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

Third Party Oral Statement of Australia

14 July 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 chicken meat and chicken products.

2. In this third party oral statement, Australia will firstly briefly summarise our views regarding Indonesia’s import licensing regimes. Secondly, we will comment on the interpretation of Article XI:1 of the GATT 1994, Article III:4 of the GATT 1994, and Article 4.2 of the Agreement on Agriculture. Lastly, we will also comment on the interpretation of, and relationship between, recent changes to various Indonesian regulations, further to our views already provided on Indonesia’s first written submission. Australia notes that we also provided views on the inconsistency of Indonesia’s measures with Article 3.2 of the Agreement on Import Licensing Procedures in our written submission.

3. As a preliminary point, Australia notes that there is substantial overlap between the measures at issue in this dispute and those challenged by New Zealand and the United States with respect to Indonesia’s import licensing regimes in an ongoing dispute, Indonesia – Importation of Horticultural Products, Animals, and Animal Products (DS477/DS478), to which Australia is also a third party. As demonstrated in that dispute, Indonesia’s measures are clearly inconsistent with its obligations under the GATT 1994, the Agreement on Agriculture and the Import Licensing Agreement.

AUSTRALIA’S VIEWS ON INDONESIA’S IMPORT LICENCING REGIMES

4. Under various Indonesian laws identified by Brazil,1 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 products2; and

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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
(f) strict enforcement of halal labelling requirements\(^7\) when these same requirements are rarely enforced with regard to equivalent domestic products.

5. Australia considers that these measures constitute prohibitions and restrictions on importation inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

**INCONSISTENCY OF INDONESIAN MEASURES WITH WTO OBLIGATIONS**

6. Indonesia’s laws prohibit imports of food and agricultural products when domestic production is deemed sufficient. Indonesia’s measures also include outright prohibitions on imports of certain animal products through Indonesia’s positive list of permissible imports. These bans on imports are clearly “prohibitions” on the import of a product within the meaning of Article XI:1, defined by the Appellate Body as a “legal ban on the trade or importation of a specified commodity”,\(^8\) and therefore inconsistent with the requirements of Article XI:1.

7. Indonesia’s import restrictions include the imposition of numerical limits on imports.\(^9\) Import licences specify the quantity of each animal product that can be imported for a given import period, and new permits cannot be sought during that period, effectively establishing a fixed numerical limit, or quota, for that import period. These numerical limits clearly act as a limiting condition on imports and are “restrictions” contrary to Article XI:1.

8. It has also been held that “restrictions” under Article XI:1 of the GATT 1994 includes measures which affect the “competitive situation”\(^10\) of importers, and uncertainty which “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”.\(^11\) Many of Indonesia’s measures – such as rules limiting use and sale, limited licence validity periods and application windows, fixed licence terms, and restrictions on the transportation of imported animal products are, therefore, also “restrictions” inconsistent with Article XI:1.

9. We consider that rules preventing the sale of imported animal products in modern and traditional markets, and the enforcement of halal labelling requirements only on imported animal products, accord less favourable treatment to the sale of imported products than to like domestic products, contrary to Article III:4.

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\(^{6}\) Brazil’s first written submission, paras 214-217

\(^{7}\) Brazil’s first written submission, paras. 136-139.

\(^{8}\) Appellate Body Reports, *China – Raw Materials*, para. 319 and *Argentina – Import Measures*, para. 5.217.

\(^{9}\) The panel in *India – Autos* stated that a breach of Article XI “need not be a blanket prohibition or a precise numerical limit”, indicating that a precise numerical limit is clearly inconsistent with Article XI. (Panel Report, *India – Autos*, para. 7.270.)

\(^{10}\) Panel Report, *Colombia – Ports of Entry*, para. 7.240.

10. Australia also considers 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”\(^\text{12}\) 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”\(^\text{13}\) 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.

**INDONESIA’S CLAIMS REGARDING ITS MEASURES**

11. 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 agreements and are inconsistent with the findings of previous panels and Appellate Body reports\(^\text{14}\).

12. Further to our written submission, Australia has examined Ministry of Trade (MoT) Regulation 37/2016. In its first written submission, Indonesia asserted that the new MoT Regulation 37/2016 “has removed the positive list requirement”\(^\text{15}\). However, it is not clear to Australia that 37/2016 does in fact remove the positive list requirements of MoA 58/2015 and MoT 05/2016. MoT 37/2016 states that products that are not listed must still obtain both an MoT Import Approval and an MoA Import Recommendation.\(^\text{16}\) However, unlike listed products, in which the process for obtaining MoT Import Approvals and MoA Import Recommendations is set out in MoT 5/2016 and MoA 58/2015 respectively, it is not clear to Australia that there is a process by which MoT Import Approvals and MoA Import Recommendations for unlisted products can be obtained. We look forward to Indonesia providing clarification on this issue and how the new regulation will work in practice.

13. Australia notes that regulations that give effect to the measures at issue in this dispute (and in DS477/DS478) have been frequently replaced. This has created continuing uncertainty and lack of transparency, without effecting any material change.\(^\text{17}\)

14. Under DSU Article 6.2, the “matter” to be examined by the DSB, and with respect to which the DSB establishes the panel to make findings to assist the DSB, consists of

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\(^{12}\) Article 4.2, Agreement on Agriculture.

\(^{13}\) Footnote 1 to Article 4.2, Agreement on Agriculture.


\(^{15}\) Indonesia’s first written submission, para 228.

\(^{16}\) Indonesia’s first written submission, para. 224 citing Article 29A, MOT 37/2016 stating "Animals and Animal Products which are not included in the Appendix of this Ministerial Regulation can be imported only after acquiring Import Approval from the Import Director by attaching Recommendation as referred to in Article 10 paragraph (2) letter e or letter f".

\(^{17}\) Brazil’s first written submission, paras. 57-58.
“the specific measures at issue”\textsuperscript{18}, as they existed at the time of the Panel’s establishment, that are properly within the Panel’s terms of reference and on which the Panel should make findings\textsuperscript{19}.

15. Australia considers that in order to "secure a positive solution to [a] dispute"\textsuperscript{20} 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.

CONCLUSION

16. In conclusion, Australia considers that Indonesia’s prohibitions and restrictions on imports of animal products are clearly inconsistent with Indonesia’s WTO obligations, including under Articles III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. These measures are frequently amended to cause further uncertainty for importers and exporters, in order to achieve Indonesia’s broader policy of self-sufficiency. Australia does not consider that these measures can be justified under any of the exceptions in Article XX of the GATT 1994.

17. 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.

\textsuperscript{18} See US – Carbon Steel (AB), para. 125; Guatemala – Cement I (AB), para. 72.
\textsuperscript{19} EC – Chicken Cuts (AB), para. 156; EC – Selected Customs Matters (AB), paras. 187 and 259; China – Raw Materials (AB), para. 264; EC – Approval and Marketing of Biotech Products, para. 7.456.
\textsuperscript{20} Article 3.7 of the DSU.