# Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/AB/R (29 November 2010)

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## I Introduction

The place of agriculture under the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT),[1] has, for some time, been somewhat vexed. Indeed, the road to the incorporation of agriculture under the WTO's specific jurisdiction was a long one. GATT had limited scope to deal with issues relating to agriculture until the finalisation of the Uruguay Round and the creation of the WTO.[2] Nations were not prepared, and the proliferation of disputes in this area continues to demonstrate a continuing reluctance,[3] to cease subsidising domestic farmers.[4] The Uruguay Round, which resulted in a number of agriculture-specific agreements,[5] after much lobbying by the 'Cairns Group',[6] was finally signed at Marrakesh on 15 April 1994, more than seven years after initial negotiations commenced in September 1986.

The *SPS Agreement*, which takes centre stage in the *Australia — Apples* dispute,[7] was a product of that Round. Australia has, on a number of occasions, been involved in agricultural disputes,[8] including quarantine matters under the *SPS Agreement*.[9] In general

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1 Formed by the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948).

2 See generally Arvind Subramanian and Shang-Jin Wei, 'The WTO promotes trade, strongly but unevenly' (2007) 72 *Journal of International Economics* 151.

3 See, for example, Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (12 January 2000).

4 See Richard Steinberg and Timothy Josling, 'When the peace ends: The vulnerability of EC and US agricultural subsidies to WTO legal challenge' (2003) 6 *Journal of International Economic Law* 369, 370.

5 Including, relevantly, the *Agreement on Agriculture*, opened for signature 15 April 1994, 1867 UNTS 410 (entered into force 1 January 1995) and *Agreement on the Application of Sanitary and Phytosanitary Measures*, opened for signature 15 April 1994, 1867 UNTS 493 (entered into force 1 January 1995) ('*SPS Agreement*').

6 A league of member nations of the WTO, chaired by Australia and including a number of developing countries for whom agricultural exports formed a significant majority of all exportation. That group, during the Uruguay Round negotiations, conducted significant lobbying activities to ensure that agriculture became a part of the WTO ambit: Bryan Mercurio, 'Should Australia continue negotiating bilateral free trade agreements? A practical analysis' (2004) 27 *University of New South Wales Law Journal* 667, 681.

7 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/AB/R (29 November 2010) ('*Australia – Apples*').

8 Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (6 November 1998); Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (12 January 2000); Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WTO Doc WT/DS177,178/AB/R (1 May 2001). There are other agricultural disputes have not yet reached the Panel stage: eg *Australia — Certain Measures Affecting the Importation of Fresh Pineapple*, WTO Doc WT/DS271/1 (23 October 2002).

terms, the *SPS Agreement* allows nations to set quarantine measures as they see fit, subject to the terms of articles 2 and 5. The measures are to be based, as far as is possible, on objective, scientific information and must be 'necessary' in the circumstances.[10] In that sense, the *SPS Agreement* seeks to balance the necessary protectionism of preventing the spread of harmful disease against restrictions on trade, particularly undue or unqualified restrictions. Of course, for a nation such as Australia, which prescribes some of the highest health and safety standards,[11] the globalisation and equalisation of these standards is not necessarily in the public (or private) interest, particularly where such standards must be lowered to facilitate world trade.[12]

## II The Panel Report

It is not necessary here to canvas in detail the facts giving rise to the *Australia — Apples* dispute, or the findings of the Panel Report.[13] What is pertinent, however, is the nature of the dispute. The dispute arose over Australia's decision to lift an 89-year-old ban on the importation of apples from New Zealand. The ban had been in place to prevent the spread of diseases.[14] Initially, in 1999, the Australian Quarantine and Inspection Service conducted a preliminary risk assessment on allowing imports, and in 2006, Biosecurity Australia delivered its import risk analysis report ('IRA'), which recommended 17 measures (16 of those were in issue in the *Australia — Apples* proceedings) that were later implemented.[15] New Zealand argued, inter alia, that those measures were inconsistent with the *SPS Agreement*.[16]

The Panel found substantially in New Zealand's favour. It found that the measures in issue contained in the IRA were measures correctly under the scope of the *SPS Agreement* per annex A(1),[17] however the specific measures were contra articles 5.1, 5.2 (and thereby 2.2)[18] and 5.6 of the *SPS Agreement*.[19] New Zealand also demonstrated that the general

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9 Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (6 November 1998) and *Australia — Certain Measures Affecting the Importation of Fresh Pineapple*, WTO Doc WT/DS271/1 (23 October 2002).

10 *Agreement on Agriculture*, opened for signature 15 April 1994, 1867 UNTS 410 (entered into force 1 January 1995) arts 2, 2.2, 5.1, 5.2 and 5.6.

11 See, for example, Sid Marris and Christopher Dore, 'Salmon row spawns legal battle/Growers demand $500m indemnity from Canberra', *The Australian* (Australia), 21 July 1999.

12 See generally Tim Buthe, 'The globalisation of health and safety standards: Deregulation of regulatory authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization' (2008) 71 *Law and Contemporary Problems* 219.

13 For a more detailed consideration of the dispute and the Panel Report, see generally Shaun Star, 'Australia – Measures Affecting the Importation of Apples from New Zealand, WTO Appellate Body Report, WTO Doc. WT/DS367/AB/R (29 November 2010)' (2010) 17 *Australian International Law Journal* 225. See also Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/AB/R (29 November 2010) [129]–[130], for a general description of the background to the dispute.

14 Including 'fire blight', 'European canker' and the pest 'apple leaf-curling midge' ('ALCM'): 'NZ apples likely to sell here after WTO decision', *The Age* (Melbourne), 12 April 2010. The measures taken in relation to these diseases, when referred to hereinafter collectively, shall be referred to as the 'specific measures'.

15 Biosecurity Australia, *Final Import Risk Analysis Report for Apples from New Zealand* (Canberra, November 2006). See also Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/AB/R (29 November 2010) [131]–[164], for a detailed description of the methodology employed by Biosecurity Australia in formulating the recommendations in the IRA.

16 Including arts 2.2, 2.3, 5.1, 5.2, 5.6 and 8, and annex C(1)(a) of the *SPS Agreement*.

17 Panel Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/R (9 August 2010) [8.1(a)] and [7.102].

18 Ibid [8.1(c)], [7.510], [7.781], [7.887] and [7.906].

measures adopted by Australia were inconsistent with articles 5.1, 5.2 and 2.2,[20] although not article 5.6.[21] New Zealand's claim with respect to article 5.5 (and 2.3)[22] was rejected, and the claim under annex C(1)(a) and article 8 was considered outside the terms of reference.[23]

## III The Appeal

Despite Australia's poor history with the WTO Appellate Body with respect to the *SPS Agreement*,[24] there was little hesitation in the decision to appeal the Panel's findings.[25] Australia notified the Dispute Settlement Body ('DSB') of its intention to appeal the decision on 31 August 2010.[26] Along with Australia and New Zealand, a number of third-party participants also provided submissions, including Chile, the European Union, Japan, Pakistan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States (US).

The grounds of appeal were manifested in five categories, the first four the subject of Australia's appeal, and the latter New Zealand's cross-appeal:

1. whether Australia's measures (per the IRA) were SPS measures under annex A(1);
2. whether the specific and general measures were inconsistent with articles 5.1, 5.2 and 2.2;
3. whether the Panel failed to objectively assess the matter before it contra to article 11 of the *Dispute Settlement Understanding* ('DSU');[27]
4. whether the specific measures were inconsistent with article 5.6; and
5. whether, in respect of New Zealand's appeal, the argument in relation to 'without undue delay' per annex C(1)(a) and article 8 was outside the Panel's terms of reference.[28]

Each of these issues shall be dealt with in turn.

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19 Ibid [8.1(e)] and [7.1403].

20 Ibid [8.1(c)] and [7.905].

21 Ibid [8.1(e)] and [7.1403].

22 Ibid [8.1(d)], [7.1089], [7.1090] and [7.1095]. That finding was not the subject of appeal by New Zealand.

23 Ibid [8.1(f)] and [7.1447].

24 A similarly negative outcome was achieved in the *Australia — Salmon* dispute with Canada, whereby Australia was required to lower its quarantine standards to allow for the importation of fresh, chilled or frozen salmon: see generally Panel Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/R (6 November 1998); Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (6 November 1998); Panel Report, *Australia — Measures Affecting Importation of Salmon — Recourse to Article 21.5 of the DSU by Canada*, WTO Doc WT/DS18/RW (20 March 2000).

25 John Durie, 'Kiwis see a $100 million opportunity', *The Australian* (online), 10 August 2010 <http://www.theaustralian.com.au/business/opinion/kiwis-see-a-100m-opportunity/story-e6frg9io-1225903419548>.

26 It is not within the scope of this article to consider the process of the DSB and the dispute settlement regime subscribed by the *Understanding on Rules and Procedures Governing the Settlement of Disputes,* opened for signature 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) ('DSU'). For a detailed consideration of those processes, see generally Gavin Goh and Trudy Witbreuk, 'The WTO dispute settlement system' (2001) 30 *University of Western Australia Law Review* 51 and Gavin Goh, 'Australia's participation in the WTO dispute settlement system' (2002) 30 *Federal Law Review* 203.

27 DSU, opened for signature 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995).

28 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/AB/R (29 November 2010) [124].

### A Annex A(1)

Australia appealed against the Panel's finding that the 16 measures in issue espoused in the IRA were, in fact, measures both individually and as a whole under the *SPS Agreement*. It was Australia's submission that there were only four such measures, the rest being ancillary by way of effectual dependency upon the four principal measures.[29] It follows, therefore, that it was incumbent on the Panel to consider each of the 16 measures individually as to their nature (which, on Australia's submission, it did not do). New Zealand submitted that to characterise the IRA measures as ancillary was an erroneous construction of the annex and noted that the 'ancillary' measures were similar to examples of measures in annex A(1).[30]

Annex A(1) of the *SPS Agreement* defines sanitary and phytosanitary measures as measures for the protection of human, animal or plant health from, inter alia, diseases, pests and toxins. The Appellate Body noted that measures per annex A(1) must be linked to an objective, namely, to provide protection for those items listed in annex A(1)(a)–(d).[31] The assessment of that link is objective and can be determined in a fashion similar to article III:1 of the GATT 1994;[32] that is, by looking to the overall 'design, architecture and structure'.[33] In terms of what may constitute a measure, annex A(1) specifies a number of examples, but, on its terms, does not purport to be exhaustive.[34]

The Appellate Body rejected Australia's contention that the measures ought to have been considered separately — there was no error in the Panel's reasoning that the IRA's purpose as a whole was entirely in line with annex A(1) and so could be determined collectively.[35] The Appellate Body also noted that the Panel did, in fact, consider at some length the individual measures.[36] Further, the Appellate Body noted that annex A(1) 'refers to laws decrees, regulations, requirements, and procedures in general, without in any respect limiting the scope of these instruments' and on that basis, rejected the submission that a measure prescribe some course of action.[37]

### B Articles 5.1, 5.2 and 2.2

Articles 5.1 and 5.2 operate in tandem — article 5.1 requires that an SPS measure must be based upon a risk assessment and article 5.2 sets out (again, not exhaustively)[38] the list of factors that must be considered, including, inter alia, 'scientific evidence'. It has previously

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29 Ibid [166]–[167].

30 Ibid [168].

31 Ibid [171]–[172]; see also Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (6 November 1998) [200].

32 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('GATT 1994').

33 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [172]–[173]. That interpretation was laid down first in Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R (1 November 1996) [120].

34 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [176].

35 Ibid [179].

36 Ibid; Panel Report, *Australia — Measures Affecting the Importation of Apples from New Zealand*, WTO Doc WT/DS367/R (9 August 2010) [7.141].

37 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [180]–[181].

38 Ibid [207]; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998) [187].

been established that article 2.2, which requires SPS measures to be based on scientific evidence and principles 'rationally and objectively' considered,[39] is to be read together with article 5.1.[40] In that sense, a panel should only determine if the risk assessment 'is supported by coherent reasoning and respectable scientific evidence'.[41] Australia disputed the Panel's findings that a proper risk assessment had not been carried out in formulating the IRA. It was contended that the scientific evidence of the IRA need only 'fall within a range that would be considered "legitimate"', and that the test laid down in *US — Continued Suspension* ought to apply only to the ultimate conclusion and not the reasoning and intermediate conclusions of the IRA as such.[42]

The Appellate Body opined that risk assessment under article 5.1 requires, first, a determination that the scientific evidence is legitimate and second, that the reasoning of the risk assessment is 'objective and coherent'.[43] Australia's contention that only the ultimate conclusions should have been considered was rejected as inconsistent with previous WTO jurisprudence.[44] The Panel's 'intermediate conclusions' were, in the Appellate Body's opinion, properly conceived.[45] Further, the Appellate Body upheld the Panel's wariness of the use of 'expert judgment' in lieu of scientific data where such was not available — the term 'as appropriate in the circumstances' cannot be read in such a way as to obviate the Panel's ability to assess the coherence and objectivity of the reasoning adopted, notwithstanding any methodological difficulties that might be encountered.[46] Further, the Appellate Body found both where and how the expert judgment is used must be identified.[47] As a matter of fact, the Appellate Body upheld the Panel's finding that the flaws were material to the assessment,[48] and dismissed this ground of appeal.

### C Article 11 of the DSU

Article 11 of the DSU requires a panel to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. It was Australia's contention that the Panel had failed to exercise that requirement by, first, merely reproducing expert testimony that was favourable to Australia without giving it due consideration and second,

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39 Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R (1 November 1996) [84].

40 Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998) [180].

41 Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WTO Doc WT/DS320/AB/R (14 November 2008) [590]. In determining the meaning of 'respectable scientific evidence', the jurisprudence of the Appellate Body suggests that that question is determined in the following terms, 'that the correctness of the views need not have been accepted by the broader scientific community, the view must be considered to be legitimate science according to the standards of the relevant scientific community': [591].

42 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [217].

43 Ibid [220].

44 Ibid [226].

45 Ibid [231].

46 Ibid [233], [236], [237], [241] and [242]. Indeed, similar conclusions were reached in Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WTO Doc WT/DS320/AB/R (14 November 2008) [562].

47 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [247].

48 Ibid [249]–[260].

by entirely overlooking some of that evidence.[49] Australia also contended that the Panel failed to understand the risk assessment methodology utilised by the IRA.[50]

Ultimately, on the facts of the case, Australia was unsuccessful on all grounds in relation to article 11 of the DSU.[51] However, the Appellate Body made a number of pertinent observations in relation to the interpretation of article 11. The Appellate Body recalled the decision in *US — Continued Suspension* insofar as it is accepted jurisprudence that a panel should not disregard relevant evidence,[52] although that cannot rationally amount to a requirement that that a panel consider in its report all evidentiary statements.[53] That being established, a panel, as a 'trier of fact',[54] has a degree of discretion with respect to what evidence is utilised in making its findings,[55] and the value and weight that evidence is to have.[56] Further, article 11 of the DSU does limit the operation of the discretion so that a panel cannot, of its own accord, conduct its own risk assessment on the evidence, but can only 'review' the risk assessment put before it.[57]

### D Article 5.6

The Panel had found that, contra to article 5.6 of the *SPS Agreement*, the measures utilised by Australia to protect against fire blight and ALCM were 'more trade restrictive than necessary to achieve [Australia's] appropriate level of sanitary or phytosantiary protection, taking into account technical and economic feasibility'.[58] Further, the Panel considered that the alternative measures put forward by New Zealand were 'reasonably available' pursuant to footnote 3 of article 5.6.[59]

Determination of whether or not a measure is unduly trade restrictive depends upon the satisfaction of a three-pronged test, laid down in *Australia — Salmon*, which provides that the measure is inconsistent if there is another measure, other than the contested measure, that:

(i) is reasonably available taking into account technical and economic feasibility;

(ii) achieves the Member's appropriate level of sanitary or phytosanitary protection; and

(iii) is significantly less restrictive to trade than the SPS measure contested.[60]

Australia argued that the Panel had misconstrued the requirement under article 5.6, namely, that the alternative measures 'might or may' achieve the appropriate level of

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49 Ibid [266].

50 Ibid [316].

51 See ibid [315], [327].

52 Ibid [270]; Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WTO Doc WT/DS320/AB/R (14 November 2008) [533], [615].

53 Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS139/AB/R (17 December 2007) [202], [275]–[276].

54 Ibid [271].

55 Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998) [135], [138].

56 Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (5 April 2001) [161].

57 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [272].

58 Ibid [331], [332].

59 Ibid.

60 Ibid [337]; Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (6 November 1998) [194].

protection as the contested measure, as distinct from 'would' achieve that level.[61] In that sense, Australia's complaint related to the overall approach of the Panel to the interpretation of whether the alternate measure achieved Australia's appropriate level of protection.

It was also contended, as a matter of analysis, that the Panel failed to consider the biological and economic consequences of allowing the entry of imported apples.[62] The Panel adopted a two-tiered test in determining whether New Zealand had established a prima facie case for the alternate measure.[63] That test constituted first, an assessment of whether Australia's calculation of the risk was exaggerated; and second, an assessment whether, more directly, the alternate measure might sufficiently reduce the risk to or below Australia's measure.[64] This approach was contended as being fundamentally flawed as it envisaged that a violation of article 5.1 had to first be found before considering whether there was a violation of article 5.6.[65]

The Appellate Body reversed the Panel's finding that Australia's measure was in breach of article 5.6,[66] on the grounds that it was incumbent on the Panel to have assessed whether 'the importing Member could have adopted a less trade restrictive approach' and that required 'the panel itself to objectively assess, inter alia, whether the alternative measure proposed by the complainant *would* achieve the importing Member's appropriate level of protection', and that this had not been done.[67] However, despite that reversal, the Appellate Body noted that it did not have sufficient information to conduct an assessment pursuant to the three-pronged test noted above,[68] and accordingly dismissed Australia's appeal.

## *E Annex C(1)(a) and article 8*

The appeal lodged by New Zealand claimed that the process by which the development of the procedures adopted by Australia (that being the 16 IRA measures) amounted to undue delay contra to annex C(1)(a) and, consequentially, article 8 of the *SPS Agreement*.[69] At first instance, the Panel considered that that task was outside its terms of reference on the grounds that the IRA process, which was the subject of New Zealand's contention, was not identified in the Panel request and, therefore, the measures in issue were not identified in the claims pursuant to annex C(1)(a) and article 8.[70] That finding, in the Appellate Body's view, was in error in light of the fact that article 6.2 of the DSU specifically demarcates 'measures' from 'claims'.[71] The Panel had erred by stating that the 'claims' were outside the terms of reference when their issue was with whether the 'measure' had been

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61 Appellate Body Report, *Australia — Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R (29 November 2010) [335].

62 Ibid.

63 Ibid [350].

64 Ibid.

65 Ibid [356]–[357].

66 Ibid [359].

67 Ibid [356] (emphasis added).

68 Ibid [385], [407].

69 Ibid [99]–[104], [408]–[410], [439]. Article 8 of the *SPS Agreement* states that a party shall abide by annex C when undertaking SPS measures and annex C(1)(a) provides that 'any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures ... are undertaken and competed without undue delay'.

70 Ibid [412].

71 Ibid [414]–[418].

identified.[72] Further, the Appellate Body disagreed that the question was a jurisdictional one — rather, the Panel ought to have reviewed on a substantive basis whether the measures violated the obligations in annex C(1)(a) and article 8,[73] and on that basis overturned the Panel's initial decision.

In terms of completing the reasoning, the Appellate Body considered that the processes of adoption could conceivably form a process under annex C(1)(a),[74] but that on the merits of this case, the process by which the measures were developed was not identified,[75] and that despite the long time taken to conduct the risk assessment, the process itself was not a measure in issue, and therefore the evidence could not establish whether the process was completed without undue delay.[76]

## IV Conclusion

The *Australia — Apples* decision continues Australia's unenviable record before the DSB in respect of quarantine disputes. However, that is unsurprising — Australian produce is marketed to the world and domestically as being of the very highest quality and safety; indeed, Australia, apparently, boasts 'the cleanest and greenest agricultural credentials in the world'.[77] The cumulative effect of both *Australia — Salmon* and *Australia — Apples* suggests that the Appellate Body is of the view that restrictions on trade by way of quarantine measures, where the risk of disease is not immediate and apparent, are unlikely to be tolerated. Further, the scientific rigour required by the Appellate Body to substantiate the risk of disease is, somewhat onerous, particularly where diseases may not have occurred for some time, but where the consequence of entry may be catastrophic.

It is a noted drawback of the WTO, and the *SPS Agreement* in particular, that quarantine standards may have to be lowered to prevent disputes of this nature.[78] The act of lowering these boundaries will necessarily increase the risk of the spread of disease.[79] When and if that occurs, the effect will not merely be confined to crop damage — it will also affect the reputation of the country and could result in long-term bans on exports. For example, US beef was banned in South Korea from 2003 to 2006 after an outbreak of foot-and-mouth disease in the US. It remains to be seen what Members' reactions might be if post-determination contamination occurs and what repercussions there are on the DSB and the WTO, as well as on international trade.

In terms of this dispute's context, Australia and New Zealand have, for the most part, enjoyed a strong trading relationship. Both are signatories to the ANZCERTA, which

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72 Ibid [420]–[421].
73 Ibid [424]–[425].
74 Ibid [438].
75 Ibid [439].
76 Ibid [442], [443].
77 Malcom Farr, 'Kiwis and apples: Something is rotten', *Perth Now* (online), 26 May 2011 <http://www.perthnow.com.au/kiwis-and-apples-something-is-rotten/story-fn6mhct1-1226063567508>.
78 See J Martin Wagner, 'The WTO's interpretation of the SPS Agreement has undermined the right of governments to establish appropriate levels of protection against risk' (1999–2000) 31 *Law and Policy in International Business* 855, 857 and generally Buthe, above n 12.
79 Zishun Zhao, Thomas I Wahl and Thomas L Marsh, 'Invasive species management: Foot-and-Mouth disease in the U.S. beef industry' (2006) 35 *Agricultural and Resource Economics Review* 98, 98–9.

aimed to foster, and to an extent has achieved, a strengthening of the trade relationship.[80] That is unlikely to change even with the outcome of this dispute. Moreover, there may be a number benefits flowing from the *Australia — Apples* decision: for New Zealand, a benefit to New Zealand farming and greater access to the Australian market; and for Australia consumers, cheaper shelf prices for goods when markets are opened to international players.[81]

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[80] *Australia New Zealand Closer Economic Relations Trade Agreement*, opened for signature 1 January 1983, [1983] ATS 2 (entered into force 1 January 1983).

[81] See 'Crunch time for apple growers', *The Australian* (online), 14 April 2010 <http://www.theaustralian.com.au/news/opinion/crunch-time-for-apple-growers/story-e6frg71x-1225853379994>.