Australia – Measures Affecting the Importation of Apples from New Zealand, WTO Panel Report, WTO Doc. WT/DS367/R (9 August 2010)

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Introduction

The message that trade liberalisation will deliver global benefits has been fundamental in the operation of the World Trade Organisation (WTO).[1] Accordingly, any state that implements mechanisms to protect their local produce, and in the process creates barriers for foreign imports, may be acting counter to the basic tenets underpinning the WTO.[2] It is axiomatic that the strategies used by many countries to protect local agricultural produce from disease have been targeted in recent years and labelled as protectionist policies.[3] This practice poses an interesting question as to the permissible scope of quarantine measures given that their inherent objective is to protect a country from health problems and disease.[4]

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[5] recognises this dilemma by providing for certain rights and responsibilities

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1 *Agreement on Agriculture* (15 April 1994) 1867 UNTS 41; *Agreement on Government Procurement* (15 April 1994) 1915 UNTS 103; *Agreement on the Application of Sanitary and Phytosanitary Measures* (15 April 1994) 1867 UNTS 493. See further, World Trade Organisation, *GATS: Fact and Fiction – Six Benefits of Services Liberalisation* <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction3_e.htm>.

2 The Director General of the WTO stated that:
The WTO's founding and guiding principles remain *the pursuit of open borders*, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities. (emphasis added)
Director General, *About the WTO – A Statement by the Director-General*, World Trade Organisation <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm>.

3 Panel Report, *Australia – Measures Affecting the Importation of Salmon,* WTO Doc WT/DS8I/R (6 November 1998); Appellate Body Report, *Japan – Measures Affecting the Importation of Apples* WTO Doc WT/DS245/AB/R (26 November 2003). See further, J Atik, 'The Weakest Link: Demonstrating the Inconsistency of "Appropriate Levels of Protection" in *Australia-Salmon*' (2004) 2 *Risk Analysis* 483.

4 Indeed scope for allowing Member States flexibility in creating their own quarantine measures was envisaged long before the creation of the WTO. For instance, the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (hereinafter 'GATT'), Article XX(b), grants states the right to adopt measures 'necessary to protect human, animal or plant life or health', subject to other obligations under the GATT.

5 *Agreement on the Application of Sanitary and Phytosanitary Measures* (15 April 1994), Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Legal Instruments-Results of the Uruguay Round vol. 27 <http://www.wto.org/english/docs_e/legal_e/15-sps.pdf> [hereinafter 'SPS Agreement'].

with respect to protecting local products for each Member state.[6] The SPS Agreement allows countries to set their own standards with respect to protecting food safety, and animal and plant health within its borders. However, the SPS Agreement also requires that:

> … in seeking to protect health, WTO members must not use SPS measures that are: unnecessary, not science-based, arbitrary, or which constitute a disguised restriction on international trade.[7]

As such, all regulations adopted by a state must be based on scientific evidence.[8] This requirement restricts a Member state's ability to use technical barriers to trade, and in particular quarantine measures, as a means of restricting imports for the protection of domestic producers from foreign competition.[9]

In interpreting the SPS Agreement, the WTO must balance the rights and obligations that Member States must follow.[10] As has been highlighted in the recent *Australia Apples Case,*[11] these obligations are often construed as more important than the rights under the Agreement. This case is significant because of the WTO's strict interpretation of the 'risk analysis' and 'scientific evidence' obligations under the SPS Agreement. This interpretation may cause confusion for governments that have already adopted quarantine measures, based on available 'scientific evidence' or conducted their own risk assessments.[12] Accordingly, there is scope—and it is indeed desirable—for a clearer jurisprudence to develop in considering what quarantine protection measures should be permissible.

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[6] Indeed the SPS Agreement was created because:

> [t]here was a concern among agricultural exporters that the benefits to them from the [Uruguay Round] agreement would be reduced by current farm protectionist measures being replaced by alternative measures such as quarantine restrictions.

Sallie James and Kym Anderson, 'On the need for more economic assessment of quarantine policies' (1998) 42(4) *The Australian Journal of Agricultural and Resource Economics* 425, 425.

[7] Australian Government, Department of Agriculture, Fisheries and Forestry, *The WTO Santiary and Phytosanitary (SPS) Agreement: Why You Need To Know*, 3 <http://www.daff.gov.au/__data/assets/pdf_file/0007/146896/wto_sps_agreement_booklet.pdf>.

With respect to what measures are considered necessary, the WTO considers that there are a number of provisions in the SPS Agreement that require a 'necessity test'; namely, Articles 2.2 and 5.6. See WTO, '"Necessity Tests" in the WTO' (2 December 2003) S/WPDR/W/27 (Note by the Secretariat).

[8] WTO Secretariat, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures: Introduction* (1998) accessed online at <http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm>.

[9] Matthew Arthur, 'An Economic Analysis of Quarantine: The Economics of Australia's Ban on New Zealand Apple Imports' <http://www.nzares.org.nz/pdf/9%20Arthur%20-%20%20Economic%20Analysis% 20of%20 Aust.pdf>.

[10] WTO Secretariat, above n 8.

[11] Panel Report, Australia—Measures affecting the importation of apples from New Zealand, WTO Doc WT/DS367/R (9 August 2010).

[12] The question of an inadequate risk assessment, causing a breach of the SPS Agreement, was considered in the *EC Biotech Case.* See Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc WT/DS291/R (29 September 2006) [4.237].

1. Background

Australia first imposed a ban on New Zealand apple imports in 1921 in order to prevent the spread of 'fire blight': a bacterial disease that damages apple trees and reduces their ability to produce fruit. In March 2007, Australia agreed to lift the then 86-year-old ban on New Zealand apple imports, but insisted on implementing strict quarantine measures to prevent the spread of disease. While the Australian Government is well within its rights to set its own parameters for the process of quarantining imports, prior to their entry into the country, such regulations must comply with the SPS Agreement.[13]

In the present case, the New Zealand Government contended that Australia's quarantine approach, as dictated by the *Quarantine Act 1908* (Cth), was in breach of its obligations under the SPS Agreement. Conversely, Australia argued that its 'science-based approach to quarantine is consistent with the WTO rules'.[14] The quarantine process involved inspecting the fruit at packing houses in New Zealand before it was allowed into the country, and '[i]f there [were] any signs of fire blight or European canker, the import would be stopped'.[15] This rationale is consistent with the purpose of the measures adopted under the *Quarantine Act*; namely, to ensure:

> the prevention or control of the introduction, establishment and spread of diseases or pests that will or could cause significant damage to human beings, animals, plants, other aspects of the environment or economic activities.[16]

The WTO has interpreted the SPS Agreement in a number of key recent cases, including *EC-Hormones*,[17] *Australia-Salmon*,[18] and *Japan-Apples*.[19] Each case highlights that a Member State is entitled to implement its own SPS measures; however, these measures must be based on sufficient scientific evidence and an appropriate risk analysis.[20] In the

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[13] Australia is bound by the SPS Agreement by virtue of the fact that it is a Member State of the WTO. Moreover, any quarantine measures adopted by Member States are subject to the obligations enshrined under the GATT; specifically Articles I, III, XI.

[14] See Tracy Sutherland, 'Kiwis Invoke WTO in Apple War', *Australian Financial Review* (21 August 2007) 11, quoting the federal Minister for Agriculture, Peter McGauren.

[15] Orietta Guerrera, 'State's growers to fight apple imports from New Zealand' *The Age* (1 December 2006) 5, quoting Biosecurity Australia Spokesperson, John Wilson.

[16] *Quarantine Act 1908* (Cth), s 4 (1), defining the scope of quarantine.

[17] Appellate Body Report, European Communities – Measures Affecting Meat and Meat Products (Hormones), WTO Doc WT/DS26/AB/R (13 February 1998).

[18] Panel Report, *Australia – Measures Affecting the Importation of Salmon*, WTO Doc WT/DS8I/R (6 November 1998).

[19] Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R (26 November 2003).

[20] For a concise summary about the three recent WTO cases that have assessed the meaning of certain SPS Agreement provisions, see generally Joost Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: *EC – Hormones, Australia – Salmon and Japan – Varietals*' (1999) 2 *Journal of International Economic Law* 641.

Japan Apples Case,[21] the WTO's dispute panel condemned Japan for failing to lift its strict trade restrictions on imports of apples from the United States.[22] The WTO Appellate Body then held that, despite Japan's intention to prevent the spread of fire blight, their SPS measures were maintained 'without sufficient scientific evidence' and were therefore inconsistent with Article 2.2 of the SPS Agreement,[23] and that Japan's measures were 'clearly disproportionate' to the 'negligible risk' identified on the basis of the scientific evidence.[24] In the *Australia-Salmon* Case, the WTO Panel held that Australia had violated Articles 5.1 and 2.2 of the SPS Agreement by adopting a measure that effectively prohibited the importation of certain Canadian salmon products without basing it on a risk assessment and without sufficient scientific evidence.[25] Consequently, Australia published a risk analysis that included a more thorough analysis of the risk associated with imported fresh salmon from Canada, and it slightly reformed its quarantine process.[26] These cases, which indicate the importance of an appropriate risk analysis underpinning all quarantine measures, provide a useful starting point when considering the *Australia-Apples* case.

2. Facts of the Dispute

The WTO Dispute Review Panel was established on 21 January 2008.[27] The complaint was brought to the WTO by New Zealand and concerned the measures imposed by Australia on the importation of apples from New Zealand. On 27 March 2007, the Australian Director of Animal and Plant Quarantine confirmed Australia's position with respect to the importation of apples from New Zealand. He stated that:

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[21] Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R (26 November 2003).

[22] World Trade Organisation, *Summary: Japan – Apples (Japan: Measures Affecting the Importation of Apples)* < http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds245sum_e.pdf>.

[23] Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R (26 November 2003), [3], [138], [147], [160].

[24] Panel Report, *Japan – Measures Affecting the Importation of Apples* WTO Doc WT/DS245/R (15 July 2003), [8.198]. See also, Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R (26 November 2003), [147].
As a third party in this dispute, Australia supported Japan arguing that the Panel erred in law in finding that Japan acted inconsistently with its obligations under the SPS Agreement: See Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R (26 November 2003), [98].

[25] Panel Report, Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada, WTO Doc WT/DS18/RW (18 February 2000) [8.1(vii)].

[26] World Trade Organisation, *Australia – Measures Affecting Importation of Salmon: Summary of Key Findings in the Dispute* <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds18sum_e.pdf>.

[27] The Panel was established pursuant to New Zealand's second request to form a dispute settlement panel. It should be noted that although Australia rejected New Zealand's first request, under the WTO rules, Australia could not have blocked a second request. See, *Marrakesh Agreement Establishing the World Trade Organisation,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes), Articles 4 and 6.

> Importation of apples can be permitted subject to the Quarantine Act 1908, and the application of phytosanitary measures as specified in the final import risk analysis report for apples from New Zealand, November 2006.[28]

New Zealand claimed that this strict policy stance was inconsistent with Australia's obligations under the SPS Agreement.

New Zealand argued before the WTO Dispute Review Panel that the ruling against Japan over the importation of US apples strengthened its case against Australia on the same issue. The *Japan Apples* case was said to be analogous to the present scenario insofar as Japan, like Australia, also took certain measures in restricting imports of apples on the basis of concerns about the risk of transmission of fire blight bacterium. However, Australia (supported by third parties to the dispute)[29] refuted the claim that the cases were analogous, arguing that significant differences existed between the two sets of circumstances, including the relevant scientific evidence, pests at issue, appropriate level of protection, potential host plants, and the volume and mode of trade.[30]

3. Legal Claims

A. New Zealand

New Zealand contended that there was no objective relationship between the scientific evidence, and the measures adopted in Australia's strict quarantine regime.[31] New Zealand submitted that Australia's actions were inconsistent with Articles 2.1-2.3, 5.1-5.3, 5.5, 5.6, 8 and Annexure C of the SPS Agreement.[32] Specifically, New Zealand argued that Australia's quarantine measures were in breach of Article 2.2, which provides that all Members must ensure that:

> any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence.[33]

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[28] John Cahill, 'Biosecurity Policy Determination – Importation of Apples from New Zealand' (2007) *Biosecurity Australia Policy Memorandum 2007/07*.

[29] Panel Report, *Australia – Measures affecting the importation of apples from New Zealand,* WTO Doc WT/DS367/R (9 August 2010), [4.298], citing, Chile's Third Party submission, [11] – [13]; Japan's Third Party submission, [2]; European Communities' Third Party submission, [47]; United States' Third Party submission, [11].

[30] See Panel Report, Australia – Measures affecting the importation of apples from New Zealand, WTO Doc WT/DS367/R (9 August 2010), [4.2.98].

[31] New Zealand's First Written Submission, *Australia – Measures affecting the importation of apples from New Zealand*, WTO Doc WT/DS367/R (20 June 2008), [1.3]–[1.6], [4.31], [4.51], [4.54], [4.97], [4.105], [4.139] – [4.140], [4.144], [4.150]. See also, New Zealand's Second Written Submission (21 April 2009), [2.99]–[2.292].

[32] Request for the Establishment of a Panel by New Zealand, *Australia – Measures affecting the importation of apples from New Zealand,* WTO Doc WT/DS367/5 (7 December 2007), 3.

[33] SPS Agreement, Article 2.2

Under the SPS Agreement, Australia is also not entitled to 'arbitrarily or unjustifiably discriminate between Members'.[34] Furthermore, in the assessment of risks, Australia must take into account 'available scientific evidence'[35] and 'relevant economic factors'.[36] Article 8 of the SPS Agreement regulates 'Control, Inspection and Approval Procedures', referring to Annexure C, which outlines strict approval procedures that must be complied with in order to act consistently with the agreement.[37] New Zealand contended that Australia was in breach of both Article 8 and Annexure C of the SPS Agreement.

B. Australia

As outlined in *Australia's First Written Submissions*,[38] Australia argued that it acted consistently with the SPS Agreement by:

> exercis[ing] its right to protect its favourable plant life and health from risks arising from the introduction of certain debilitating pests and diseases that are endemic to New Zealand, but not present in Australia.

Moreover, Australia claimed to have relied on scientific evidence contained within its *Final Import Risk Analysis Report for Apples from New Zealand* (IRA).[39] The IRA contended that the specific measures were justified as they mitigate the risk of fire blight,[40] European canker,[41] and leafcurling midge,[42] and these procedures 'prevent opportunities for the disease[s] to enter and establish in Australia ...'[43] The IRA also stated that the import risk analysis 'conforms with Australia's obligations … [which] derive principally from the WTO's *SPS Agreement*'.[44] Australia argued that in considering the scientific basis of the IRA, the Panel's role was not to ascertain whether any conflicting scientific evidence exists, rather it should:

> determine whether a valid risk assessment had been conducted, considering whether the risk assessor's decision was objective and credible.[45]

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[34] SPS Agreement, Article 2.3; See also SPS Agreement, Article 5.5
[35] SPS Agreement, Article 5.2
[36] SPS Agreement, Article 5.3
[37] See SPS Agreement, Articles 8 and Annexure C
[38] See Australia's First Written Submission, *Australia – Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/R (18 July 2008), 31, [17].
[39] Australian Government Biosecurity Australia, 'Final Import Risk Analysis Report for Apples from New Zealand' (November 2006) [hereinafter 'IRA Report'].
[40] Ibid 105.
[41] Ibid 316.
[42] Ibid 319.
[43] Ibid.
[44] Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/R (9 August 2010), [7.170], citing, IRA Report, 3.
[45] Ibid [7.217].

4. Panel Findings

The main point of contention before the Dispute Review Panel was whether Australia's determination as to the appropriateness of the measures of protection was grounded on an appropriate risk analysis and based on scientific evidence. Australia argued that the determination of the appropriate level of protection is the Member's sole prerogative, and one on which no one may impinge[46]—a position accepted previously by the WTO Appellate Body.[47] The Panel insisted, however, that the scientific evidence that supports the quarantine measures must be reflected in the risk assessment. Accordingly, the logical starting point to consider a challenge against the reasoning and scientific basis for the measures is whether the risk assessment is in conformity with the requirements laid down in the SPS Agreement.[48]

The Panel concurred with New Zealand's argument that Australia's scientific evidence, contained in the IRA Report, lacked certainty as it did not 'contain reasoning that is objective and coherent, or conclusions that find sufficient support in the scientific evidence relied upon.'[49] While Australia acknowledged that conflicting scientific opinion may exist,[50] it maintained that it is entitled to act in good faith on the basis of 'divergent' scientific opinion.[51] The Panel concluded, however, that Australia's measures were not based on proper risk assessment, which therefore:

> constitute[d] a failure by the IRA to take sufficiently into account factors such as the available scientific evidence, the relevant processes and production methods in New Zealand and Australia, and the actual prevalence of fire blight, as required by Article 5.2 of the SPS Agreement.[52]

On the basis of evidence from experts independently selected by the Panel, it was concluded that Australia's risk analysis of the SPS measures was 'not coherent and objective'.[53] For instance, the Panel held that 'the evidence cited by the IRA does not seem to support the general conclusion[s]' made to support Australia's quarantine measures.[54]

The Panel circulated its report on 9 August 2010, finding that all 16 of Australia's measures that New Zealand alleged were in breach of the SPS Agreement, were not based

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[46] Above n 38, [4].

[47] Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon*, WTO Doc WT/DS18/AB/R (6 November 1998), [199].

[48] Panel Report, Australia – Measures affecting the importation of apples from New Zealand, WTO Doc WT/DS367/R (9 August 2010), [7.215].

[49] Executive Summary of New Zealand's Second Written Submission, *Australia – Measures affecting the importation of apples from New Zealand,* WT/DS367/R (28 April 2009), [23].

[50] Panel's First Substantive Meeting with the Parties: Opening Statement of Australia *Australia – Measures Affecting the Importation of Apples from New Zealand,* WT/DS367/R (2 September, 2008), [12].

[51] See ibid citing *EC-Hormones,* [194].

[52] Above n 44, [7.471].

[53] Ibid [7.258], [7.259], [7.275], [7.290], [7.320], [7.357], [7.417], [7.447], [7.470].

[54] Ibid [7.304].

on a 'proper risk assessment'.[55] Accordingly, the Panel held that these measures were inconsistent with Articles 5.1 and 5.2 of the SPS Agreement.[56] It followed that Australia's quarantine measures were, by implication, inconsistent with Article 2.2 of the SPS Agreement, which requires that SPS measures can only be maintained with sufficient scientific evidence.[57] The Panel, however, dismissed New Zealand's claim under Article 5.5, asserting that it had not satisfied the required three elements[58] in order to show that Australia's measures were arbitrary and discriminatory.[59]

The Panel additionally found that Australia's 'pest-specific' measures were 'more trade-restrictive than required to achieve Australia's appropriate level of phytosanitary protection'. [60] It held, therefore, that these measures were also inconsistent with Article 5.6 of the SPS Agreement.[61]

As an alternative solution to Australia's stringent quarantine measures with respect to New Zealand apples, the Panel agreed with New Zealand that that 'the importation of mature, symptomless apples … was an appropriate alternative under Article 5.6' and that 'the inspection of a 600-unit sample from each import lot' would be a more appropriate

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[55] Ibid [7.230].

[56] Ibid [7.906].

[57] Ibid [7.190], [7.230], [7.906]; See also, New Zealand's First Written Submission *Australia – Measures affecting the importation of apples from New Zealand,* WT/DS367/R (20 June 2008), [1.2].

[58] The three elements that the complainant must satisfy under Article 5.5, are first, that the state imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations; second, that the levels of protection exhibit arbitrary or unjustifiable distinctions in their treatment of different situations; third, that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction on international trade. See Panel Report, *Australia – Measures affecting the importation of apples from New Zealand,* WTO Doc WT/DS367/R (20 June 2008), [4.432]. See also Appellate Body Report, *European Communities – Measures Affecting Meat and Meat Products (Hormones),* WTO Doc WT/DS26/AB/R (13 February 1998), [214] – [215]; Panel Report, *Australia – Measures affecting importation of Salmon,* WTO Doc WT/DS18/RW (18 February 2000), [140]; WTO SPS Committee, 'Guidelines to further the practical implementation of Article 5.5' (21 June 2000) G/SPS/15, [4.2].
Conversely, New Zealand argued that: 'Australia has imposed measures to New Zealand apples that it does not impose in circumstances of comparable risk, as illustrated by the way Australia has treated the importation of nashi pears from Japan': see Panel Report, *Australia – Measures affecting the importation of apples from New Zealand,* WTO Doc WT/DS367/R (9 August 2010), [7.909].

[59] Panel Report, Australia – Measures affecting the importation of apples from New Zealand, WTO Doc WT/DS367/R (9 August 2010), [7.1090].

[60] See WTO, *Summary of* Australia – Measures Affecting the Importation of Apples from New Zealand <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds367_e.htm>; Panel Report, *Australia – Measures affecting the importation of apples from New Zealand,* WTO Doc WT/DS367/R (9 August 2010), [7.1403].

[61] Panel Report, Australia – Measures affecting the importation of apples from New Zealand, WTO Doc WT/DS367/R (9 August 2010), [7.1403].

measure for Australia to adopt.[62] At the very least, the Panel has requested that Australia bring its SPS measures into conformity with the SPS Agreement.[63]

The WTO Dispute Panel has sent a clear message to Member States that the obligations under the SPS Agreement must be observed, categorically. Moreover, given that the recent trend of WTO findings have highlighted the importance of scientific evidence and risk analysis, it is evident that the Panel has consistently adopted a narrow reading of the rights enshrined under the SPS Agreement, including a state's right to determine its own level of protection, in favour of these obligations.

Conclusion

The 90-year saga of how the apples trade between Australia and New Zealand should be regulated will continue for some time yet, with the WTO announcing on 31 August 2010 that Australia would appeal the Panel's decision.[64] The Australian Government claims that the Panel has erred in law in a number of key areas. Namely, it claims that the Panel has:

- 'erred in its interpretation and application of the definition of "sanitary or phytosanitary measure" in Annex A(1) to the Agreement';
- 'it erred in its interpretation and application of what constitutes a proper "risk assessment"';
- 'the Panel failed in the performance of its duty under Art 11 of the DSU to make an "objective assessment of the matter"'; and
- 'the Panel relied upon its erroneous findings against the risk assessments for [the bacterial diseases] in concluding that New Zealand's alternative measures would achieve Australia's appropriate level of protection'.[65]

While it is still unclear what the final outcome of this dispute will be, one thing is certain, whatever the final decision adopted by the Appellate Body is, it will have major implications on trade between the two nations. The importation of New Zealand apples to Australia represents a potential $100 million market.[66] However, even if Australia receives

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[62] See WTO, *Summary of* Australia – Measures Affecting the Importation of Apples from New Zealand, <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds367_e.htm>. See also Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/R (9 August 2010), [71194].

[63] The Panel also noted that 'Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment': [8.2]. It is axiomatic that the Panel suggested that this impairment must be rectified: see [8.3].

[64] Australia has appealed the Panel's decision under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review.

[65] Communication with Grounds of Appeal, *Australia – Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/R (31 August 2010), [2].

[66] John Durie, 'Kiwis See a $100m opportunity' *The Australian* (10 August 2010).

adverse findings on appeal, it is expected that the question of relaxing Australia's quarantine measures, whilst maintaining its biosecurity status, will be approached with great caution so as to prevent the spread of disease.

While the outcome of this claim is likely to have major implications on the nature of trade between Australia and New Zealand, the involvement of European Union, the United States, Chile, Japan, Pakistan and Chinese Taipei as third parties to this dispute is evidence of the international interest in this matter. Moreover, a decision in favour of New Zealand 'holds out the possibility of access to other Asian markets where its apples are banned for similar reasons',[67] and may expose the Australian apples market to competitors in the United States and Chile. The strict interpretation of the scientific evidence and risk analysis requirements of SPS measures, may further require other Member States to revisit the justifications for their respective quarantine measures.

A decision in favour of New Zealand would reinforce the trend of obligations exceeding rights under international agreements such as the SPS Agreement. Such a decision is evidence that the WTO's intention of promoting liberalisation of trade amongst its Members is overlapping increasingly with conservation measures.[68] Whatever the decision of this case on Appeal, it is desirable that the WTO make clear the threshold for risk analysis and scientific evidence requirements so that Member States can adopt SPS measures without fear of long, drawn out legal disputes.

[67] Johnathon Lynn, 'WTO condemns Australian ban on New Zealand apples' *Reuters UK* (9 August 2010).

[68] Whilst the 'precautionary principle' has been raised in the context of the SPS Agreement in past cases, it was not considered by the Panel in the *Australia – Apples Case.* See e.g., Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* WTO Doc WT/DS291/R (29 September 2006) [4.523], [4.524].