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Australians Get Their First Taste of New Zealand Apples in Ninety Years

By Meredith Kolsky Lewis



Introduction

The Australian government has finally ended a hotly-contested ninety-year ban on imports of apples from New Zealand—a move dictated by the reports in the WTO dispute (*Australia - Measures Affecting the Importation of Apples from New Zealand* (“*Australia–Apples*”)).^[1] In its report, the Appellate Body (“AB”)

clarified the sensitive issue of how WTO dispute settlement panels should balance deference and thoroughness in reviewing governments’ risk assessments.

The WTO Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”) requires WTO members to perform risk assessments whenever they introduce sanitary or phytosanitary (“SPS”) measures. In WTO disputes over SPS measures, the adequacy of the risk assessment is usually a central issue. The standard of review is a pivotal concern in applying the SPS Agreement to government actions. An overly deferential standard may let members engage in protectionism under the guise of safety—but an overly strict standard could lead WTO panels and the AB to substitute their own judgment for what should be decisions left to domestic policymakers.

Background

Australia banned apple imports from New Zealand beginning in 1921, following a determination in 1919 that fire blight (a plant disease) had become established in New Zealand.^[2] New Zealand and Australia have historically had a strong and dispute-free trading relationship, entering into the comprehensive Australia New Zealand Closer Economic Agreement in 1983. Nonetheless, New Zealand’s repeated requests to export apples between 1986 and 1995 were all rejected.^[3] In 1999, New Zealand again applied for access to the Australian apple market, and the Australian Quarantine and Inspection Service (“AQIS”) initiated an import risk analysis (“IRA”) in February 1999.^[4] In the seven years that followed, Biosecurity Australia was separated from AQIS; it issued three draft risk assessments;^[5] and the AB also issued its report in the *Japan–Measures Affecting the*

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Importation of Apples case (which also addressed SPS measures designed to prevent the entry, establishment, or spread of fire blight—in that instance from United States apples).[6]

In November 2006, Biosecurity Australia issued its final IRA, which recommended a series of risk management measures directed at fire blight and other plant diseases and pests.[7] In March 2007, Australia's Director of Animal and Plant Quarantine determined that import permits for New Zealand apples could be issued subject to, *inter alia*, the application of the SPS measures identified in the final IRA.[8] The IRA required quarantine measures similar to those struck down in the earlier U.S.-Japan dispute. This was the last straw for New Zealand, which finally initiated its first WTO or GATT dispute against Australia.[9]

Although New Zealand and Australia are relatively close geographically, their climatic conditions and apple industries differ. New Zealand currently exports sixty percent of its apple crop to over seventy countries,[10] but Australia grows apples primarily for its domestic market; only about three percent of the industry's revenue comes from exports.[11]

One might wonder why Australia fought this issue so hard, and why New Zealand chose to challenge its closest ally over this particular issue. The amount of trade at stake is small. The New Zealand industry forecasts apple exports to Australia could grow to NZ \$21.7 million/year (US \$18 million, or five percent of its total apple exports). But when deciding whether to bring WTO disputes, New Zealand considers both immediate market access needs and broader systemic implications, including New Zealand's interest as a major agricultural exporter, in ensuring SPS measures are not a disguised form of protectionism.

Meanwhile, the issue became enormously politicized within Australia, whose apple industry had been entirely protected from foreign competition until late 2010 when Australia imported Chinese apples for the first time. While many government officials privately admitted the import ban was unjustified, strong pressure from the domestic industry meant that an external mandate, such as an adverse WTO ruling, would be necessary to effect change.

Many predicted an easy win for New Zealand because of the similarity to the *Japan–Apples* dispute in which the AB found no scientific evidence that fire blight could be spread by mature, symptomless apples (the product New Zealand sought to export to Australia). Yet there were two reasons for caution. First, Australia's measures related also to another disease, European Canker, and to a pest—apple leafcurling midge. Second, since the *Japan–Apples* case, the AB had taken a more deferential view of the standard of review for risk assessments conducted under the SPS Agreement—and Australia had proposed an interpretation that would have shielded from scrutiny much of its risk assessment process.

New Zealand challenged seventeen of Australia's proposed quarantine measures (eight for fire blight; five for European Canker; one for apple leafcurling midge; and three general measures applying to all pests examined in the IRA).[12] Broadly agreeing with New Zealand, the panel found the specific quarantine measures and the general measures violated Articles 5.1 and 5.2 (and consequently Article 2.2) of the SPS Agreement; it also agreed with New Zealand's claim under Article 5.6 relating to the specific measures regarding fire blight, European canker, and apple leafcurling midge.[13]

After Australia appealed, the AB upheld the findings on the Articles 5.1, 5.2, and 2.2 issues, but reversed part of the panel's analysis under Article 5.6.[14]

The Appellate Body Report

Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*

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The AB report is of particular interest because the AB clarified the rulings it made in *Canada/United States–Continued Suspension of Obligations in the EC–Hormones Dispute* (“*U.S./Canada–Continued Suspension*”) on the standard of review for panels determining whether a measure is consistent with Article 5.1. The remainder of this *Insight* focuses on this issue.[15]

Standard of Review under Article 5.1 of the SPS Agreement

Article 5.1 provides that in conducting a risk assessment, “Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”[16] Thus a risk assessment requires a connection between scientific evidence and the measure applied. This seemingly simple requirement has been the subject of much discussion and debate. As noted above, the method of scrutinizing the relationship between the measure and the available science can lead to overly intrusive results if too stringent, but unfettered protectionism if too lenient.

In *U.S./Canada–Continued Suspension*, the AB laid out the standard of review for reviewing domestic risk assessments pursuant to Article 5.1,[17] stating: “the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.”[18] In addition, “[a] panel should also assess whether the reasoning articulated on the basis of the scientific evidence is objective and coherent.”[19] Australia argued that this interpretation meant that the panel could not apply the standard of objectivity and coherence to the *quality* of the reasoning found in the IRA’s interim determinations, only to the *ultimate conclusions* reached in the IRA.”[20]

The AB began by restating its findings in *U.S./Canada–Continued Suspension* that a panel has two primary tasks in reviewing a risk assessment pursuant to Article 5.1:

- (i) a determination that the scientific basis of the risk assessment comes from a respected and qualified source and can accordingly be considered “legitimate science” according to the standards of the relevant scientific community; and (ii) a determination that the reasoning of the risk assessor is objective and coherent and that, therefore, its conclusions find sufficient support in the underlying scientific basis.[21]

The AB also emphasized that this analysis “is centred on the notion that the risk assessment should be evaluated in the light of the scientific evidence on which it relies.”[22]

The panel’s determination of the scientific basis for the risk assessment was not appealed. Accordingly, the AB focused on the second element of this test, and in particular whether the panel erred in scrutinizing the IRA’s intermediate reasoning and findings for objectivity and coherence. The AB rejected Australia’s argument that the panel should only have reviewed whether the IRA’s intermediate conclusions fell “within a range considered legitimate by the scientific community.” It noted that Australia was effectively arguing that panels should use the same methodology to evaluate both the scientific evidence used and the reasoning and conclusions of the risk assessor.

The AB referred to its statement in *U.S./Canada–Continued Suspension* that “a panel is not well suited to conduct scientific research and assessments itself, and should not substitute its judgement for that of a risk assessor.”^[23] It noted that

whether the requisite rational or objective relationship exists can only be ascertained through the examination of how the scientific evidence is used and relied upon to reach particular conclusions. In this respect, the reasoning employed by the risk assessor plays an important role in revealing whether or not such a relationship exists.^[24]

The AB further rejected the suggestion that this formulation only applies to final conclusions of the risk assessor, stating that

it is not possible to review the ultimate conclusions reached by the risk assessor in isolation from the reasoning and the intermediate conclusions that lead up to them. A panel needs to understand how certain conclusions were reached and their relationship with the underlying scientific basis in order to be in a position to assess whether the requisite objective and rational relationships between the science, the risk assessment, and the resulting SPS measures exist.^[25]

This was particularly the case here, where the IRA contained numerous intermediate findings and conclusions, and where the ultimate conclusions were not accompanied by separate reasoning.^[26]

The AB’s Article 5.1 analysis suggests less deference than some commentators read into the *U.S./Canada–Continued Suspension* report. Although the AB did not revisit the standard of review to be applied in determining whether the scientific basis for the risk assessment is “legitimate science,” the report implies deference is due in this context because panels are “not well suited to conduct[ing] scientific research.”^[27] With respect to the panel’s determination of whether the reasoning of a risk assessor is objective and coherent, however, the AB’s decision seems to indicate that panels must undertake a fairly detailed review of many aspects of the risk assessor’s decision-making, in particular by scrutinizing the logic and reasoning used throughout the risk assessment process. Thus, the AB appears to be applying a higher degree of deference when scrutinizing the scientific basis for the risk assessment than to the determination of whether the reasoning of the risk assessor is objective and coherent.

Conclusion

The AB’s guidance on the standard of review clarifies that the deference expressed in *U.S./Canada–Continued Suspension* is predicated on a panel’s need to review scientific evidence—because this is not the panel’s area of expertise—and on the fact that a panel is reviewing decisions of Members’ authorities.^[28] However, it also suggested that a panel *should* undertake a detailed review and assessment of the authorities’ logic and reasoning. Thus, the AB appears to have signaled that its *U.S./Canada–Continued Suspension* formulation should neither be interpreted too broadly nor out of context.

Postscript

Following the AB's report, the parties agreed on a compliance deadline of August 17, 2011.[29] Biosecurity Australia subsequently reviewed its quarantine policy[30] and released final measures on August 17 establishing quarantine requirements for New Zealand apple imports, [31] and initial small shipments of New Zealand apples have arrived in Australia. More significant volumes of New Zealand apples will not be exported until April, following the next harvest. The dispute may not be over, however. At the September 2 meeting of the WTO Dispute Settlement Body, New Zealand indicated that Australia's requirements are excessive and therefore "questioned whether Australia had fully complied with the DSB ruling." [32] While New Zealand appears willing for now to accede to Australia's requirements, it expressed further concern about a proposed Private Members Bill in Australia to prevent New Zealand apple imports and about statements from some Australian states that they would refuse to allow entry of New Zealand apples.[33] It remains to be seen whether the federal government can successfully quell these opposition efforts.

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Endnotes:

[1] Appellate Body Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (Dec. 17, 2010), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds367_e.htm [hereinafter Appellate Body Report, *Australia —Apples*].

[2] *Id.* ¶ 129.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R (Dec. 10, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm.

[7] Appellate Body Report, *Australia—Apples*, ¶ 129.

[8] *Id.* ¶ 130.

[9] Request for Consultations by New Zealand, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/1 (Aug. 31, 2007), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds367_e.htm.

[10] TEARA, Apples and Pears, <http://www.teara.govt.nz/en/apples-and-pears/1>.

[11] Apple, Pear Growing in Australia: Market Research Report, IBIS World, available at <http://www.ibisworld.com.au/industry/default.aspx?indid=8>.

[12] Appellate Body Report, *Australia—Apples*, ¶ 3.

[13] *Id.* ¶ 8.1(a)-(f).

[14] *Id.* ¶ 444. The Appellate Body also upheld the panel's findings with respect to whether the measures at issue are "SPS measures" individually as well as collectively; rejected Australia's claim with respect to Article 11 of the DSU; reversed the panel's finding that New Zealand's claim under Annex C(1)(a) and its consequential claim under Article 8 of the SPS Agreement fell outside the Panel's terms of reference; and found that New Zealand had failed to establish that the measures at

issue were in fact inconsistent with Annex C(1)(a) and Article 8. *Id.*

[15] The Appellate Body addressed other arguments with respect to both Articles 5.1 and 5.6; however, due to space constraints these are not discussed here.

[16] Agreement on the Application of Sanitary and Phytosanitary Measures art. 5.2, Apr. 15, 1994, 1867 U.N.T.S. 493.

[17] Appellate Body Report, *Canada/United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 590, WT/DS320/AB/R, WT/DS321/AB/R (adopted Nov. 14, 2008), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds321_e.htm.

[18] *Id.*

[19] *Id.* ¶ 591.

[20] Appellate Body Report, *Australia—Apples*, ¶ 121. (internal quotation marks and references omitted).

[21] *Id.* ¶ 220.

[22] *Id.* ¶ 219.

[23] *Id.* ¶ 225 (quoting *U.S./Canada—Continued Suspension*, ¶¶ 590-91 (internal reference omitted)).

[24] *Id.*

[25] *Id.* ¶ 226.

[26] *Id.* ¶ 228.

[27] *Id.* ¶ 225.

[28] Of additional interest, in the context of addressing whether the panel had erred in its Article 5.6 analysis, the AB clarified that, to the extent *U.S./Canada—Continued Suspension* requires a more deferential standard of review than *de novo* in aspects of an Article 5.1 analysis, this requirement does not extend to Article 5.6. “The Panel’s caution was, however, misplaced. Caution not to conduct a *de novo* review is appropriate where a panel reviews a risk assessment conducted by the importing Member’s authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim.” *Id.* ¶ 354.

[29] *Australia—Measures Affecting the Importation of Apples from New Zealand*, Agreement under Article 21.3(b) of the DSU, WT/DS367/19 (Feb. 1, 2011), available at http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147604.pdf.

[30] Biosecurity Australia Advice 2010/38 – Commencement of a Non-regulated Analysis of Existing Policy for the Importation of Apples from New Zealand (Dec. 7, 2010), available at http://www.daff.gov.au/ba/reviews/current-plant/non-regulated_analysis_apples_from_new_zealand/baa_2010-38-_commencement_of_non-regulated_analysis.

[31] *Trickle of Apples Destined for Australia - At First*, N.Z. Herald (Aug. 18, 2011), available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10745876.

[32] *WTO Adopts Dispute Panel Report on US/Viet Nam Shrimp Case*, WTO (Sept. 2, 2011), http://www.wto.org/english/news_e/news11_e/dsb_02sep11_e.htm.

[33] *Id.*