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 Oral Statement of Australia

Geneva, 28-29 August 2017
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I. INTRODUCTION

1. Australia welcomes the opportunity to present its views on the issues raised in this proceeding.

2. In our oral statement, Australia will provide some general observations on the merits of this appeal and then set out our views on each of the grounds of appeal.

II. General observations on the merits of this appeal

3. The measures at issue in this dispute included a suite of prohibitions and restrictions imposed by Indonesia on imports of animals, animal products and horticultural products. Measures such as placing a ban on imports when domestic product is 'sufficient’ or having limited licence validity periods and application windows, preventing long term contractual arrangements.

4. As the co-complainants argued, these measures were, on their face, inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

5. As a result, the Panel found Indonesia in breach of its WTO obligations with respect to all 18 measures and dismissed Indonesia’s claims that the measures were justified under Article XX of the GATT 1994. The Panel found unambiguously and comprehensively in favour of the co-complainants.

6. While Indonesia has every right to appeal, as a matter of due process, we do wonder at the utility of pursuing this appeal, particularly at a time when the resources of the WTO dispute settlement system are under unprecedented stress. As the co-complainants have argued in their submissions, the issues before the Appellate Body today will have no impact on the Panel’s findings. In taking this appeal Indonesia is merely delaying the inevitability of bringing its measures into compliance, meanwhile, the negative impact on exporters continues.

7. Australia urges the Appellate Body to consider and resolve these questions of law swiftly and without losing sight of the bigger picture – Indonesia’s trade restrictive measures must be brought into compliance.

III. Australia’s views on the grounds of appeal

8. We submit that each of the grounds of appeal are without merit, and should be dismissed for the following reasons.

9. On the first ground of appeal, Australia submits that it was within the Panel’s discretion to structure its order of analysis in the order it did; analyzing the measures at issue under Article XI:1 of the GATT 1994, before considering Article 4.2 of the Agreement on Agriculture for the following reasons. First, as a matter of general principle, Panels are free to structure the order of their analysis. Second the measures at issue are predominantly quantitative restrictions on imports, therefore Article XI:1, 

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which specifically deals with this subject, is the most appropriate starting point.\(^2\) And third, this order of analysis has been applied by numerous previous panels.\(^3\)

10. On the second ground of appeal, Australia submits that the Panel correctly assigned the burden of proof under Article XX. The jurisprudence on this subject is clear. The burden of identifying and establishing affirmative defenses rests on the party asserting the defense, in this case it was Indonesia’s burden to discharge and they failed to do so.\(^4\)

11. On the third ground of appeal, Australia submits that Indonesia has not substantiated a claim under Article 11 of the DSU distinct from the preceding claims. Therefore this ground of appeal should be rejected.

12. On the fourth ground of appeal, Australia submits that the Panel correctly concluded that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture. There is a direct conflict between a requirement to avoid measures under the Agreement on Agriculture and a defense for the same measures under GATT 1994, and in the event of a conflict the Agreement on Agriculture prevails.\(^5\) Regardless, this claim has no practical bearing on resolving the dispute because Indonesia failed to demonstrate the elements of an Article XI:2(c)(ii) defense.\(^6\)

13. On the fifth ground of appeal, in Australia’s view 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 any incorrect conclusions. Australia’s view is that the logical order of analysis concerning Article XX is first to determine whether a measure falls within one of the listed exceptions in subparagraphs (a) to (j) and, if it does, to conduct an analysis under the chapeau. It is logical, but not mandatory. A potential risk of not applying this order of analysis is that a Panel exposes itself to risks of legal error, but this risk, in and of itself, does not constitute a legal error.\(^7\) That is not the case here. The Panel’s order of analysis did not misapply the legal standard or fail to consider the context provided by paragraphs (a), (b) or (d).

IV. Conclusion

14. Australia thanks the Appellate Body for the opportunity to address these issues.

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\(^3\) See Panel Reports, *Korea – Various Measures on Beef*, para. 762 and *India – Quantitative Restrictions*, paras. 5.238-5.242.


\(^5\) Art 21.1 AoA.

\(^6\) New Zealand’s Appellate Body submission, paras. 125-128, United States Appellate Body submission, paras. 155-158.