BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION

Indonesia – Importation of Horticultural Products, Animals and Animal Products

(WT/DS477/DS478)

(AB-2017-2)

Third Participant Written Submission of Australia

10 March 2017
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I. INTRODUCTION

1. Australia considers that these proceedings initiated by Indonesia (the Appellant) raise important issues regarding the Panel’s findings that are of systemic concern.

2. In this submission, Australia:
   
   A. submits that the Panel Report accurately describes a range of trade-restrictive measures imposed by Indonesia on imports of horticultural products, animals and animal products, that have also affected Australian exports; and
   
   B. responds to some of the claims in Indonesia’s Appellant’s Submission in regard to the Panel Report.

3. Australia may raise other claims made by Indonesia in our oral statement to the Appellate Body.

II. GROUNDS OF APPEAL

1. The Panel did not err by analysing the measures at issue under Article XI:1 of the GATT 1994

4. The Panel in this dispute, correctly in Australia’s view, considered Indonesia’s prohibitions and restrictions on imports of horticultural products, animals and animal products under Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), before considering Article 4.2 of the Agreement on Agriculture.2

5. As a starting point, the Appellate Body in Canada – Wheat Exports and Grain Imports, clearly stated that

   “As a general principle, panels are free to structure the order of their analysis as they see fit”.3

6. In this dispute, all of Indonesia’s measures were challenged as quantitative restrictions on imports under Article XI:1 of the GATT 1994 and as quantitative import restrictions or similar border measures under Article 4.2 of the Agreement on Agriculture. Only two of Indonesia’s measures, the reference price requirements on imports of chilies and shallots, and on bovine animals and animal products, were also challenged as minimum import prices or similar border measures under Article 4.2 of the Agreement on Agriculture.

7. In US – Animals, the panel stated that “the provision from the Agreement that ‘deals specifically, and in detail’ with the measures at issue should be analysed first”.4 In this dispute, the measures at issue are predominantly quantitative restrictions on imports. Australia therefore considers that it was appropriate for the Panel to consider the consistency of all of Indonesia’s measures under Article XI:1 of the GATT 1994, which specifically addresses the subject of quantitative

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1 Australia’s third participant submission contains a total of 2,790 words (including footnotes).
2 Panel Report, Indonesia - Import Licensing Regimes, paras. 7.33.
restrictions, before considering the consistency of Indonesia’s measures with the broader provision in Article 4.2 of the Agreement on Agriculture. Australia considers that, in this dispute, it is the nature of the measures, rather than the fact that they apply to agricultural products, that is more relevant to determining the appropriate order of analysis.

8. Furthermore, the Panel in this dispute followed an order of analysis applied by numerous previous panels. Many of those panels held that a breach of Article XI:1 of the GATT 1994 will also constitute a breach of Article 4.2 of the Agreement on Agriculture, where the measure is among those listed in footnote 1 to Article 4.2.5 Such a finding underlines the appropriateness of undertaking an analysis under Article XI:1 of GATT 1994, before turning to Article 4.2 of the Agreement on Agriculture.

9. While a few previous panels have considered the consistency of measures relating to agricultural products with the Agreement on Agriculture before assessing their consistency with the GATT 1994, Australia considers that those decisions are the exception rather than the rule, and can be distinguished from this dispute. For example, in Chile – Price Band System, the Appellate Body held that the panel did not err in considering Article 4.2 before the GATT 1994. However, the provision of the GATT 1994 under consideration in that dispute was Article II:1(b) and not Article XI:1.6 While Turkey – Rice considered Article 4.2 of the Agreement on Agriculture before turning to Article XI:1 of the GATT 1994,7 the centrality of Article XI:1 is clearer in this dispute than was the case in that prior dispute. In Turkey – Rice, unlike the current dispute, the three distinct measures at issue were challenged under various WTO Agreements and provisions. Furthermore, the measure for which the Panel in that dispute chose to consider Article 4.2 before Article XI:1 was challenged as either a quantitative import restriction or discretionary import licensing under Article 4.2.8 In this dispute, the subject of quantitative import restrictions is much more to the fore, as all of Indonesia’s measures have been challenged as quantitative restrictions.

2. The Panel did not err in determining that Indonesia bore the burden of proving a defence under Article XX of the GATT 1994

10. In its appeal, Indonesia argues that the burden of proof for an affirmative defence under Article XX of the GATT 1994 is reversed for agricultural quantitative restrictions.9

11. Australia does not agree. WTO jurisprudence confirms that the burden of identifying and establishing affirmative defences rests on the party asserting the defence.10 It has been consistently held that Article XX of GATT 1994 is an affirmative defence and the legal standard under Article 4.2 of the Agreement on

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5 See Panel Reports, Korea – Various Measures on Beef, para. 762 and India – Quantitative Restrictions, paras. 5.238-5.242.
7 Panel Report, Turkey – Rice, para. 7.48.
8 Panel Report, Turkey – Rice, para. 7.58.
9 Indonesia’s Appellant Submission, paras. 82-84.
Agriculture has been considered many times. Moreover, panels and the Appellate Body have consistently held that Article XX of GATT 1994 is an exception in the context of Article 4.2 of the Agreement on Agriculture.

12. Reversing the burden of proof with respect to the exceptions identified in footnote 1 to Article 4.2 would be inconsistent with the object and purpose of the Agreement on Agriculture and Article 4.2. It is Australia’s view that the Panel did not err in determining that it is for Indonesia, and not the co-complainants, to establish the defence in this regard.

3. The Panel failed to make an objective assessment under Article 11 of the DSU with respect to the applicability of Article 4.2 of the Agreement on Agriculture

13. In its appeal, Indonesia submits that the Panel did not conduct an objective assessment of the applicability of the covered agreements or of the conformity of the measures at issue with the covered agreements because it did not examine the co-complainants' claims under Article 4.2 of the Agreement on Agriculture. Indonesia submits that by addressing Article XI:1 of the GATT 1994 alone and exercising judicial economy under the Agreement on Agriculture, the Panel failed to apply Article 4.2 of the Agreement on Agriculture, which Indonesia asserts is the more specific agreement with respect to quantitative import restrictions on agricultural products.

14. Australia does not agree. As clearly outlined above, in paragraphs 4 to 9, Australia’s submits it was appropriate for the Panel to consider the consistency of all of Indonesia’s measures under Article XI:1 of the GATT 1994, which specifically addresses the subject of quantitative restrictions, before considering the consistency of Indonesia’s measures with the broader provision in Article 4.2 of the Agreement on Agriculture.

15. Indonesia also argues that the Panel erred in determining that Indonesia bore the burden of proving the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture. As outlined in paragraphs 11 to 12 of this submission, Australia’s view is that the burden of identifying and establishing affirmative defences rests on the party asserting the defence, in this case, Indonesia.

16. Accordingly, Australia submits that Indonesia has not substantiated its claim under Article 11 of the DSU.

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11 Chile – Price Band System (Panel), paras. 7.17-7.101, Chile – Price Band System (AB), para. 239.
12 Turkey – Rice, para. 7.138, Peru – Agricultural Products (Panel), para. 7.308-7.372.
13 Indonesia’s Appellant Submission, para. 105.
14 Indonesia’s Appellant Submission, para 94.
4. The Panel did not err in concluding that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture

17. In its appeal, Indonesia claims that the Panel erred in concluding that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture.\(^\text{16}\)

18. Australia does not agree. Article XI:2(c) of the GATT 1994 covers import restrictions of any form, which are tolerated as exceptions to the general prohibition to impose quantitative restrictions established under Article IX:1 of GATT 1994. Article 4.2 of the Agreement on Agriculture requires that WTO Members avoid recourse to a series of measures that could come under Article XI:2(c) of GATT 1994. In footnote 1 to Article 4.2 of the Agreement on Agriculture, the measures which had to be converted into tariffs or tariff quotas were identified as including “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO agreement”.

19. Accordingly, members cannot have recourse to similar measures, and invoke Article XI:2(c) of GATT 1994. Australia supports the view that, to the extent of the conflict, Article 4.2 of the Agreement on Agriculture renders Article XI:2(c) of the GATT 1994 inoperative.

5. The Panel did not err in finding that Indonesia failed to demonstrate that Measures 9 through 17 were justified under Article XX of the GATT 1994.

20. In its appeal, Indonesia submits that the Panel erred in finding that Indonesia failed to demonstrate that Measures 9 through 17 were justified under Article XX(a), (b) or (d) of the GATT 1994. Indonesia asserts that the Panel did not employ the "mandatory sequence" for analysis in regard to Article XX.\(^\text{17}\)

21. Australia does not agree. The logical order of analysis in regard to Article XX (and well-established in WTO jurisprudence) is to first determine whether a measure falls within one of the listed exceptions in paragraphs (a) to (j) and, if it does, then conduct an analysis under the chapeau. In Australia’s view, while that sequence is logical, it is not “mandatory” as suggested by Indonesia. A potential result of not applying this order of analysis is that a panel exposes itself to risks of legal error. In Australia’s view, this risk of legal error does not constitute a legal error in itself.

\(^{16}\) Indonesia’s Appellant Submission, para. 119.

\(^{17}\) Indonesia’s Appellant Submission, paras. 142-145, 151-152.
22. In its Appellant Submission, Indonesia characterises the Appellate Body's decision in *US – Shrimp* as supporting its claims. The Appellate Body in *US – Shrimp* did find that the Panel's analysis of the *chapeau* was substantively flawed and constituted a legal error. However, it was the flawed application of the *chapeau*, and not the Panel's order of analysis, which constituted an error in that dispute. The Appellate Body did not find that analysing the *chapeau* first constituted a legal error in itself.

23. This is supported by the Appellate Body's decision in *Canada – Wheat and Grain Imports*. The Appellate Body held that the Panel's decision to commence its analysis with subparagraph (b) of Article XVII:1 of the GATT 1994, rather than subparagraph (a), did not constitute an error of law. The Appellate Body, citing *US – Shrimp* and *Canada – Autos*, determined that "in the particular circumstances" of the dispute the panel's order of analysis did not affect the panel's substantive application of the legal standard and was therefore "not fatal" to its legal analysis. The Appellate Body found that it is the substance of the analysis, rather than its order *per se*, that is determinative in establishing whether an error of law has occurred.

24. Indonesia also suggested that the Panel's sequence of analysis in this matter had "repercussions for the substance" of the Panel's analysis under the *chapeau* and led to flawed results. It is Australia's view that, in conducting its analysis under the *chapeau*, the Panel was aware of, and expressly applied, the correct legal standard as set out by the Appellate Body. In particular, the Panel specifically considered the policy objective as identified with respect to which each measure was allegedly justified under the subparagraphs of Article XX, to the extent necessary to properly perform its *chapeau* analysis. It is Australia's view that the Panel's analysis of Measures 9 through 17 with respect to the *chapeau* of Article XX had no repercussions in terms of substance and did not lead to the wrong conclusions.

III. CONCLUSION

25. Australia does not consider that the Panel erred in any of the instances claimed by Indonesia and respectfully requests that the Appellate Body uphold the Panel's finding that Indonesia's prohibitions and restrictions on imports of horticultural products, and animals and animal products, are inconsistent with its WTO obligations.

26. Australia thanks the Panel for the opportunity to provide this submission.

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18 Indonesia's Appellant Submission, paras. 141, 152.
19 Indonesia’s Appellant Submission, paras. 152-153.
23 Indonesia’s Appellant Submission, para. 153.