Indonesia – Importation of Horticultural Products, Animals and Animal Products

(WT/DS477/DS478)

Third Party Oral Statement of Australia

2 February 2016
I. Introduction

1. Mr Chairman, Members of the Panel, thank you for the opportunity to present Australia’s views in this dispute regarding Indonesia’s restrictions on the importation of horticultural products, animals and animal products.

2. Australia has significant trade interests in this dispute, as agricultural products made up over 48 per cent of Australia’s total goods and services exports to Indonesia in 2014. Indonesia is Australia’s largest export market for cattle. Cattle and bovine meat products were also Australia’s second and fourth largest goods exports to Indonesia in 2014 respectively. 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.

3. As a major exporter of agricultural products, Australia also has systemic interests in the interpretation of the legal obligations at issue in this dispute, including Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.2 of the Agreement on Agriculture.

4. In this third party oral statement, Australia will briefly summarise our views regarding Indonesia’s import licensing regimes, including as they are applied to cattle. We will also comment on the interpretation of, and relationship between, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Australia notes that we have also provided views on the inconsistency of Indonesia’s measures with Article III:4 of the GATT 1994 and Article 3.2 of the Agreement on Import Licensing Procedures in our written submission.

5. Australia also notes that we, along with Brazil, Canada and the European Union, requested that the Panel exercise its discretion under Article 12.1 of the DSU to grant enhanced third party rights in this dispute. Australia is disappointed that this request was not granted, and was not supported by two of the parties, given the limited and passive nature of the additional rights that were requested. Australia would have been
pleased to provide additional information about our interests in this dispute if required. Given Australia’s substantial trade interest in this dispute as a major exporter of agricultural products, both to Indonesia and globally, we consider that granting the limited additional third party rights that were requested in this proceeding would have been justified.

II. Indonesia’s import licensing regimes

6. Australia considers that each of the challenged measures that form part of Indonesia’s import licencing regimes for horticultural products, and for animals and animal products, are quantitative restrictions on imports contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

7. Indonesia has in place outright prohibitions on imports, in clear breach of basic WTO obligations and without legitimate justification. Indonesia’s measures include prohibitions on imports of ready to slaughter cattle, and of certain cuts of meat and offal, through the “positive list” of permissable imports in its regulations on animals and animal products.

8. Australia explained in our written submission that, in attempting to address the severe beef shortages that resulted from these import bans, Indonesia has previously imported ready to slaughter cattle despite its exclusion from the positive list in the version of MOT 46/2013 provided by Indonesia. However, we also wish to note that the version of MOT 46/2013 provided by the complainants would have permitted imports of ready to slaughter cattle up until September 2015, when they were removed from the positive list in the corresponding Minister of Agriculture regulation on cattle imports. This uncertainty regarding the content of Indonesia’s regulations illustrates the difficulties for importers and exporters posed by the frequent amendments to Indonesia’s licensing regimes. Regardless of which version of the measures in the regulations were in fact applied, it would appear to have been the case that the importers were subject to inconsistent and non-transparently applied import licensing regimes.

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1 Australia’s first written submission, paras. 71-72; Regulation of the Minister of Trade of the Republic of Indonesia, Number 46/M-DAG/PER/8/2013, Concerning Animal and Animal Product Import and Export Provision (“MOT 46/2013”) (Exhibit IDN-14).
regulation is correct, however, Indonesia clearly prescribes a positive list of permissible imports in breach of fundamental WTO obligations. This is demonstrated by Indonesia’s laws and regulations and the statements of its Ministers and officials about their operation.

9. Indonesia’s measures also include prohibitions on imports of certain products whenever the Indonesian Government declares that certain circumstances exist, for example that domestic production is sufficient, the market price has fallen below a set reference price, or a large domestic harvest is expected. Again, these measures are clearly WTO-inconsistent “prohibitions” on imports, implemented whenever the relevant circumstances are deemed to apply by the Indonesian Government. In addition, as importers and exporters have no way of knowing when the Indonesian Government will declare that the relevant circumstances exist, and import bans will be imposed, these measures are also “restrictions” on imports due to the considerable uncertainties they create for business.

10. In this regard, Australia notes that the panel in Argentina – Import Measures confirmed that “uncertainties can constitute ‘restrictions’ under Article XI:1 of the GATT 1994”,3 because 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”.4

11. Indonesia’s import licensing regimes also include measures which impose numerical limits on imports for each import period. Once an importer has shipped the volume of a product specified in its import licence, that importer is not allowed to import any more of that product until the next licence validity period.

12. In the case of cattle, the Indonesian Government has publicly acknowledged the fact that Indonesia’s fixed licence terms enforce a quota for each import period. Indonesian Ministers and officials regularly make public statements at the start of an import quarter about the number of cattle Indonesia will allow to be imported in that

quarter. For the first quarter of 2016, for example, the Indonesian Government has announced an import quota of 200,000 head of cattle. These numerical quotas, enforced through Indonesia’s fixed import licence terms, are clear quantitative restrictions on imports. In addition, as importers cannot know the volumes they will be allowed to import in the next import period, these quotas limit the ability of importers and exporters to plan beyond the current period or enter into long-term supply arrangements. This increases the cost of importing and acts as a further limiting condition on imports.

13. Indonesia’s import licensing regimes also include a range of other measures which are limiting conditions on imports and affect the “competitive situation” of importers. These include: limited licence validity periods and application windows which prevent imports at the beginning and end of each import period as well as preventing long-term planning by business; 80 per cent realisation requirements which encourage importers to limit the quantities in their licence applications; restrictions on the sale and distribution of imported animal and horticultural products; and requirements for bovine meat importers to also purchase local beef.

14. Australia considers that all of the measures identified by the complainants operate individually, and as licensing regimes as a whole, as quantitative restrictions on imports inconsistent with both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

III. The interpretation of, and relationship between, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

15. In regard to the scope of Article XI:1 of the GATT 1994, there is considerable jurisprudence that a “restriction” on imports is a measure that acts as a “limiting

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6 Panel Report, Colombia – Ports of Entry, para. 7.240.
condition”\(^7\) or “has a limiting effect”\(^8\) on imports, including as a result of its “implications on the competitive situation of an importer”.\(^9\) As we have stated, Australia considers that all of Indonesia’s measures, as well as its import licensing regimes as a whole, have limiting effects on imports and are therefore restrictions of a quantitative nature inconsistent with Article XI:1. Indeed, it is the stated policy goal of the Indonesian Government to achieve food self-sufficiency and cease or significantly reduce agricultural imports. The measures should be considered in this context.

16. To the extent that Indonesia seeks to rely on Article XX of the GATT 1994 to justify its measures, it bears the burden of demonstrating that they meet the criteria in one of the Article XX exceptions, and are also consistent with the chapeau of Article XX\(^10\). We do not consider that, in the submissions we have reviewed to date, Indonesia has met this burden.

17. In regard to the scope of Article 4.2 of the Agreement on Agriculture, Australia does not agree with Indonesia’s claim that the term “quantitative import restrictions” in footnote 1 to Article 4.2 only includes measures that impose “an absolute limit on imports”\(^11\) and not measures that impact “competitive opportunities”.\(^12\) The panel in \textit{Turkey – Rice} clearly held that a lack of transparency and predictability resulting from a measure was “liable to restrict the volume of imports”,\(^13\) and found that measure to be a quantitative import restriction under Article 4.2 of the Agreement on Agriculture.

18. Australia agrees with the complainants 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

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\(^11\) Indonesia’s first written submission, para. 55.

\(^12\) Indonesia’s first written submission, para. 55.

\(^13\) Panel Report, \textit{Turkey – Rice}, para. 7.120.
among those measures listed in footnote 1. In this dispute, 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 therefore 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 of the Agreement on Agriculture.

19. Noting that the Panel has indicated its interest in these issues in its advance written questions to the third parties, Australia would be pleased to expand on our views on these matters in response to questions from the Panel.

IV. Conclusion

20. In conclusion, Australia submits that all of the Indonesian measures at issue in this dispute are prohibitions or restrictions of a quantitative nature on imports. These measures are therefore inconsistent with both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

21. Australia thanks the Chair and Members of the Panel for this opportunity to present our views in this dispute and would be pleased to answer any questions you may have.

14 New Zealand’s first written submission, paras. 304-305; United States’ first written submission, para 149.