AUSTRALIA - MEASURES AFFECTING THE IMPORTATION OF APPLES FROM NEW ZEALAND

(AB-2010-2 / DS367)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

September 27, 2010

BEFORE THE

WORLD TRADE ORGANIZATION

APPELLATE BODY

Australia – Measures Affecting the Importation of Apples from New Zealand

(AB-2010-2 / DS367)

THIRD-PARTICIPANT SUBMISSION OF THE UNITED STATES

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I. Introduction

1. The United States welcomes this opportunity to provide its views on certain issues raised in this dispute, in which both Australia and New Zealand appeal certain findings by the Panel. The United States, as a major agricultural exporter and importer, has a strong interest in the proper interpretation and application of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("*SPS Agreement*"). The United States respectfully submits written comments on each of Australia's four grounds of appeal.

II. Australia's Annex A(1) Argument Is Without a Textual Basis and Should Be Rejected

2. In its first ground of appeal, Australia asserts that the Panel improperly found 12 of the 16 measures at issue to be SPS measures within the meaning of Annex A(1).[1] Attempting to draw a distinction between those measures that – in Australia's terminology – are "ancillary" and those that are not, Australia contends that "[t]he ultimate question" in determining whether a measure is an SPS measure "is to identify, practically and purposively, some action or course of action (including an identifiable omission) that a Member may put into practical operation for the purposes of protecting against some risk."[2] In fact, under Australia's proposed approach, only measures that are "sufficient" to achieve the Member's appropriate level of protection ("ALOP") can be considered to be SPS measures; measures that are merely "necessary" or "indispensable" to achieving that ALOP, without more, do not qualify.[3] Such "ancillary" measures, which "have no operation other than to enhance the efficacy of" other measures, do not constitute individual SPS measures, and "should be identified collectively as amounting to a single composite, or enhanced, SPS measure."[4]

3. Australia's analysis is entirely of its own devising, and is completely divorced from the text of Annex A(1). Annex A(1) defines an SPS measure as "any measure applied" in order "to protect" against or "to prevent" specified risks. Of course, Annex A(1) could have been drafted to define an SPS measure as a measure that is "sufficient ... in itself" to protect against or prevent

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[1] Australia Appellant Submission, para. 67.

[2] Australia Appellant Submission, para. 58.

[3] Australia Appellant Submission, para. 64.

[4] Australia Appellant Submission, para. 58.

a specified risk entirely without the assistance of any other measure.[5] It was not, however, and Australia has provided no reason to read the text otherwise.[6]

4. It is equally difficult to understand how Australia, after determining that such "ancillary" measures are not SPS measures individually, believes that such measures could – in fact "should" – be considered, collectively, as an "enhanced" SPS measure.[7] Australia does not explain why, if under Australia's approach there is a textual basis for excluding such measures from Annex A(1) in the first place, there would be a textual basis for including them.

5. In its report, the Panel determined that the legislative basis for each of the 16 measures, the procedures under which they were adopted, and Australia's Import Risk Analysis for Apples from New Zealand (the "IRA") that sets them out had "general objectives" that correspond to those set out in the first paragraph of Annex A(1).[8] Moreover, the Panel looked at the 16 measures individually and found that each had a "close linkage" – indeed, that they were "indispensable" – to the objective of controlling the risks set out in the IRA, risks that correspond to those set forth in Annex A(1).[9] Finally, the Panel analyzed the form and nature of the measures at issue, finding that they fit within Annex A(1) as well.[10]

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[5] Australia Appellant Submission, para 64. To follow Australia's example in paragraph 66 of its appellant submission, Australia's reasoning with respect to "Measure (iii)" demonstrates the flaws in its theory. Australia does not dispute that Measure (iii) has an "ultimate purpose" that corresponds to sub-paragraph (a) of Annex A(1). Rather, Australia contends that Measure (iii), by itself, is "meaningless" and "ineffective." The measure cannot be "meaningless;" if it were, it would not be a measure at all and Australia has conceded that each of these 16 measures is a "measure" within the meaning of DSU Article 3.3. Australia's primary contention then is that the measure is "ineffective to achieve any protection from risk." But Annex A(1) does not discuss effectiveness or set out a standard for how effective a measure must be before it can be considered an SPS measure. Rather, the inquiry under the first paragraph of Annex A(1) is simply into the purpose of the measure at issue. Thus, the Panel correctly found that, in light of its "ultimate purpose," Measure (iii) – as well as the other 15 measures at issue – meets the definition of Annex A(1).

[6] Australia's contention that "[t]o adopt a different approach would be potentially to open up every detail of an administrative regime to separate evaluation for compliance, relevantly, with Arts 2.2, 5.1, 5.2 and 5.6 of the SPS Agreement" is without merit. Australia Appellant Submission, para. 58. That is not the issue presented in this dispute. The concept of "measure" is sufficiently flexible to allow a panel or the Appellate Body to take into account the particular provision of the *SPS Agreement* at issue in determining whether a complaining party has properly identified a "measure" that falls within the scope of that provision.

[7] Australia Appellant Submission, para. 58.

[8] Panel Report, paras. 7.123-7.141.

[9] Panel Report, paras. 7.140-7.141.

[10] Panel Report, paras. 7.143-7.172.

6. Although the United States believes that the Panel's analysis was grounded in the text, the United States does note that this issues seems to be of minimal importance for purposes of this dispute.

III. The Appellate Body Should Not Adopt Australia's Proposed Standard of Review for Article 5.1 Claims

7. In its Appellant Submission, Australia presents arguments that – if adopted – would change the standard of review in SPS disputes in a manner that would be inconsistent with the findings in prior disputes and would undermine the requirement under Article 5.1 of the SPS Agreement that SPS measures must be based on a risk assessment.

8. The starting point for considering the standard of review is Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Article 11 provides the standard of review applicable in proceedings brought pursuant to the *SPS Agreement*, which does not prescribe a particular standard of review or include specific provisions addressing the review by a panel of a determination or examination conducted by a Member. As the Appellate Body has found in the context of SPS disputes, the standard under Article 11 "is neither *de novo* review, as such, nor 'total deference,' but rather the 'objective assessment of the facts'."[11]

9. Moreover, the Appellate Body has found that the text of the *SPS Agreement* does not support a standard of review – as advocated by Australia – in which the reasoning of national authorities is not subject to examination.[12] In particular, the Appellate Body has found that panels should examine whether a risk assessment's "reasoning articulated on the basis of the scientific evidence is objective and coherent."[13]

10. In this dispute, the Panel repeatedly found, consistent with the science as well as the Appellate Body's report in *Japan – Apples*, that the IRA exaggerated the risk presented by mature, symptomless apples with regard to fire blight.[14] Yet nowhere in Australia's view of the proper standard of review would it even be possible for a panel to reach such a conclusion, particularly in this case where in order to determine that the IRA has exaggerated the risk, the Panel had to examine each intermediate step of the assessment.

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[11] *EC – Hormones (AB)*, para. 117.

[12] *See, e.g.*, *Japan – Apples (AB)*, para. 165.

[13] *US – Continued Suspension (AB)*, para. 591.

[14] Panel Report, para. 7.429.

11. Australia's argument regarding the standard of review has two elements – regarding "quality or reasoning" and "intermediate vs. ultimate conclusions." Both elements of the argument are unsupportable.

12. *First*, Australia contends that it is not within the Panel's authority to review the "quality of the reasoning" contained in the IRA.[15] In Australia's view, "the requisite standard of objectivity and coherence relates not to the quality of the reasoning *per se,*" but the quality of the "particular conclusions drawn."[16] Such an argument, if successful, would significantly transform the responsibility of a panel, which is to make an objective assessment of the facts.

13. Australia's proposed interpretation of the WTO Agreement would be untenable. If a WTO panel may not assess the quality of reasoning used in a risk assessment, the panel could not analyze whether the conclusions drawn from the available science are sound. And if the panel cannot assess the validity of the conclusions in the risk assessment, the panel could not complete the tasks assigned to it, including, for example, analyzing whether a risk assessment "takes into account" the available scientific evidence and otherwise conforms to Article 5.2.

14. In addition, Australia's approach would be inconsistent with the approach adopted in prior disputes. For example, in *Japan – Apples*, Japan appealed the panel's conclusion that Japan was in error for not analyzing the risks of apple fruit separately from risks posed by other hosts, claiming "the Panel's reasoning relates to a 'matter of methodology', which lies within the discretion of the importing Member."[17] The Appellate Body disagreed, noting that while the Member may choose the methodology on which to analyze the risk, the reasoning embedded in that analysis must be sound.[18] The Appellate Body went on to uphold the panel's finding that Japan's reasoning regarding risk was unsound, concluding that Japan's reasoning "was not sufficiently specific to qualify as a 'risk assessment' under the *SPS Agreement* for the evaluation of the likelihood of entry, establishment or spread of fire blight in Japan through apple fruit."[19]

15. In *US – Continued Suspension*, the Appellate Body again found that panels are to analyze the risk assessment's reasoning; it explained that panels are to "assess whether the *reasoning* articulated on the basis of the scientific evidence is objective and coherent."[20]

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[15] Australia Appellant Submission, paras. 76-77.

[16] Australia Appellant Submission, para. 103.

[17] *Japan – Apples (AB)*, para. 201.

[18] *See Japan – Apples (AB)*, para. 205.

[19] *Japan – Apples (AB)*, para. 203.

[20] *US – Continued Suspension (AB)*, para. 509 (emphasis added).

16. For these reasons, Australia's argument that panels are not permitted to examine the quality of reasoning used in a risk assessment should not be accepted.

17. *Second*, and similarly, Australia's argument that the Panel was not permitted to review anything but the IRA's ultimate conclusions should not be accepted.[21]

18. There is no support for the view that panels, in performing their role under DSU Article 11, are prohibited from conducting a full examination of a challenged risk assessment, including all intermediate steps that the assessors completed in route to an ultimate conclusion. In fact, to ignore such conclusions and any evidence – or lack of evidence – underlying those conclusions would constitute a reversible error of the panel; such a "deliberate disregard" for the evidence would be "incompatible with a panel's duty to make an objective assessment of the facts."[22] Not surprisingly, previous panels, including the *Japan – Apples* Panel, have examined the intermediate steps in a risk assessment (as well as the assessment's ultimate conclusions), and have been upheld by the Appellate Body for doing so.[23]

19. The facts of this particular dispute illustrate the flaws in Australia's proposed approach. A central component of any pest risk analysis is estimating the probability of the introduction of that pest. The overall probability is the result of a *sequence* of events – all of which must occur with some frequency and probability for the pest to be introduced into the territory of the importing Member. If the probability of any one of the events in the sequence occurring is zero (or negligible), then there will be zero (or negligible) probability of introduction of the pest, that is, that the sequence of events will be completed.

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[21] Australia Appellant Submission, para. 97 (arguing that the Panel was "fundamentally wrong to impose on biosecurity Australia such a free-standing obligation to explain precisely how biosecurity Australia got to the expert judgments it made and recorded at intermediate steps in the IRA."); *see also id.* para. 77 ("[T]he question whether a particular conclusion ultimately reached by a Member as a result of the application of that methodology is rationally or objectively related to the scientific evidence identified by the Member is not answered by asking whether expert judgements made at every intermediate step in the application of the methodology are themselves supported by reasoning that is articulated in a way that can be seen as objective and coherent.").

[22] *EC – Hormones (AB)*, para. 133.

[23] *See Japan – Apples (Panel)*, paras. 8.123-8.176 (conducting a step-by-step analysis of the Article 2.2 claim of whether sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment or spread of fire blight within Japan); *Japan – Apples (AB)*, para. 164 ("Thus, the approach followed by the Panel in this case – disassembling the sequence of events to identify the risk and comparing it with the measure – does not exhaust the range of methodologies available to determine whether a measure is maintained 'without sufficient evidence' within the meaning of Article 2.2.").

20. Two points flow from this. First, as noted above, a conclusion of negligible risk in one particular factor may be determinative of the ultimate conclusion. Therefore, each step needs to be evaluated in order to make an "objective assessment" in accordance with Article 11 of the DSU. Second, it would be very difficult (if not impossible) for a panel to evaluate the ultimate conclusion fully and accurately without any appreciation as to whether the intermediate conclusions are themselves supported by science.

21. In the IRA's pest introduction analysis, the Panel found that Australia had determined certain probabilities to be unsupported by the evidence,[24] resulting in the exaggeration of the overall risk of the pest in question.[25] The Panel was thus performing its proper role under DSU Article 11 by reviewing each and every intermediate step of the assessment.

22. In sum, if adopted, Australia's approach would severely weaken the ability of a panel to review the sufficiency of a risk assessment. Rather, the panel would only be able to judge an assessment in the most general terms, and would not be authorized to assess the sufficiency of the science and the conclusions drawn therefrom. Such an approach is not consistent with the standard of review provided under Article 11 of the DSU, and it should not be adopted.

IV. Australia's Reading of DSU Article 11 Is Incorrect and Unworkable

23. Australia's third ground of appeal is that the Panel did not comply with its obligation under Article 11 of the DSU to make an objective assessments of the facts. Upon examination, Australia's Article 11 claim is based on the theory that a dispute settlement panel has failed to make an "objective assessment" when the panel's report does not include a discussion of every single piece of evidence that may not be supportive of the panel's ultimate findings, or when the report does not describe in each instance why the panel placed greater weight on other evidence before the panel.[26] This interpretation of Article 11 is incorrect and unworkable.

24. Article 11 requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case."[27] The Appellate Body has stated that a panel has not complied with Article 11 where it "deliberately disregards," "refuses to consider"

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[24] *See, e.g.*, Panel Report, paras. 7.259, 7.274, 7.289.

[25] *See, e.g.*, Panel Report, paras. 7.427-7.448.

[26] *See* Australia Appellant Submission, para. 133 (arguing that how "[t]he Panel disregarded critical aspects of the appointed experts' testimony that was favourable to Australia's case."); *see also id.* paras. 133-151 *(*reviewing the more than 250 pages of expert testimony and answers to questions, and noting instances where, in its opinion, the Panel ignored testimony favorable to Australia, overstated the effect of testimony unfavorable to Australia, or failed to properly assess the significance of testimony).

[27] DSU, Art. 11.

or "wilfully distorts or misrepresents" evidence submitted to it. In addition, disagreeing with one of the parties on the value of a piece of evidence is not an Article 11 violation: "Panels ... are not required to accord to factual evidence of the parties the same meaning and weight as do the parties."[28] And finally, the Appellate Body has said it "will not interfere lightly with a panel's exercise of its discretion" in deciding "which evidence it chooses to utilize in making findings."[29] The Appellate Body has never found, as Australia argues in its appeal, that a panel must discuss each and every piece of evidence before it, and explain how that evidence fits with the ultimate conclusion.

25. Indeed, Australia proposed interpretation of a panel's role under DSU Article 11 is unworkable. Particularly in complicated and fact-intensive disputes, as SPS disputes often are, it is impractical for the Panel to reproduce every piece of "potentially relevant"[30] evidence on the record and address the significance of the evidence.

26. It is for this reason that the Appellate Body has refused to require a panel to discuss the relevance of, or even reproduce, every piece of "potentially relevant" evidence. In *Brazil – Tyres*, for instance, the EC argued that the panel ignored relevant studies that the EC had submitted, and claimed that this violated Article 11. The Appellate Body found that the panel had cited in a footnote the paragraphs of the EC's oral statement and answers to questions in which the EC referenced its own studies, and that the panel had satisfied its obligations under Article 11.[31] While the EC studies were "potentially relevant" evidence, the Appellate Body did not require the panel to reproduce it, or even cite it directly, let alone discuss how it assessed the studies. Rather, the Appellate Body decided that "[t]he Panel simply attached more weight to other pieces of evidence that were before it, as Article 11 of the DSU entitles it to do."[32]

27. Finally, the concept of what a panel must include in its report should not be conflated with a panel's assessment of the evidence. While allegations of egregious errors in the assessment of evidence are properly addressed under Article 11, what must be included in a report is specifically addressed by Article 12.7.[33] Thus, the DSU recognizes that the act of

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[28] *Australia – Salmon (AB)*, para. 267.

[29] *US – Carbon Steel (AB)*, para. 142 (quoting *EC – Hormones (AB)*, para. 135; and *US – Wheat Gluten (AB)*, para. 151).

[30] *See* Australia Appellant Submission, para. 130 (citing *US – Continued Suspension (AB)*, para. 615; *Canada – Continued Suspension (AB)*, para. 615).

[31] *Brazil – Tyres (AB)*, para. 190.

[32] *Brazil – Tyres (AB)*, para. 190.

[33] DSU, Art. 12.7 ("[T]he report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.").

assessing evidence (addressed in Article 11) is distinct from what a panel is required to provide in its report to the DSB (Article 12.7).

V. The Panel Interpreted and Applied Article 5.6 Properly

28. In its fourth ground of appeal, Australia argues that the Panel's finding on the Article 5.6 claim both with regard to fire blight and the apple leafcurling midge ("ALCM") resulted in an incorrect legal interpretation of the parties' respective burdens of proof under Article 5.6. Australia's argument is based on a mischaracterization of the Panel's analysis, and thus should not be sustained.

29. Australia acknowledges that the Panel *correctly* stated that New Zealand's burden was to "adduce[] sufficient evidence to raise a presumption that the proposed alternative measure would achieve Australia's ALOP."[34] Australia argues, however, that the Panel evaluated New Zealand's argument under a lower burden of proof standard than what is required, resulting in a "premature[] 'shifting [of] the burden' to Australia to rebut the 'presumption' of inconsistency."[35] In particular, Australia argues that the Panel, in effect, lowered that burden of proof by relying "virtually entirely" on the conclusion that the IRA was inconsistent with Article 5.1.[36]

30. But Australia mischaracterizes the Panel's analysis for fire blight. Contrary to Australia's depiction, the Panel explicitly conducted a *two-part* analysis. The first part focused on the IRA: the Panel assessed "whether New Zealand has demonstrated that Australia's calculation of the risk resulting of the importation of New Zealand apples is exaggerated."[37] If so, "it would cast doubt on whether the risk would exceed Australia's ALOP to the extent calculated by the IRA, and warrant as strict risk management measures as those developed by the IRA."[38] And then, the Panel proceeded to a second step: namely, to determine whether New Zealand had met its burden of proof. The Panel went on to determine "more directly" whether New Zealand "has raised a

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[34] Australia Appellant Submission, para. 170 (quoting the Panel Report, para. 7.1197). The United States notes the distinction between a panel conducting its own risk assessment, and a panel finding that the complaining party had met its burden under Article 5.6. Here, the Panel did not conduct its own risk assessment to determine the risk arising from the importation of mature, symptomless apples. Rather, in the proper exercise of its role of making an objective assessment of the matter, the Panel found that New Zealand met its burden of showing that the alternative measure met the ALOP that Australia established with respect to the risk posed by fire blight in the context of the importation of apples.

[35] Australia Appellant Submission, para. 173.

[36] Australia Appellant Submission, para. 171.

[37] Panel Report, para. 71143.

[38] Panel Report, para. 71143.

presumption, not successfully rebutted by Australia, that its alternative measure sufficiently reduces" the risk attributable to fire blight.[39] In this second step, the Panel undertook a careful analysis of all the evidence before the Panel. Based on this analysis, the Panel concluded that New Zealand had established a presumption, not rebutted by Australia, that the alternative measure meets Australia's ALOP.[40]

31. Australia ignores this entire second step of the analysis, highlighting isolated quotes that the alternative measure "may" or "might" meet Australia's ALOP from the Panel's analysis under the first step, then declaring such a showing should not have discharged New Zealand's burden.[41] This mischaracterization of the Panel's analysis is fatal to Australia's argument. The Panel did not in fact discharge the burden simply on the basis that New Zealand had raised "doubt" as to whether the alternative measures meet Australia's ALOP.

32. In this appeal, Australia also advances a second, similar argument, contending that the Panel misapplied Article 5.6 by failing to make the "factual" finding that the alternative measure "would" meet Australia's ALOP, instead of what Australia claims the Panel concluded – that the alternative measure merely "could" or "might" achieve the ALOP.[42]

33. In doing so, Australia misconstrues the proper burden of proof standard. As Australia itself noted, the correct burden of proof standard was enunciated by the Appellate Body in *US – Wool Shirts and Blouses*:

> it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether

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[39] Panel Report, paras. 7.1154-7.1197.

[40] *See* Panel Report, para. 7.1197.

[41] Australia Appellant Submission, paras. 172-173.

[42] Australia Appellant Submission, paras. 179, 182. The United States further notes that although Australia faults the Panel for determining that an alternative measure "might" or "may" achieve Australia's ALOP, New Zealand need only establish a (rebuttable) presumption of inconsistency – not prove its case beyond a shadow of a doubt – to satisfy its burden, and that such terms are not necessarily inappropriately used in this context. For example, the *Japan – Apples* compliance panel, which addressed a very similar Article 5.6 claim to the one at issue here, evaluated that the United States, as complaining party, had satisfied its burden in establishing a *prima facie* case for an Article 5.6 violation, in similar terms. *See Japan – Apples (21.5)*, para. 8.194 (finding that the collective opinion of the experts was "that mature, symptomless apples are *unlikely* to complete the pathway and contaminate a host plant in Japan") (emphasis added); *id.* (concluding "that restricting imports exclusively to mature, symptomless apples *could* meet Japan's ALOP") (emphasis added). Given that the United States had already satisfied the other two prongs of the Article 5.6 analysis, the compliance panel determined that the United States had established a *prima facie* case of non-compliance with Article 5.6, which Japan did not rebut.

> complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a *presumption* that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[43]

The Appellate Body has referenced and relied on the *US – Wool Shirts and Blouses* standard in SPS cases.[44]

34. Australia thus overstates New Zealand's burden. All that was required of New Zealand was that it put forward sufficient evidence of a presumption of inconsistency. New Zealand was not required to adduce such evidence that its argument was the correct one beyond a shadow of a doubt, as Australia seems to contend. Once New Zealand established that presumption, it was up to Australia to rebut that presumption.[45] Notably, Australia does not advance the argument that it had successfully rebutted the evidence that New Zealand had put forward.

35. The United States further notes that an examination of the report shows that New Zealand had adduced sufficient evidence to discharge its burden.[46] As the United States noted in its third party submission before the Panel, with regard to the risk of fire blight, the evidence shows that that mature, symptomless apples present a negligible risk of transmitting or becoming a pathway for the disease.[47]

36. Likewise, the Panel, surveying all the evidence before it, concluded that:

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[43] Panel Report, n.2792 (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

[44] *See, e.g.*, *Japan – Agricultural Products (AB)*, para. 137 ("[W]e disagree with the United States that the Panel imposed on the United States an impossible and, therefore, erroneous burden of proof by requiring it to prove a negative, namely that there are *no* relevant studies and reports which support Japan's varietal testing requirement. In our view, it would have been sufficient for the United States to raise a presumption that there are not relevant studies or reports.") (emphasis in original); *EC – Hormones (AB)*, paras. 97-98; *Japan – Apples (AB)*, paras. 153-157.

[45] Australia's contention that the Panel improperly assessed the risk of the proposed alternative measure because the Panel only considered the "likelihood of entry, establishment and spread" without also considering the "potential biological and economic consequences" to Australia is similarly without merit. Australia Appellant Submission, para. 176. The Panel explicitly addressed these issues in its analysis of the risk assessment. *See* Panel Report, paras. 7.458-7.470 (fire blight); paras. 7.877-7.885 (ALCM).

[46] *EC – Hormones (AB)*, paras. 108, 208 (finding that despite the mis-allocation of the burden of proof by the panel, the complainants did, in fact, establish that the SPS measures at issue were inconsistent with Article 5.1).

[47] U.S. Third Party Submission Before the Panel, para. 87.

> the experts did not consider that the IRA contains any adequate scientific evidence to support the proposition that the introduction of fire blight via mature apple fruit has occurred or could occur. They found even less likely the further step of transfer from this imported bacterial population to a new plant in Australia. The likelihood of introduction via mature apple fruit would, in any event, be less than that of introduction via plant material or root stock. There would not be a higher likelihood of introducing Erwinia amylovora through mature apple fruit than 'the natural spreading possibility of the bacteria to go from place to another with something else ... which has no connection with trade of apples.'[48]

37. As such, "limiting trade to 'mature symptomless apples' renders the risk extremely low and akin to the risk of the bacteria making its way from New Zealand to Australia on air jet or some other mode of transport not connected to trade in apples."[49] Given that Australia's ALOP is defined as "providing a high level of protection aimed at reducing risk to a very low level, but not to zero," the Panel properly found that the alternative measure meets Australia's ALOP,[50] just as the previous *Japan – Apples* compliance panel had found the same alternative measure met Japan's arguably more stringent ALOP.[51]

VI. Conclusion

38. The United States thanks the Appellate Body for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.

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[48] Panel Report, para. 7.1186. This conclusion is in accordance with the *Japan – Apples* panel, which found that "there is not sufficient scientific evidence to conclude that mature symptomless apples would harbour endophytic populations of bacteria capable of transmitting E. Amylovora." *Japan – Apples (Panel)*, para. 8.136. The *Japan – Apples* panel ultimately concluded that "there is not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment or spread of fire blight." *Japan – Apples (Panel)*, para. 8.176. The compliance panel concurred with this judgment. *See Japan – Apples (Article 21.5)*, para. 8.71.

[49] Panel Report, para. 7.1190.

[50] Panel Report, para. 7.1197.

[51] *See Japan – Apples (21.5)*, para. 8.193 ("We note that Japan describes its ALOP as equivalent to the one that would result from an import ban on commercial apples.").