AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF APPLES FROM NEW ZEALAND

(WT/DS367)

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

August 8, 2008

I. Introduction

1. The United States welcomes the opportunity to provide the Panel with its views in this dispute, in which New Zealand challenges Australia's imposition of phytosanitary measures for the importation of its apples under the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"). As the Panel is aware, the United States was the complaining party in *Japan – Apples*, a dispute that dealt with fire blight restrictions imposed by Japan for the importation of U.S. apples. In light of that experience, the United States considers it appropriate to offer its views on the scientific evidence and the merits of some of New Zealand's claims, particularly in relation to fire blight. The United States, as a major agricultural exporter and importer, has a strong interest in the proper interpretation and application of the SPS Agreement.

II. The Panel Should Make An Objective Assessment of the Matter Before It Pursuant to Article 11 of the DSU

2. In the view of the United States, Australia has failed to correctly set forth the applicable standard of review in this dispute. Australia maintains that the Panel should provide it "considerable deference" in assessing the scientific basis of sanitary and phytosanitary ("SPS") measures evaluated in its risk assessment. But such an interpretation does not comport with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which requires a panel to make "an objective assessment of the facts".

3. The United States considers that a panel's obligation to make "an objective assessment of the facts" pursuant to Article 11 of the DSU is also important to understanding the relevance of reports by prior panels and the Appellate Body. The United States is of the view that adopted reports by prior panels and the Appellate Body should be considered for their persuasiveness, but they are not binding on subsequent panels and need not be followed.

III. Article 2.2 of the SPS Agreement Requires Sufficient Scientific Evidence to Maintain a Measure

4. The obligation in Article 2.2 not to maintain an SPS measure "without sufficient scientific evidence" requires that there be a rational or objective relationship between the SPS measure and the scientific evidence.

5. As was also case during *Japan – Apples*, there is still no scientific evidence that mature, symptomless apples transmit fire blight disease. The scientific evidence further demonstrates that apples are not a pathway for the disease. And Australia has provided no scientific evidence establishing either that mature, symptomless apples transmit fire blight disease or that they are a pathway for disease. Accordingly, the United States considers that the measures for fire blight that Australia imposes on apples from New Zealand are maintained without sufficient scientific evidence, in violation of Article 2.2 of the SPS Agreement.

6. The vast scientific literature on fire blight establishes that mature, symptomless apples have never transmitted fire blight, nor do they play a role in the transmission of the disease. Two important studies conducted a critical review of all published data on the presence of *Erwinia amylovora* (fire blight bacteria) on or in mature, export-quality apples and estimated the theoretical probability of transmission of the disease via those fruit. The first study, published by Roberts *et al.* in 1998, estimated the risk of establishing new outbreaks of fire blight in previously blight-free areas, and found this risk to be so small as to be insignificant. The second study, published by Roberts and Sawyer in 2008, updates the Roberts *et al.* 1998 study and estimates that the probability of an outbreak of fire blight due to trade in export-quality apple fruit was dramatically lower than originally projected in the 1998 study. Australia attempts to discredit this comprehensive and significant 2008 study because it contradicts the findings of Australia's risk assessment. But Australia's contentions lack merit.

7. Three key factors are necessary for the infection of apple fruit with European canker: 1) conducive climatic conditions; 2) the presence of a susceptible host; and 3) a sufficient concentration of inoculum. Favorable occurrence of all three of these factors is necessary for infection of apple fruit to occur. In light of these three factors, and the U.S. knowledge of the disease, the United States does not consider that Australia has adduced sufficient scientific evidence to establish that apples will be latently infected with European canker and can transfer the disease to susceptible hosts.

8. In Australia's discussion of apple leafcurling midge (ALCM), it notes that the United States has a regulatory program in place for the export of apples from New Zealand to the United States. The United States makes one point of clarification regarding this regulatory program. The U.S. inspection levels used for apples from New Zealand are not targeted to ALCM, but a different pest – light brown apple moth.

IV. Article 5.1 Requires that SPS Measures Be Based on a Risk Assessment

9. Article 5.1 of the SPS Agreement provides that "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal, or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." The United States has concerns with Australia's "Final Import Risk Analysis for Apples from New Zealand" ("IRA") relating to both Australia's general methodology and its evaluation of the scientific evidence, particularly with respect to fire blight and European canker. Australia has not been consistent regarding its methodological approach with respect to its use of a semi-quantitative model – both within the IRA and in other risk assessments that it has conducted for other products. The United States has previously explained its concerns to Australia in comments that it submitted on a draft IRA published by Australia.

10. Australia's use of a semi-quantitative model for fire blight and European canker contributed to a flawed risk assessment. For fire blight, this is evidenced by the various values

that Australia assigns to different steps in its analysis. In several instances, Australia extrapolates values for risk levels in the absence of, or contrary to, the scientific evidence. For European canker, among other concerns, the United States considers that the transfer scenario of the disease set forth in the IRA from mature, export quality apples is highly unlikely. And for both fire blight and European canker, Australia has not evaluated the likelihood of entry, establishment, and spread of the diseases according to the SPS measures that might be applied.

V. Arbitrary or Unjustifiable Distinctions in the Level of Protection Under Article 5.5

11. In understanding Article 5.5, the United States considers it important to recognize that the SPS Agreement allows each Member to establish its own appropriate level of protection and that Article 5.5 does not prohibit a Member from having different appropriate levels of protection in different situations.

VI. Article 5.6 Requires that SPS Measures Not Be More Trade Restrictive Than Necessary to Meet a Member's Appropriate Level of Protection

12. The United States considers that there is an alternative measure for fire blight that is reasonably available, achieves Australia's appropriate level of protection, and is significantly less restrictive to trade than Australia's fire blight measures: restricting importation to mature, symptomless apple fruit. This measure follows from the scientific evidence that mature, symptomless apple fruit are not a pathway for the disease and thus will not result in transmission of fire blight to Australia. In the absence of any evidence that mature, symptomless apples transmit the disease, the United States submits that Australia has imposed fire blight measures that are more trade-restrictive than required to achieve its appropriate level of protection.

VII. Undue Delay Under Article 8 and Annex C

13. Article 8 of the SPS Agreement provides that "Members shall observe the provisions of Annex C in the operation of control, inspection, and approval procedures", and Paragraph 1(a) of Annex C states that "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that: (a) such procedures are undertaken and completed without undue delay." The United States shares New Zealand's concerns about undue delay by Australia regarding its import risk assessments for foreign apples. As Australia has done with apples from New Zealand, it continues to block access to its market for U.S. apples due to longstanding quarantine restrictions. The United States suffered a long delay in the commencement of a risk assessment for U.S. apples, which was further compounded by the lengthy delays in Australia's IRA for apples from New Zealand.