to provide further data on viability levels when this was requested by the experts earlier this year⁵.

26. If the present data were to be considered insufficient, any review would suffer the same problem in the absence of further information. The IRA process contemplates review on the basis of new information and Australia stands ready to do this. However, without new data, any review will face the same difficulties as faced by the IRA Team. This is the real world which confronts Australia.

⁴ Final IRA Report, Part B, p. 174, Table 43; Australia’s rebuttal submission, paras. 644-649.

⁵ New Zealand’s letter to the Panel, dated 9 April 2009.

Article 5.6

27. On Article 5.6, New Zealand’s opening statement makes it clear that the only “alternative” measures that the Panel should consider are “mature, symptomless apples” for fire blight and European canker, and a 600-unit inspection for ALCM. New Zealand did not mention any other potential alternative measures.

The Panel’s evaluation of the measures

28. It is also clear from this hearing that New Zealand indicated no objection with the Panel evaluating each of the measures at issue on a collective basis, rather than each individually. In Australia’s view, this would be the appropriate approach.

Real world measures

29. Finally, Mr Chairman and Members of the Panel, the real world of apple production and trade inevitably involves damaged fruit, discarded waste, diverse handling procedures and inevitable, unpredictable human interaction. The real world does not involve monolithic, sterile procedures. New Zealand has not offered any alternative measures on any of the pests that meet Australia’s ALOP.

30. As is clear from a reading of the Final IRA Report, and acknowledged by New Zealand, the IRA team considered a number of different measures in relation to each pest. For each of the pests, it recommended the least restrictive measure of those which would achieve Australia’s ALOP. For most pests considered in the Final IRA Report, it found that no risk management measures were necessary to achieve Australia’s ALOP. For the three pests at issue, it recommended risk management measures largely endorsed by the experts.

31. On fire blight, the experts have confirmed that Australia's principal measures – symptomless orchards and chlorine treatment – are warranted. On European canker, they have agreed that measures to ensure pest-free places of production would be necessary to reduce the risk to Australia's ALOP.

32. On ALCM, the expert expressed the view that the intensity of any inspection would need to be determined by reference to more reliable data such as viability. But the best existing data indicates that the only alternative measure proposed by New Zealand – a 600-unit inspection – would *not* reduce the risk below Australia's ALOP because it is insufficiently sensitive.

33. It is important for you to recognise the real world constraints that apply to the formulation of risk management measures. The reality is that there are a limited number of approaches that can be taken to risk management for any given pest. New Zealand has proposed no alternative measures for any of the pests that would meet Australia's ALOP. Australia would ask that you bear this in mind when considering how best to secure a positive solution to this dispute.

Conclusion

34. In conclusion, Australia reaffirms its position that New Zealand has failed to establish any serious flaws in the risk assessments for fire blight, European canker and ALCM.

35. We thank the Panel, the Secretariat and New Zealand for their time over the last three days.