Indonesia – Importation of Horticultural Products, Animals and Animal Products

(WT/DS477/DS478)

Australia’s Third Party Submission to the Panel regarding Indonesia’s request for a Preliminary Ruling of 11 December 2015

Geneva, 6 January 2016
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I. INTRODUCTION

1. Australia provides the following comments on Indonesia’s request for a preliminary ruling because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant agreements, in particular the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).

II. ARGUMENTS IN INDONESIA’S PRELIMINARY RULING REQUEST

2. Australia considers that Indonesia’s request for a preliminary ruling in dispute WT/DS477/DS478, as set out in its submission to the Panel of 11 December 2015, has not been made out.

A. The Complainants’ claims were identified in their panel requests

3. Australia does not agree with Indonesia’s contention that New Zealand and the United States (the Complainants) made new claims in their first written submissions that were not properly identified in the Complainants’ panel requests. In particular, Australia considers that the Complainants’ claims under Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 3.2 of the Agreement on Import Licensing Procedures (ILA) were sufficiently identified in their panel requests to be within the Panel’s terms of reference.

4. In regard to the Complainants’ claims under Article III:4 of the GATT 1994 and Article 3.2 of the ILA, Indonesia states:

   First, the only mention made of these treaty provisions in the Complainants’ panel requests is in footnotes. Second, to the extent the Complainants’ make reference to possible violations of these treaty provisions by Indonesia, they do so in conditional and ambiguous language. As a result, Indonesia and third parties were left to wonder whether the Complainants meant to include claims under these provisions within their panel requests or not.

5. As a third party in this dispute, Australia notes that it was aware of and understood the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA in the Complainants’ panel requests.

6. In regard to the inclusion of these claims in footnotes, Australia submits that there is nothing in the text of the DSU to indicate that footnotes in a panel request do not form part of that panel request. Article 6.2 of the DSU states:

   The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

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1 Indonesia’s preliminary ruling request, para. 10.
7. Article 6.2 does not establish any structural or formatting requirements for panel requests. In *US – Carbon Steel*, the Appellate Body stated that: compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.

8. A finding that claims cannot be made in footnotes to a panel request would be inconsistent with this requirement to determine compliance with Article 6.2 “on the merits of each case”. In the context of the Complainants’ panel requests in this dispute, Australia took the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA to be complementary, alternative or additional claims to those in the body of the text. In these circumstances, it was reasonable for the Complainants to include these claims in footnotes to their panel requests.

9. In regard to Indonesia’s argument that the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA use “conditional and ambiguous language”, Australia again considers that the language used by the Complainants in regard to these claims reasonably reflects that they can be considered complementary, alternative or additional claims to those in the text.

10. Indonesia argues that it was “left to wonder whether the Complainants meant to include claims under these provisions within their panel requests or not”. However, Australia notes that the Panel in *Korea – Commercial Vessels* stated:

   if a complaining party wishes to pursue claims in respect of a given measure under multiple provisions, whether complementarily or alternatively, not only is it permitted by Article 6.2 of the DSU to refer to all of those provisions in its request for establishment, but it is required to do so.

By notifying Indonesia of complementary, alternative or additional claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA, the Complainants panel requests served to fully inform Indonesia of the nature of their case.

11. Australia also does not agree with Indonesia that the Complainants’ panel requests in this dispute “merely ‘challeng[ed] some (groups of) measures as inconsistent with some (groups) of the listed WTO obligations’”. The claims in each footnote disputed by Indonesia clearly relate to the measures in the section containing that footnote (e.g. footnote 5 relates to the measures in Sections I(a)-(c), and footnote 7 relates to the measures in Section I(c)).

12. Australia further disagrees with Indonesia that the Complainants’ claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA are outside the scope of the Panel’s terms of reference because they “only repeat treaty provisions”. The

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4 Indonesia’s preliminary ruling request, para. 10.
5 Panel Report, *Korea – Commercial Vessels*, para. 7.2.
7 Indonesia’s preliminary ruling request, para. 20.
Appellate Body in *EC – Bananas III* set out the difference between claims and arguments when it stated that:

> In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel’s terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties…. Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint.8 (emphasis original)

13. Complainants are therefore not required to set out the arguments supporting their claims in their panel requests. The Appellate Body held in *Korea – Dairy* that “the mere listing of the articles claimed to have been violated”9 may be sufficient to meet the minimum requirements of Article 6.210, depending on whether or not “the ability of the respondent to defend itself was prejudiced”11.

14. Australia considers that, in this dispute, the Complainants’ panel requests have clearly exceeded the minimum requirements of Article 6.2 of the DSU. In their panel requests, the Complainants’ claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA are linked to specific Indonesian measures, identify the specific articles that these measures violate, and also provide a brief explanation of why the measures violate the relevant articles. For example, footnote 7 of the Complainants’ panel requests states that the measures identified in Section I(c) violate Article III:4 of the GATT 1994 “because Indonesia does not impose similar limitations on the internal sale, offering for sale, purchase, transportation, storage, distribution, and use of like domestic products”.

15. This information provided in the Complainants’ panel requests clearly exceeds by a considerable margin the standard articulated by the Panel in *EC – Approval and Marketing of Biotech Products* in its preliminary ruling:

> Neither the text of Article 6.2 nor relevant jurisprudence suggests that a complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party’s written submissions and oral statements. Accordingly, we do not consider that the Complaining Parties’ panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions. Nor do we consider that the panel requests are defective because they do not make it clear whether all of the provisions listed are alleged to apply to the same

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aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure\textsuperscript{12}.

16. Australia therefore submits that the Complainants’ claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA were sufficiently identified to be within the Panel’s terms of reference, consistent with the requirements of Article 6.2 of the DSU.

B. Indonesia has not suffered prejudice

17. Australia recognises the dual purposes which a panel request must serve. As stated by the Appellate Body in \textit{US – Carbon Steel}: The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying the parties and third parties of the nature of a complainant’s case\textsuperscript{13}.

18. Australia considers that the Complainants’ panel requests did serve the due process objective of notifying Indonesia of the nature of their complaints, and that Indonesia’s ability to defend itself in this dispute has not been prejudiced.

19. The Appellate Body stated in \textit{Thailand – H-beams} that “the fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself”\textsuperscript{14}.

20. Indonesia has not argued that it was unaware of the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA in the Complainants’ panel requests. Indeed, as noted above, the inclusion of complementary, alternative or additional claims served to fully notify Indonesia of all the claims that the Complainants could raise in their first written submissions.

21. Australia is therefore of the view that the Complainants’ panel requests achieved the due process objective of notifying Indonesia of the nature of their case, and were sufficient to enable Indonesia to defend itself.

III. Summary

Australia is of the view that the claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA in the Complainants’ panel request were summarised in a manner that was “sufficient to present the problem clearly” as required by Article 6.2 of the DSU.


\textsuperscript{13} Appellate Body Report, \textit{US – Carbon Steel}, para. 126.

\textsuperscript{14} Appellate Body Report, \textit{Thailand – H-Beams}, para. 95. (emphasis added)
22. Australia therefore considers that the Complainants’ claims regarding Article III:4 of the GATT 1994 and Article 3.2 of the ILA are within the Panel’s terms of reference and that Indonesia’s right to due process has not been violated.