Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products
(WT/DS484)

Executive Summary

9 August 2016
AUSTRALIA’S VIEWS ON INDONESIA’S IMPORT LICENCING REGIMES

1. Under various Indonesian laws identified by Brazil, and by ourselves and other third parties in written submissions, Indonesia has in place the following measures to restrict imports of animal products:
   (a) prohibition of chicken meat and chicken products not listed in its regulations. This is in effect a positive list prohibition;
   (b) restriction of importation other than for certain limited uses. This includes rules preventing the sale of imported meat products in modern and traditional markets, which reduce the commercial opportunities for imported goods;
   (c) limited licence validity periods and application windows. These prevent long term planning and contractual arrangements, impose additional costs on importers and exporters when the issuance of licences is delayed, and effectively prevent imports at the beginning and end of each import period;
   (d) fixed licence terms. These prevent importers from responding to any changes in the importing or exporting market during an import period;
   (e) restrictions on the transportation of imported animal products; and
   (f) strict enforcement of halal labelling requirements when these same requirements are rarely enforced with regard to equivalent domestic products.

Australia considers that these measures constitute prohibitions and restrictions on importation inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.2 of the Agreement on Agriculture. To the extent that this Panel finds that the use, sale and distribution restrictions are internal measures, Australia considers that they are contrary to Article III:4 of the GATT 1994.

2. Australia agrees with Brazil that, to the extent the Panel considers that Indonesia’s measures 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, the trade-restrictive effects of these procedures, including their effect on long-term business planning and the flow of goods at the beginning and end of each import period, must be considered “additional”. Furthermore, the procedures are clearly “more administratively burdensome than absolutely necessary” as there is no permissible measure that they administer.

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1 Brazil’s first written submission, paras. 49-56, 80-86, 172-189.
2 Brazil’s first written submission, paras. 191-194.
3 Brazil’s first written submission, paras. 195-199.
4 Brazil’s first written submission, paras. 200-209.
5 Brazil’s first written submission, paras. 210-213.
6 Brazil’s first written submission, paras. 214-217.
7 Brazil’s first written submission, paras. 136-139.
8 Brazil's first written submission, paras. 268-283.
INDONESIA’S CLAIMS REGARDING ITS MEASURES

3. In our written submission, Australia disagreed with several claims made in Indonesia’s first written submission. In Australia’s view, Indonesia’s assertions in regard to Article XI.1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, and in regard to Article 4.2 of the Agreement on Agriculture and Article XX of the GATT 1994, are not supported by the text of the WTO covered agreements and are inconsistent with the findings of previous panels and Appellate Body reports.

4. A number of disputes have considered claims made by Members under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. As outlined in Australia’s written submission, the panels in Korea - Beef and India - Quantitative Restrictions, found that certain measures breached both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.\(^9\)

5. As Australia outlined in paragraph 24 of its written submission, Australia agrees with Brazil that Indonesia’s restrictions on imports of animal products are “measures of the kind which have been required to be converted into ordinary customs duties”\(^10\) that are prohibited under Article 4.2 of the Agreement on Agriculture. These measures are also “quantitative import restrictions … discretionary import licensing … and similar border measures”\(^11\) 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 rendered them inconsistent with Article XI:1 of the GATT 1994. As previous panels have found, 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.\(^12\)

6. Indonesia has also asserted that Article III:4 of the GATT 1994 and Article XI:1 of the GATT 1994 are mutually exclusive in their scope of application.\(^13\) To date, these provisions have not been found by panels to be mutually exclusive. Given the systemic issues regarding the distinction between market access and domestic regulation, in Australia’s view the Panel should carefully consider the classification of the measures at issue before reaching a conclusion. It is Australia’s view that the Panel should examine the relationship between the two provisions in light of the manner in which Brazil has characterised its claims.

7. The Panel in India – Autos found that “there may be circumstances in which specific measures may have a range of effects”.\(^14\) The Panel went on to say that “[i]n appropriate circumstances [specific measures] may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4”.\(^15\)

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\(^10\) Article 4.2, Agreement on Agriculture.
\(^11\) Footnote 1 to Article 4.2, Agreement on Agriculture.
\(^12\) Panel Reports, Korea – Various Measures on Beef, para. 762 and India – Quantitative Restrictions, paras. 5.238-5.242.
\(^13\) Indonesia’s first written submission, paras. 81-89.
\(^14\) Panel report, India-Autos, para 7.296.
\(^15\) Ibid.
For a Panel to find that a measure has “different effects” (i.e. definitive effect on importation, and then modifies the conditions of competition once the goods have entered the market), and therefore the measure may be both an internal measure and a border measure, will turn on the facts in dispute, and the scope of the measure under challenge. In Brazil – Retreaded Tyres, the Panel noted that “what is important in considering whether a measure falls within the types of measures covered by Art. XI:1 is the nature of the measure”. In Australia’s view, the Panel should examine whether a measure can be assessed as a border measure and internal measure simultaneously in light of the manner in which Brazil has characterised its claims.

8. Australia notes that regulations that give effect to the measures at issue in this dispute have been frequently replaced. This has created continuing uncertainty and lack of transparency, without effecting any material change. In order to "secure a positive solution to [a] dispute" it is important that the Panel make rulings and recommendations on the measures at issue, irrespective of any changes to the regulations that Indonesia may have made, which do not actually effect any material change. In this regard, the Panel’s characterisation of the measure will be important.

9. In its first written submission, Indonesia asserts that regardless of whether its measures are found to be WTO-inconsistent under various agreements, the measures are nevertheless justified under Article XX of the GATT 1994. 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. Indonesia provides no convincing 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.

CONCLUSION

10. In conclusion, Australia considers that Indonesia’s prohibitions and restrictions on imports of animal products are clearly inconsistent with Indonesia’s WTO obligations under the GATT 1994, the Agreement on Agriculture and the Agreement on Import Licensing Procedures. In respect of the GATT 1994, Australia further considers that these measures cannot be justified under any of the exceptions in Article XX of the GATT 1994. Australia is further concerned that the measures at issue have been frequently amended to cause further uncertainty for importers and exporters, in order to achieve Indonesia’s broader policy of self-sufficiency.

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16 Panel report, Brazil – Retreaded Tyres, para 7.372.
17 Brazil's first written submission, paras. 57-58.
18 Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).