

***AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF
APPLES FROM NEW ZEALAND***

(WT/DS367)

**RESPONSES OF THE UNITED STATES
TO QUESTIONS FROM THE PANEL AND AUSTRALIA**

September 23, 2008

Table of Reports Cited

<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998

QUESTIONS FROM THE PANEL TO THE THIRD PARTIES

1. Third Parties

Q1: Both Parties and most of the Third Parties have cited the reports in *EC – Hormones* and *Japan – Agricultural Products II*, where the Appellate Body said that Articles 2.2 and 5.1 should be “constantly read together” and that 5.1 is a specific application of the basic obligations in Article 2.2. In paragraph 42 of its opening statement for the Panel’s first substantive meeting, Australia contends that:

“[T]he Appellate Body has indicated that Article 5.1 is a specific application of Article 2.2, meaning 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.” (Footnote omitted)

Do Third Parties agree with the proposition contained in paragraph 42 of Australia’s opening statements for the Panel meeting cited above? In other words, if under the circumstances of the present case, the Panel were to find that any of the challenged requirements is consistent with Article 5.1 of the SPS Agreement, would it have to conclude by implication that the requirement is also consistent with Article 2.2? Why or why not?

Conversely, can Third Parties answer whether, if the Panel were to find that any of the challenged requirements is inconsistent with Article 5.1 of the SPS Agreement, would it have to conclude by implication that the requirement is also inconsistent with Article 2.2? Why?

1. The United States considers that in the circumstances presented in this dispute, if the Panel were to find that any of the measures challenged by New Zealand are consistent with Article 5.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”), then those measures would also be consistent with the obligation in Article 2.2 not to maintain SPS measures without sufficient scientific evidence. As the Appellate Body has explained, Article 5.1 may “be viewed as a specific application of the basic obligations contained in Article 2.2 of the SPS Agreement.”¹

2. Article 5.1 requires that a sanitary or phytosanitary (“SPS”) measure be based on a risk assessment. Read in the context of Article 2.2, Article 5.1 means that “the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure.”² Determining whether Australia’s risk assessment sufficiently warrants the SPS measures at issue

¹ *EC – Hormones (AB)*, para. 180.

² *EC – Hormones (AB)*, para. 193.

in this dispute will require the Panel to evaluate both whether the measures at issue are based on a risk assessment and whether the scientific evidence presented in the risk assessment supports the conclusions of that risk assessment. In these evaluations and in light of the facts and arguments advanced by the parties, it would appear inevitable that the Panel will be examining whether Australia's SPS measures are not maintained without sufficient scientific evidence, as required by Article 2.2. Accordingly, the United States agrees with Australia that, in this dispute, a finding by the Panel of a measure's consistency with Article 5.1 would also mean that the measure is consistent with the provision of Article 2.2 at issue.

3. But the opposite is not necessarily true. In other words, if the Panel were to find that a particular measure in this dispute was inconsistent with Article 5.1, it is not necessarily the case that the measure is also inconsistent with the obligation in Article 2.2 not to maintain an SPS measure without sufficient scientific evidence. Rather, it depends on the basis of the finding of inconsistency with Article 5.1. According to the definition of a "risk assessment," as applicable to the present dispute, there are three factors involved: (1) an identification of "the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases"; (2) an evaluation of "*the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences;" and (3) an evaluation of "the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*"³

4. In this dispute, if a finding of inconsistency with Article 5.1 is based on the fact that the scientific evidence relied upon by Australia does not support the conclusions of Australia's risk assessment, then the measures at issue will also be inconsistent with the provision of Article 2.2 requiring that a measure not be maintained without sufficient scientific evidence.

5. But if a panel finds that a measure is inconsistent with Article 5.1 for a reason that is not related to whether the scientific evidence supports the conclusions in the risk assessment or that the measure is not based on a proper risk assessment, then that measure is not necessarily inconsistent with the obligation in Article 2.2 to ensure that measures are not maintained without sufficient scientific evidence. For instance, a panel could conclude that a risk assessment is not "appropriate to the circumstances" or did not take into account risk assessment techniques developed by the relevant international organization. Such a finding would not necessarily mean that there is not sufficient scientific evidence. The evidence could be sufficient but there could be other flaws that mean that the measure is in breach of Article 5.1.

Q2: __Can Third Parties comment whether they have had any experience with the entry, establishment or spread of fire blight or European canker or apple leafcurling midge as a result of trade in fresh apple fruit? Do the following

³ U.S. Third Party Submission, para. 50, quoting *Australia – Salmon (AB)*, para. 121 (emphasis original).

criteria, individually or in combination, modify Third Parties’ responses: (i) Whether the apple traded was mature and symptomless; (ii) Whether it was free of trash; (iii) Whether it was free of wounds or damages: and/or (iv) Whether it was traded retail-ready or bulk?

6. The United States has significant experience with trade in fresh apple fruit. At the same time, the United States has not experienced the entry, establishment, or spread of fire blight or European canker due to trade in fresh apple fruit. The four criteria listed above do not alter this. The United States has not intercepted fire blight or European canker either in apples that are imported into the United States or in apples that it exports. The lack of the United States experiencing these diseases as a result of trade in apples is not surprising, particularly with respect to fire blight because the scientific evidence demonstrates that mature, symptomless apples do not transmit the disease. The United States also has not found apple leafcurling midge (“ALCM”) in any of the apples that it exports and is not aware of any outbreaks of ALCM as a result of exports of U.S. apples. On occasion, the United States has intercepted ALCM in imported apples entering the United States, but has no experience with these imported apples causing the establishment or spread of ALCM in the United States.⁴

Q8: In paragraph 14 of its Third Party written submission, the United States argues that:

“Article 2.2 and Article 5.1 provide relevant context for each other, but that does not mean that a panel must first examine consistency with Article 5.1 rather than with Article 2.2. Rather, as in *Japan Apples*, it is possible to examine separately whether a measure is based on sufficient scientific evidence.”

Does the United States suggest that, when addressing New Zealand claims under Article 2.2 and Article 5.1 of the SPS Agreement, the sequence is indifferent, and what is important is that those two claims be addressed separately?

7. Given the relationship between Articles 5.1 and 2.2 discussed above in relation to Question 1 of the Panel, it may often make sense to begin an analysis with Article 5.1. In the above-quoted passage from the U.S. third-party submission, the United States was simply making the point that is *possible* to examine a claim under Article 2.2 separately from a claim under Article 5.1. Whether a panel will choose to do so may depend in part on what will “secure a positive solution to a dispute” as called for under Article 3.7 of the *Understanding on Rules*

⁴ With the exception of the State of California, the United States does not prohibit entry or require fumigation or any other treatment for imported apples found to have ALCM.

and Procedures Governing the Settlement of Disputes. The United States defers to the parties for purposes of this dispute as to what will promote such a positive solution.

Q9. In paragraph 1103 of its first written submission, Australia states that it understands that:

“[U]nder some circumstances New Zealand apple exports to the United States are already subject to much higher inspection rates (up to 20,000 apples) than that required by Australia

Can the United States comment on Australia’s statement.

8. As the United States explained in its third-party submission, the U.S. inspection levels for New Zealand apples are targeted to a pest not at issue in this dispute – light brown apple moth.⁵ The United States requires a biometric sampling level for light brown apple moth based on the determination that this moth is a high risk pest with a high likelihood of introduction in the United States, particularly because many different plants may serve as a host for it. The manner in which this biometric sample is operationalized means that under certain circumstances, it is possible that U.S. inspection of apples from New Zealand may reach inspection levels approaching 20,000 apples.

Q10: In paragraph 92 of its Third Party Submission, the United States argues that:

“The United States first formally requested access to Australia’s market for U.S. apples and provided Australia with a pest list to facilitate commencement of the risk assessment in June 1999. Yet, Australia waited until March 17, 2008 to announce the commencement of a risk assessment for U.S. apples – a delay of almost nine years. During those nine years, the United States made multiple requests for access to the Australian market and emphasized the importance of beginning and completing the risk assessment. In response, at various times throughout that period, Australia informed the United States that it would consider the U.S. request for market access only after it had completed the IRA for New Zealand apples. In other words, Australia chose to put the U.S. risk assessment

⁵ U.S. Third Party Submission, para. 48.

on hold until it had completed the IRA for New Zealand. Essentially, Australia linked the timing of the U.S. risk assessment to the completion of the IRA for New Zealand and delayed commencement of the U.S. risk assessment due to delays in the IRA for New Zealand. The Panel will appreciate the concerns that these facts raise.”

In the United States’ view, does its statement imply that it expects Australia to apply the same or similar requirements to US apple exports as the ones set out in the IRA for New Zealand apples?

9. The United States made the above-quoted statements because it shares New Zealand’s concerns about undue delay by Australia regarding its risk assessments for imported apples. The United States also understands that Australia intends to apply similar requirements to U.S. apples as those set forth in Australia’s Import Risk Analysis (“IRA”) for apples from New Zealand based on statements by Australia. In numerous discussions since 1999 when the United States first formally requested access to Australia’s market for U.S. apples, Australian officials have told U.S. officials that Australia would apply the policy it developed for apples from New Zealand to apples from the United States.

10. Moreover, as the United States noted in its third-party submission, Australia announced the commencement of a risk assessment for U.S. apples on March 17, 2008. Subsequently, in July 2008, Australia released an “Issues paper for the import risk analysis of fresh apple fruit from the United States of America” to provide information to stakeholders about the risk assessment for U.S. apples.⁶ The second paragraph of this issues paper makes clear that “Australia has existing quarantine policy for the importation of apples from Japan and New Zealand.”⁷ Later, the paper reiterates that “[i]mport policy exists for Fuji apples from Japan (AQIS 1998) and apples from New Zealand (BA 2006)” and clearly states, “[t]hese policies will be taken into account, where relevant, as part of this import risk analysis.”⁸ These statements provide a further strong indication to the United States that Australia intends to apply similar requirements to U.S. apples as those for apples from New Zealand.

⁶ Biosecurity Australia, “Issues Paper for the import risk analysis of fresh apple fruit from the United States of America,” (July 2008), p. 6 (Exhibit US-7).

⁷ Biosecurity Australia, “Issues Paper for the import risk analysis of fresh apple fruit from the United States of America,” (July 2008), p. 5 (Exhibit US-7).

⁸ Biosecurity Australia, “Issues Paper for the import risk analysis of fresh apple fruit from the United States of America,” (July 2008), p. 8 (Exhibit US-7).

QUESTIONS FROM AUSTRALIA

Q8. At paragraph 28 of its third party written submission, the United States claimed that it has exported apples to 18 countries that are free of fire blight over a period of 41 years and that there has not been a reported fire blight outbreak in any of these countries.

However, many of these countries, such as Saudi Arabia, the United Arab Emirates and Singapore, for example, do not seem to have any apple and pear growing industry and have largely unsuitable climatic conditions for growth of fire blight host plants.

Given the irrelevance of these situations to the circumstances of trade in apples between New Zealand and Australia, what use does the United States expect the Panel to make of this trade information?

11. The United States provided the export statistics in paragraph 28 of its third-party submission to demonstrate that trade data supports the scientific evidence that mature symptomless apples do not transmit fire blight. The key point of paragraph 28 is that although the United States has exported a tremendous volume of apples during the last 41 years – over 64.9 billion apples to be precise – there has been no spread of fire blight through those apples. In making this point, the United States further noted that over half of these apple exports went to 18 countries that are either free of fire blight disease or in which no fire blight has been reported. This is significant because it provides further proof that mature, symptomless apples do not transmit fire blight, even when U.S. apples are exported to countries that are free of the disease. In listing the 18 countries at issue, the United States simply provided a complete list of fire blight-free countries. It did not filter out particular countries based on the significance of their apple and pear growing industry, the suitability of their climate for fire blight host plants, their level of U.S. apple imports, or any other criteria.

12. It is true that a few of the 18 countries listed by the United States are less likely than most to have conditions that are conducive to the establishment of fire blight. But that does not negate the more significant fact that several countries on the list that have host plants for fire blight and permissive climates continue to import U.S. apples without any record of such importation causing the introduction of fire blight disease where it was previously unknown. Moreover, some of the countries listed by the United States have significant pome fruit production. For instance, China is the world's largest producer of both apples and pears. China also imports both U.S. apples and U.S. pears but reports being free of fire blight. Similarly, Brazil is a sizeable producer of both apples and pears and also imports U.S. pome fruit, while remaining free of fire blight. Taiwan, the third largest importer of U.S. apples, also produces modest quantities of apples and pears, but does not have fire blight disease.

13. Australia's attempts to discount countries that do not have a pome fruit industry is further unavailing because there is a broad range of hosts for fire blight in addition to apple and pear trees. This includes, among others, apricot, blackberry, cherry, firethorn, hawthorn, mountain ash, plum, raspberry, and rose. Thus, it is not necessary for a country to have apple and pear production in order to have fire blight. If fire blight is introduced in a country, it can become established in host plants other than apples and pears.

Q9. Have there been any outbreaks of fire blight in countries that the United States has exported apples to?

14. Although there have been fire blight outbreaks in some of the countries to which the United States has exported its apples, there is no evidence that the fire blight outbreaks in these countries were caused by U.S. apples. Whether a country has experienced a fire blight outbreak is entirely unrelated to its imports of U.S. apples. This is because the scientific evidence demonstrates that mature symptomless apples do not transmit fire blight. These apples are not involved in the disease cycle of fire blight, they are not a vector for the disease, and the pathway for the disease is not completed via these apples.⁹ Moreover, there are no scientific reports that new outbreaks of fire blight have occurred as a result of the trade in apple fruit in general or U.S. apples in particular. Any suggestion that attempts to draw a connection between U.S. apple exports and fire blight outbreaks is without merit.

⁹ U.S. Third Party Submission, paras. 15-32.