AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF APPLES FROM NEW ZEALAND

(WT/DS367)

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE THIRD-PARTY SESSION OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

September 10, 2008

1. The United States would like to provide a short summary of some of the key issues addressed in our third-party written submission and make a few brief points on the following topics raised in other third-party submissions: (1) the standard of review for a claim relating to whether there is a risk assessment within the meaning of Article 5.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"); (2) the proper interpretation of Article 5.2; (3) the "necessity" of a measure under Articles 2.2 and 5.6; and (4) undue delay under Article 8 and Annex C.

Key Issues in the U.S. Written Submission

2. The U.S. third party submission focused on New Zealand's claims under Articles 2.2 and 5.1 of the SPS Agreement. The United States agrees with New Zealand that Australia's fire blight measures are inconsistent with Article 2.2 because there is no scientific evidence that mature, symptomless apples transmit fire blight disease. Mature, symptomless apples are not a pathway for fire blight disease. As for European canker, we similarly concur with New Zealand that Australia has not adduced sufficient scientific evidence to establish that apples will be latently infected with the disease and can then transfer it to susceptible hosts in Australia. In terms of New Zealand's Article 5.1 claims, the United States also has concerns regarding Australia's risk assessment, relating both to its general methodology and its evaluation of the scientific evidence. Australia's use of a semi-quantitative model for its risk assessment for fire blight and European canker contributed to a flawed risk assessment. For fire blight, Australia's risk assessment often extrapolates values for risk levels in the absence of, or contrary to, scientific evidence.[1] For European canker, the transfer scenario for the disease set forth in Australia's risk assessment for mature, export-quality apples is highly unlikely.[2]

Standard of Review for a Risk Assessment Under Article 5.1

3. The European Communities ("EC") argue in their written submission that the proper role of the Panel in reviewing Australia's risk assessment is to determine whether the risk assessment is "so fundamentally flawed or biased that under no circumstances can it be considered as being supported by science."[3] By taking this position, the EC, like Australia, advocates an extremely deferential standard of review for risk assessments conducted pursuant to Article 5.1. But as explained in the U.S. written submission in response to a similar argument by Australia, this deferential standard of review is not correct.[4]

4. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provides the applicable standard of review for panels in disputes under WTO covered agreements, including the SPS Agreement. Article 11 requires a panel to "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Thus, the proper role of the Panel in this dispute is to make an

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[1] Third Party Submission of the United States, paras. 63-72.
[2] Third Party Submission of the United States, para. 76.
[3] Third Party Submission of the European Communities, para. 30.
[4] Third Party Submission of the United States, paras. 3-8.

objective assessment of whether Australia's measures are "based on" a risk assessment, including whether the scientific evidence presented in Australia's risk assessment supports the conclusions of that risk assessment.

The Proper Interpretation of Article 5.2

5. Article 5.2 requires that a risk assessment must "take into account" certain factors, such as available scientific evidence and relevant processes and production methods. Australia argues that New Zealand incorrectly interprets the phrase "take into account" as meaning to "give genuine consideration" to the factors enumerated in Article 5.2, and Japan concurs.[5] The EC submits that Article 5.2 is not breached unless the complaining party "proves that the risk assessment did not take into account *at all* those factors"[6] (italics added). But the phrase "to take into account" is not qualified in the manner stated by the EC.

6. Further, both Australia and New Zealand have cited the panel report in the dispute *United States – Continued Suspension of Obligations in the EC - Hormones Dispute* for that panel's interpretation of Article 5.2 and the phrase "take into account". There, the panel explained that "taking available scientific evidence into account does not require that a Member conform its actions to a particular conclusion in a particular scientific study." The panel further stated that "the requirement in Article 5.2 is to ensure that a Member, when assessing risk with the aim of formulating an appropriate SPS measure, has as wide a range as possible of scientific information before it to ensure that its measures will be based on sufficient scientific data and supported by scientific principles."[7]

7. The United States agrees with both parties that the Panel should consider the panel's interpretation in *US – Continued Suspension of Obligations in the EC - Hormones Dispute* in formulating its views on Article 5.2 and whether Australia has properly taken into account the factors listed in Article 5.2. We also note that the aforementioned dispute is currently on appeal, and the Appellate Body is scheduled to issue its report on October 16, 2008. Thus, the Panel will have the benefit of any articulation by the Appellate Body of its understanding of Article 5.2 prior to resolving this dispute.

The "Necessity" of a Measure Under Article 2.2 and 5.6

8. We now turn to an issue raised by the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu ("TPKM") regarding whether an SPS measure is "necessary" to protect human, animal, or plant life or health under Article 2.2 and the relationship between Article 2.2

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[5] Third Party Submission of Japan, paras. 17-21.

[6] Third Party Submission of the European Communities, para. 51.

[7] *United States – Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/R, circulated 31 March 2008, para. 7.480.

and 5.6. TPKM submits that in the absence of international standards, guidelines, or recommendations, Article 5.6 should be used to determine whether a SPS measure is necessary, as required by Article 2.2.[8] The United States believes that in this dispute, the Panel need not make findings on the precise relationship between Article 2.2 and 5.6.

9. Rather, because New Zealand has made specific claims under Article 5.6, the Panel can simply address those claims. This is particularly true because New Zealand's Article 2.2 claims primarily relate to whether Australia's measures are maintained without sufficient scientific evidence and not whether they are necessary for the protection of human, animal, or plant life or health. New Zealand's arguments regarding the necessity of Australia's measures are made with respect to its claims under Articles 5.1 and 5.6.[9]

Undue Delay Under Article 8 and Annex C

10. We also would like to address an issue of undue delay under Article 8 and Annex C raised by the EC. The EC states that it is not possible to draw from Annex C, paragraph 1(a), a general time frame for deciding on procedures to check and ensure the fulfillment of SPS measures. The EC then asserts that the justified time period could be quite lengthy, extending "to many years or even decades" depending on the "exporter's anticipated profits".[10] But an "exporter's anticipated profits" should have no bearing on whether procedures to check and ensure the fulfillment of SPS measures are undertaken and completed without undue delay. Such profits anticipated by exporters in no way affect *a Member's* ability to proceed with its procedures "as promptly as possible," as the panel in *EC – Biotech* considered necessary.[11]

Conclusion

11. Finally, in Australia's oral statement, it alleged that there were "serious flaws" in the U.S. third-party submission and stated that it would address these flaws in subsequent stages of the dispute. Of course, the United States would not have an opportunity to comment or correct any errors in its submission in subsequent stages. We would like to suggest an alternative approach: Australia could pose questions to the United States on those "serious flaws" in the U.S. submission so that the United States could provide clarifications or corrections. This could be of assistance to both of the parties and to the Panel in its efforts to produce a high-quality panel report as set out in Article 12.2 of the DSU.

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[8] Third Party Submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 17.

[9] New Zealand First Written Submission, para. 4.6

[10] Third Party Submission of the European Communities, para. 75.

[11] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.1498