Indonesia – Importation of Horticultural Products, Animals and Animal Products
(WT/DS477/DS478)

Executive Summary of Australia’s Third Party Written Submission and Third Party Oral Statement

12 February 2016
I. AUSTRALIAN INTERESTS IN THIS DISPUTE

1. Australia has both systemic and commercial concerns about Indonesia’s trade restrictions on imports of horticultural products, animals and animal products. Agricultural products made up over 48 per cent of Australian goods and services exports to Indonesia in 2014. Indonesia is Australia’s largest export market for cattle, and cattle and bovine meat products were Australia’s second and fourth largest goods exports to Indonesia in 2014 respectively. Indonesia is also an important market for Australian horticultural exports. Bilateral trade in these products is important to Australian businesses, and to Indonesian businesses and consumers. Removing limitations on this trade would be of benefit to both countries.

2. Given our substantial trade interests in this dispute, Australia, Brazil, Canada and the European Union requested that the Panel exercise its discretion to grant enhanced third party rights under Article 12.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Australia considers the Panel would have been justified in granting the additional third party rights that were requested, particularly given their limited and passive nature.

II. APPLICATION OF IMPORT LICENSING REGIME TO CATTLE

3. Australia has been particularly affected by Indonesia’s import licensing regime for animals and animal products as it is applied to cattle. Under Indonesia’s “positive list” of permissible animal and animal product imports, “Feeder cattle” with a maximum weight of 350 kilograms are the only type of live bovine animal permitted for importation. Imports of “Ready to Slaughter cattle” are currently prohibited.1

4. As is the case for other animals and animal products, importers of feeder cattle are subject to fixed licence terms, and are only permitted to import the quantity of cattle specified in their import approval. The Indonesian Government has regularly acknowledged that these fixed licence terms enforce an import quota – a maximum permissible volume of imports – on feeder cattle. For the first quarter of 2016, for example, the Indonesian Government has announced an import quota of 200,000 head of cattle.2

---

1 “Feeder cattle” are the only type of live bovine animal listed as permitted for import in Appendix 1 of the version of Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products (MOT 46/2013) provided by Indonesia. (Appendix 1, MOT 46/2013 (Exhibit IDN-14).) While ready to slaughter cattle are listed as permitted for import in the complainants’ version of MOT 46/2013 (Exhibit JE-18), the Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 Concerning Husbandry and Animal Health (Animal Law Amendment) also requires that imported livestock “must be in the form of feeder”. (Article 1(11), Animal Law Amendment (Exhibit JE-5).) In addition, in September 2015, Indonesia issued Regulation of the Minister of Agriculture Number 48/Permentan/ PK.440/8/2015 Regarding Importation of Feeder Cattle and Production Heifer into the Territory of the Republic of Indonesia (MOA 48/2015), which states that “importation of ready-to-slaughter cattle is no longer applicable”, and does not include ready to slaughter cattle in the list of permissible imports in its Appendix. (Preamble, par. b, Appendix, MOA 48/2015 (Exhibit AUS-2).)

5. Quotas on feeder cattle imports are evidenced by a large number of media articles and public statements by Indonesian officials. In addition to imposing fixed limits on the number of feeder cattle that can be imported, quarterly import quotas have imposed considerable uncertainty and economic costs on importers and exporters. Australian exporters have had to find alternative markets for cattle at short notice when quotas have been significantly lower than expected, and incur additional costs when quotas are not set until after the start of the quarter. Quarterly import quotas on feeder cattle have also led to reductions in supply and higher prices for Indonesian consumers.

III. INCONSISTENCY OF MEASURES WITH WTO OBLIGATIONS

A. GATT 1994 ARTICLE XI:1

6. Australia considers that each of the challenged measures that form part of Indonesia’s import licensing regimes for horticultural products, and for animals and animal products, is clearly inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which forbids “prohibitions or restrictions other than duties, taxes or other charges” on imports, whether through “quotas, import … licences or other measures”.

7. Indonesia’s import licensing regimes include outright prohibitions on imports of certain products, including ready to slaughter cattle and certain types of bovine offal and secondary cuts, through Indonesia’s positive list of permissible imports of animals and animal products. They also include prohibitions on imports of fresh horticultural products harvested more than six months previously, and on animal products that have been stored for more than three or six months between slaughter and arrival in Indonesia. These bans on imports of particular products are clearly “prohibitions” on the import of a product within the meaning of Article XI:1, defined as a “legal ban on the trade or importation of a specified commodity”.

---


5 New Zealand’s first written submission, paras. 24-25, Figure 1 and Figure 2; United States’ first written submission, para. 304.

8. Indonesia’s import licensing regimes also include prohibitions on imports of certain products in certain circumstances. These include prohibitions on imports of:
   (a) food and agricultural products when domestic production is deemed sufficient;
   (b) certain bovine secondary cuts and carcasses except by State Owned Enterprises and Regional State Enterprises in the event of beef shortages due to a disease outbreak or natural disaster, or to control prices and prevent inflation;
   (c) bovine animals and animal products, and chilies and shallots, when the market price for these products falls below a set reference price; and
   (d) horticultural products based on Indonesian harvest periods.

9. These measures are clearly “prohibitions” on imports when the relevant circumstances are deemed to apply for each product. Furthermore, these measures are also “restrictions” on imports, which have been defined by the Appellate Body as measures that act as a “limiting condition” or have “a limiting effect” on imports. Indonesia’s prohibitions on imports in certain circumstances also create considerable uncertainty for importers and exporters as they do not know when the Indonesian Government will declare the relevant circumstances to exist, and therefore are unable to make business plans with any confidence. The panel in Argentina – Import Measures confirmed that “uncertainties can constitute ‘restrictions’ under Article XI:1 of the GATT 1994”, as uncertainty “negatively impacts business plans of economic operators who cannot count on a stable environment in which to import and who accordingly reduce their expectations as well as their planned imports”.

10. In addition, Indonesia’s import licensing regimes include the imposition of numerical limits on imports. Import licences with fixed terms specify the quantity of each product that can be imported in a given import period, and additional permits cannot be sought during that period. This effectively establishes a fixed numerical limit, or quota, for that import period and prevents importers from responding to any changes in the importing or exporting market during an import period. Explicit quotas are set for imports of feeder cattle, which are then enforced by assigning fixed quantities to each importer under the import approval system. An annual quota system has been introduced for horticultural imports, which are also limited in each import period to the storage capacity owned by an importer. These numerical limits clearly act as limiting conditions on imports and are “restrictions” contrary to Article XI:1.

11. Furthermore, Indonesia’s import licensing regimes include measures which affect the “competitive situation” of importers. Limited licence validity periods and application windows effectively prevent imports at the beginning and end of each import period, prevent long term planning and contractual arrangements, and impose additional costs on importing when the issuance of licences is delayed. Eighty per

---

8 Appellate Body Reports, China – Raw Materials, para. 319 and Argentina – Import Measures, para. 5.217.
cent realisation requirements have encouraged importers to limit the quantities in their import licence applications. Rules preventing the sale of imported meat products in modern and traditional markets, and importers from selling horticultural products directly to consumers and retailers, reduce the commercial opportunities for imported goods and impose additional distribution costs on imports.

12. In addition to acting as a minimum import price, reference price rules also limit the ability of imports of bovine animals and animal products, and chilies and shallots, to compete with like domestic products on price. Laws requiring operators of markets to prioritise the sale of local horticultural products further affect the competitive position of imports. Requirements for importers of bovine meat to purchase local beef require importers to substitute imports with domestic products, limit imports according to the availability of local beef and increase the costs of importing. The requirement for imported cattle to be fed for four months in Indonesia not only effectively prohibits the importation of ready to slaughter cattle (in conjunction with Indonesia’s positive list licensing regime), but also places a restriction on the use of imported feeder cattle that affects their competitive position against local cattle. These measures are clearly “restrictions” on imports which “create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly”,12 which the panel in Colombia – Ports of Entry held would have “implications on the competitive situation of an importer”13 contrary to the requirements of Article XI:1.

13. Panels have consistently held there is no requirement for complainants to demonstrate “a causal link between the measure and its effects on trade volumes”.14 The limiting effects of Indonesia’s measures are evident in their design, structure and operation. Furthermore, Indonesia’s measures are part of a broader policy to restrict agricultural imports and promote food self-sufficiency, and should be considered in that context.

14. Australia considers that all of these measures operate individually as “quotas, import … licences or other measures” to prohibit or restrict imports contrary to Article XI:1. Furthermore, Indonesia’s import licensing regimes as a whole impose an even greater restriction on imports than their individual components. We therefore agree that the Panel should also consider the effect of these import licensing regimes as a whole, in which the various prohibitions and restrictions reinforce and amplify one another, and “contribute in different combinations and degrees … towards the realization of common policy objectives”15 of food self-sufficiency and the promotion of domestic production, similar to the situation in Argentina – Import Measures.16

12 Panel Report, Colombia – Ports of Entry, para. 7.240.
13 Panel Report, Colombia – Ports of Entry, para. 7.240.
14 Panel Report, Colombia – Ports of Entry, para. 7.252; see also Panel Report, Korea – Various Measures on Beef, para. 627.
15 Panel Reports, Argentina – Import Measures, para. 6.228.
16 Panel Reports, Argentina – Import Measures, para. 6.228.
B. AGREEMENT ON AGRICULTURE ARTICLE 4.2

15. Indonesia’s measures, and its import licensing regimes as a whole, are “measures of the kind which have been required to be converted into ordinary customs duties” that are prohibited under Article 4.2 of the Agreement on Agriculture. These individual measures and the regimes as a whole are also “quantitative import restrictions … minimum import prices … and similar border measures” as identified in footnote 1 to Article 4.2 as specifically prohibited under Article 4.2. These measures are contrary to Article 4.2 as a result of the same limiting effects on imports that render them inconsistent with Article XI:1 of GATT 1994.

16. Australia considers that a measure on agricultural imports that breaches Article XI:1 of the GATT 1994 will also breach Article 4.2, to the extent it is among those measures listed in footnote 1. As all of Indonesia’s measures have been challenged by the complainants as quantitative restrictions under both Article XI:1 and Article 4.2, it is appropriate to consider the consistency of Indonesia’s measures with Article XI:1 of the GATT 1994, as the more specific provision on quantitative restrictions, before considering their consistency with the broader provision in Article 4.2.

17. While Indonesia’s reference price requirements do not impose additional duties, Indonesia’s approach is actually more trade-restrictive than other minimum import price systems, by completely banning imports when the market price falls below a set threshold. These requirements should therefore be considered minimum import prices or similar measures under Article 4.2, as well as quantitative import restrictions.

C. GATT 1994 ARTICLE III:4

18. Australia agrees with New Zealand that Indonesia’s requirement for importers of bovine animal products to purchase domestic beef, and restrictions on the sale and distribution of imported animal and horticultural products, are also inconsistent with Article III:4 of the GATT 1994, which provides that imported products “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.

D. AGREEMENT ON IMPORT LICENSING PROCEDURES ARTICLE 3.2

19. As Indonesia’s import licensing procedures limit the time periods in which applications can be submitted and import licences are issued, they do not satisfy the definition of automatic import licensing procedures in Articles 2.1 and 2.2(a) of the Agreement on Import Licensing Procedures.

---

17 See Panel Reports, Korea – Various Measures on Beef, para. 762 and India – Quantitative Restrictions, paras. 5.238-5.242.
18 To qualify as automatic licensing under the Agreement on Import Licensing Procedures, Article 2.2(a)(ii) requires that applications “may be submitted on any working day prior to the customs clearance of the goods”, and Article 2.2(a)(iii) requires that applications be approved “within a maximum of 10 working days”. 
20. To the extent the Panel considers that Indonesia’s limited application windows and validity periods are non-automatic licensing procedures, they are also inconsistent with Article 3.2 of the Agreement on Import Licensing Procedures. As there is no underlying permissible restriction implemented by these licensing procedures, their trade-restrictive effects, including on long-term business planning and the flow of goods at the beginning and end of each import period, must be considered “additional” and “more administratively burdensome than absolutely necessary”.

IV. AMENDMENTS TO INDONESIA’S IMPORT LICENSING REGIMES

21. Since the Panel’s establishment, Indonesia’s Minister of Agriculture has issued a new regulation governing the importation of animal products.\(^{19}\) Indonesia’s Minister of Trade has also issued a new regulation on the importation of horticultural products.\(^{20}\) However, these new regulations do not alter the essential requirements of Indonesia’s import licensing regimes, which remain inconsistent with Indonesia’s WTO obligations, and actually impose additional restrictions on imports.\(^{21}\)

22. Indonesia’s regular amendments to its import licensing regimes should not enable it to avoid its WTO obligations. Indonesia’s frequent amendments to its regulations over many years, often without notification and with no or limited opportunity for consultation with trading partners, have not reduced their WTO-inconsistencies. These amendments have instead served to further increase uncertainty for Indonesian importers and consumers and overseas exporters, limiting the development of long-term trading relationships and deterring investment.

V. ARTICLE XX OF THE GATT 1994

23. Australia does not agree with Indonesia’s claims that several of its measures can be justified under the exceptions in Articles XX(a), (b) and (d) of the GATT 1994, which allow for measures “necessary to protect public morals”, “necessary to protect human, animal or plant life or health” or “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement…”. Indonesia provides no evidence to support its claims that these measures are designed or “necessary” to achieve these objectives or that it has considered less trade-restrictive alternatives. Nor has Indonesia demonstrated it has equivalent measures in place to address any similar alleged risks posed by like domestic products. The Panel should therefore conclude that these measures do not meet the criteria in the Article XX exceptions, and also amount to “an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”, contrary to the chapeau of Article XX.

---

\(^{19}\) Regulation of the Minister of Agriculture Number 58/Permentan/PK210/11/2015 Regarding Importation of Carcass, Meat, and/or its Derivatives into the Territory of the Republic of Indonesia, 7 December 2015 (unofficial English translation) (MOA 58/2015) (Exhibit AUS-1).

\(^{20}\) Regulation of the Minister of Trade Number 71/M-DAG/PER/9/2015 Regarding Horticultural Product Import Provision, 28 September 2015 (MOT 71/2015) (Exhibit JE-12).

\(^{21}\) For example, MOT 71/2015 adds further restrictions on horticultural imports, including a formal annual quota setting process. (Article 3, MOT 71/2015 (Exhibit JE-12).)