# WORLD TRADE ORGANIZATION

**WT/DS367/7**
23 June 2008

(08-2984)

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

Communication from the Chairman of the Panel

*Preliminary Ruling by the Panel*

The following communication, dated 19 June 2008, from the Chairman of the Panel to the Chairman of the Dispute Settlement Body, is circulated to Members for their information.

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On 13 March 2008, Australia, the respondent in the above-mentioned dispute, raised a preliminary procedural question concerning the consistency of New Zealand's request for the establishment of the Panel (WT/DS367/5) with Article 6.2 of the Dispute Settlement Understanding.

Over the past months, the Panel has received written submissions on this preliminary issue from both parties as well as from two third parties. On 6 June 2008, the Panel issued the enclosed preliminary ruling on the procedural question raised by Australia, reserving its right to further develop the reasons for its preliminary ruling later in the proceedings or to include them in its report, as appropriate.

After having consulted the parties to the dispute, the Panel has decided to inform the Dispute Settlement Body of the content of its preliminary ruling. Therefore, I would be grateful if you could circulate the body of this letter and the enclosed preliminary ruling as a WT/DS367 document in all three official languages of the WTO at the same time.

Circulation of the preliminary ruling as a separate document in the WT/DS series was decided because of the specific circumstances of the case before this Panel and in the light of the outcome of the preliminary ruling. Accordingly, it should not be seen as establishing a practice or setting a precedent for the circulation of preliminary rulings in any other dispute.

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**PRELIMINARY RULING OF THE PANEL**
**6 June 2008**

## I. INTRODUCTION

1. On 13 March 2008, Australia filed a request before this Panel for a preliminary procedural ruling. Australia asserted that New Zealand's request for the establishment of this Panel, dated 7 December 2007, is inconsistent with Article 6.2 of the Dispute Settlement Understanding (DSU), because the panel request fails to identify the specific measures at issue and fails to provide a brief summary of the legal basis of New Zealand's complaint sufficient to present the problem clearly. Australia asked the Panel to find that New Zealand's panel request fails to fulfil the requirements of Article 6.2 of the DSU, and therefore to refrain from considering the substance of New Zealand's claims in this dispute.[1]

2. The Panel has examined Australia's preliminary request, as well as the arguments presented subsequently by Australia and New Zealand, and by Chile and the European Communities as third parties to the dispute. In considering Australia's request, the Panel has looked at New Zealand's request for the establishment of the Panel as a whole and on its face, as well as the attendant circumstances of the present case. The Panel assessed the sufficiency of this panel request in the light of the terms used in Article 6.2 of the DSU in their context and in the light of the object and purpose of this provision.

3. In the interest of due process, and especially in order to allow parties and third parties sufficient time to prepare their first written submissions, the Panel has decided to issue an early preliminary ruling. This is consistent with Australia's request that the Panel issue its preliminary ruling prior to the due dates of the parties' first written submissions.[2] The Panel reserves its right to further develop the reasons for its ruling later in the proceedings, or to include them in its report.

4. The Panel begins by recalling the requirements contained in Article 6.2 of the DSU. These requirements are as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

5. The Panel notes that New Zealand's panel request clearly satisfies the first two requirements contained in Article 6.2 of the DSU. In this regard, the panel request was made in writing and indicates that "consultations [between the parties] were held on 4 October 2007 in Geneva ... [but they] failed to resolve the matter".[3] Indeed, neither Australia nor the third parties have raised any issue with regard to these particular two requirements. The Panel will now turn to whether New Zealand's panel request satisfies the other requirements of Article 6.2.

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[1] Australia's letter dated 13 March 2008.
[2] Australia's letter dated 17 March 2008.
[3] *Australia – Apples*, Request for the Establishment of a Panel by New Zealand (WT/DS367/5), 7 December 2007, p. 3.

## II. ON THE IDENTIFICATION OF THE SPECIFIC MEASURES AT ISSUE

6. As to whether New Zealand's panel request identifies the specific measures at issue in a manner consistent with the requirements of Article 6.2 of the DSU, the Panel has reached the conclusions set forth below.

7. In its panel request, New Zealand has referred to both "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand*" (*FIRA*) and, "in particular" to a list of 17 requirements spelt out in the *FIRA* and identified in the panel request through bullet points.

8. Looking at the text of New Zealand's panel request, the Panel finds that, with respect to the 17 items identified by New Zealand through 17 separate bullet points, the request is sufficiently precise in identifying the specific measures at issue with respect to those 17 items, pursuant to Article 6.2 of the DSU.

9. On the other hand, given the length and complexity of Australia's *FIRA*, the Panel finds that the broad reference in New Zealand's panel request to the "measures specified in and required by Australia pursuant to the [*FIRA*]" fails to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU. Accordingly, the Panel finds that its terms of reference are limited to the 17 measures specifically identified by New Zealand in its panel request and do not encompass other measures that may be contained in Australia's *FIRA*, but which were not identified with sufficient precision in the panel request.

## III. THE SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT

10. In its panel request, New Zealand has listed a number of provisions of the covered agreements, which it alleges are breached by the measures adopted by Australia. New Zealand has not drawn an explicit and detailed connection between the specific measures challenged and the provisions invoked. New Zealand has only stated in general terms that "the above measures are inconsistent with the obligations of Australia under [nine provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures, (SPS Agreement)]".[4] Having carefully considered the language used in the panel request and the specific content of the provisions of the SPS Agreement cited therein, the Panel understands that New Zealand has claimed that "every measure ... [identified] in its panel request is inconsistent with each of the [nine] provisions referred to [in the panel request]."[5] In the Panel's view, this satisfies the requirement that the panel request lays out a connection between the various measures challenged and the specific provisions invoked.[6]

11. The Panel now turns to the issue of whether New Zealand's panel request provides a brief summary of the legal basis of the complaint, which is sufficient to present the problem clearly, as required by Article 6.2 of the DSU. The Panel would ideally have preferred a more explicit explanation of *how* or *why* the measures at issue are considered by New Zealand to be violating the identified provisions of the SPS Agreement. However, considering the language used in the panel request and the specific content of the provisions of the SPS Agreement cited therein, the Panel concludes that New Zealand's panel request contains enough information to adequately inform the responding party and other WTO Members on the nature of the complaint[7] and to allow the

[4] *Australia – Apples*, Request for the Establishment of a Panel by New Zealand (WT/DS367/5), 7 December 2007, p. 3.

[5] *Australia – Apples*, Written Submission by New Zealand on Australia's Request for a Preliminary Procedural Ruling in Relation to the Consistency of New Zealand's Panel Request with Article 6.2 of the DSU, 7 April 2008, para. 2.51.

[6] See Appellate Body Report on *US – Oil Country Tubular Goods Sunset Review*, para. 162.

[7] Appellate Body Report on *EC – Bananas III*, para. 142.

responding party to begin preparing its defence.[8] The Panel recalls in this regard that the complaining party is under no obligation to develop its arguments in its panel request.[9] Furthermore, the Panel's conclusion in this case is supported by practice followed by WTO Members in some previous panel requests (including that of New Zealand and Australia), as well as by rulings such as that adopted by the panel in *EC – Approval and Marketing of Biotech Products*. Finally, the Panel notes that it is not convinced by Australia's arguments that the lack of a more detailed explanation as to how or why the 17 specifically listed measures at issue are considered by New Zealand to be violating the provisions invoked has prejudiced or will prejudice Australia's ability to defend itself in the course of the Panel's proceedings.

12. Accordingly, the Panel finds that New Zealand's panel request does not fail to provide a brief summary of the legal basis of its complaint, which is sufficient to present the problem clearly, as required by Article 6.2 of the DSU.

## IV. CONCLUSION

13. In light of the foregoing, the Panel finds:

(a) With respect to the 17 items contained in Australia's *Final import risk analysis report for apples from New Zealand* (*FIRA*) and identified by bullet points in New Zealand's request for the establishment of this Panel, dated 7 December 2007, the specific measures at issue have been properly identified;

(b) New Zealand's panel request does not identify with sufficient precision any measures contained in Australia's *FIRA*, other than the 17 specific items identified through bullet points. Accordingly, any such other measures are not part of this Panel's terms of reference; and,

(c) New Zealand's panel request contains sufficient information regarding the legal basis of the complaint to present the problem clearly with respect to the 17 identified items.

14. In light of the findings above, the Panel will allow this proceeding to continue with respect to the 17 measures specifically identified in New Zealand's panel request and to the alleged inconsistency of such measures with the provisions of the SPS Agreement cited therein.

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[8] Appellate Body Report on *Thailand – H-Beams*, para. 88.
[9] Appellate Body Report on *EC – Bananas III*, para. 143.