



**INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT
AND CHICKEN PRODUCTS**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY BRAZIL

REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 13 June 2019, from the delegation of Brazil to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

1. My authorities have instructed me to request the establishment of a panel pursuant to Articles 6 and 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 19 of the Agreement on Agriculture, and Article 11 of the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"), with respect to the failure of Indonesia to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this dispute.

I. Background

2. On 22 November 2017, the DSB adopted its recommendations and rulings in *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products* (DS484).¹ The DSB found that the measures at issue are inconsistent with Indonesia's obligations under Articles III:4 and XI of the GATT 1994 and Article 8 and Annex C(1)(a) of the SPS Agreement. The DSB recommendations and rulings included the following findings:

Positive List Requirement

- the positive list requirement as enacted through Ministry of Agriculture Regulation No. 58/2015 ("MoA 58/2015") and Ministry of Trade Regulation No. 05/2016 ("MoT 05/2016") is inconsistent with Article XI:1 of the GATT 1994;²
- the positive list requirement as enacted through MoA 58/2015 and MoT 05/2016 is not justified under Article XX(d) of the GATT 1994;³
- the positive list requirement has not ceased to exist by virtue of the relevant provisions in Ministry of Agriculture Regulation No. 34/2016 ("MoA 34/2016") and Ministry of Trade Regulation No. 59/2016 ("MoT 59/2016");⁴ and
- since the positive list requirement, as enacted through MoA 34/2016 and MoT 59/2016, continues to apply in the same manner as enacted through MoA 58/2015 and MoT 05/2016, the findings on Articles XI and XX(d) of the GATT 1994, in respect of the measure as enacted

¹ WT/DSB/M/404, para. 4.7; WT/DS484/12.

² Original Panel Report, paras. 7.118 and 8.1(b).

³ Original Panel Report, paras. 7.158 and 8.1(b).

⁴ Original Panel Report, paras. 7.167 and 8.1(b).

through MoA 58/2015 and MoT 05/2016, also apply to this measure as enacted through MoA 34/2016, and MoT 59/2016.⁵

Intended Use Requirement

- the intended use requirement, as enacted through the relevant provisions in MoA 58/2015, is inconsistent with Article XI:1 of the GATT 1994 and is not justified under Article XX(b) or Article XX(d) of the GATT 1994;⁶
- the intended use requirement has not ceased to exist by virtue of the amendments made through the relevant provisions in MoA 34/2016;⁷ and
- in respect of the intended use requirement as enacted through the relevant provisions in MoA 34/2016,
 - Article III:4 of the GATT 1994 is applicable because there is an equivalent measure applied to like domestic products;⁸
 - the intended use requirement with respect to its enforcement provisions is inconsistent with Article III:4 of the GATT 1994;⁹ and
 - the intended use requirement with respect to its enforcement provisions is not justified under the general exceptions in Article XX(b) or Article XX(d) of the GATT 1994.¹⁰

Import Licensing Procedures

- the application windows, the validity periods and the fixed licence terms, as enacted through MoA 58/2015 and MoT 05/2016, are inconsistent with Article XI:1 of the GATT 1994;¹¹
- the application windows, the validity periods and the fixed licence terms, as enacted through MoA 58/2015 and MoT 05/2016, are not justified under Article XX(d) of the GATT 1994;¹² and,
- because of the almost identical language in the relevant provisions governing the fixed licence terms, the Panel's findings on Article XI and XX(d) of the GATT 1994, in respect of this measure as enacted through MoA 58/2015 and MoT 05/2016, also apply to this measure as enacted through MoA 34/2016 and MoT 59/2016.¹³

Undue Delay in the Approval of the Veterinary Health Certificate

- Indonesia has caused an undue delay in the approval of the veterinary health certificate for the importation of chicken meat and chicken products from Brazil inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.¹⁴

3. In light of the above findings, the DSB recommended that Indonesia bring its measures into conformity with its obligations under these agreements.

4. On 15 March 2018, Brazil and Indonesia informed the DSB that they had agreed that the reasonable period of time ("RPT") for Indonesia to implement the DSB's recommendations and

⁵ Original Panel Report, paras. 7.170 and 8.1(b).

⁶ Original Panel Report, paras. 7.337 and 8.1(c).

⁷ Original Panel Report, paras. 7.277 and 8.1(c).

⁸ Original Panel Report, paras. 7.296 and 8.1(c).

⁹ Original Panel Report, paras. 7.331 and 8.1(c).

¹⁰ Original Panel Report, paras. 7.335 and 8.1(c).

¹¹ Original Panel Report, paras. 7.383, 7.400 and 8.1(d).

¹² Original Panel Report, paras. 7.428 and 8.1(d).

¹³ Original Panel Report, paras. 7.449 and 8.1(d).

¹⁴ Original Panel Report, paras. 7.535 and 8.1(e).

rulings would be eight months from the date of adoption of the Panel Report, expiring on 22 July 2018.¹⁵

5. On 27 July 2018, Brazil and Indonesia informed the DSB that the two parties concluded Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding ("Agreed Procedures").¹⁶ Paragraph 1 of the Agreed Procedures provides that "[i]f Brazil deems it appropriate to invoke Article 21.5 of the DSU, Brazil may at any time request the establishment of a compliance panel pursuant to that Article." It further provides that "Brazil will not need to hold previous consultations with Indonesia before requesting the establishment of the panel". Brazil and Indonesia did not hold consultations before the date of this request.

II. Measures at Issue

6. In the paragraphs that follow, Brazil identifies the measures at issue for the purposes of this request.

Positive List Requirement

7. The positive list requirement concerns Indonesian regulations governing the importation of meat, which prescribe the type of carcass for which an importer may obtain a Ministry of Agriculture Import Recommendation and Ministry of Trade Import Approval. Products that are not listed in the relevant appendices of the respective regulations cannot be the subject of either an Import Recommendation or an Import Approval.¹⁷

8. In its status report to the DSB, Indonesia reported having adopted Ministry of Agriculture Regulation No. 23/2018 ("MoA 23/2018"), which entered into force on 24 May 2018. Indonesia also reported having adopted Ministry of Trade Regulation No. 65/2018 ("MoT 65/2018"), which entered into force on 31 May 2018.¹⁸ On 24 April 2019, Indonesia promulgated Ministry of Trade Regulation No. 29/2019 ("MoT 29/2019"). MoT 29/2019 appears to revoke MoT 59/2016 and to additionally revoke the amendments to MoT 59/2016 that had been introduced by Ministry of Trade Regulation No. 13/2018 ("MoT 13/2018"), Ministry of Trade Regulation No. 20/2018 ("MoT 20/2018"), and MoT 65/2018. These measures, however, did not eliminate the positive list requirement.

9. The positive list requirement is still reflected, *inter alia*, in:

- MoA 34/2016, including Articles 6A and 7 thereof;
- MoA 23/2018, including Articles I.2, and I.10 and Annexes I and II thereof; and
- MoT 29/2019, including Articles 9, 10, 11, 12, 13, 17, and 22 and Annexes II, III, and IV.

Intended Use Requirement and its Enforcement Provisions

10. The intended use requirement limits the uses of imported chicken meat and chicken products in the Indonesian market to specific "intended uses" as identified in the relevant Indonesian regulations.¹⁹

11. The enforcement provisions of the intended use requirement applicable with respect to imported products include: stricter sanctions that apply to importers deviating from the limitation on the allowed uses, including, for instance, the importer's suspension; the commitment to certain intended uses (to obtain an MoA Import Recommendation, for instance), which restricts the importer to not selling elsewhere; and the burden and cost arising from having to submit a distribution plan and a weekly distribution report.

¹⁵ WT/DS484/16.

¹⁶ WT/DS484/17.

¹⁷ Original Panel Report, para. 7.103.

¹⁸ WT/DS484/18/Add.4.

¹⁹ Original Panel Report, para. 7.176.

12. In its status report to the DSB, Indonesia reported having adopted MoA 23/2018 and MoT 65/2018.²⁰ As discussed above, on 24 April 2019, Indonesia promulgated MoT 29/2019, which appears to revoke MoT 59/2016 and to additionally revoke the amendments to MoT 59/2016 that had been introduced by MoT 13/2018, MoT 20/2018, and MoT 65/2018. These measures, however, did not eliminate the intended use requirement or its enforcement provisions.

The intended use requirement and its enforcement provisions are still reflected, *inter alia*, in:

- MoA 23/2018, including Articles I.9, I.10, and I.11 thereof;
- MoA 34/2016, including in Articles 4, 22, 28, 31, 32, and 38 thereof; and
- MoT 29/2019, including in Articles 22, 25, and 26 thereof.

Import Licensing Procedures:

13. Indonesia's import licensing procedures include fixed licence terms, which limit the ability of importers to modify an MoA Import Recommendation and an MoT Import Approval after their issuance.

The fixed licence terms are still reflected, *inter alia*, in:

- MoA 23/2018, including Articles I.9 and I.11 thereof;
- MoA 34/2016, including Articles 22(1)(l), 32(2) and 38 thereof; and
- MoT 29/2019, including Articles 16, 17, 18, and 31 thereof.

Undue Delay in Approval Procedures

14. Pursuant to Indonesia's laws and regulations, the approval of the veterinary health certificate is part of the country of origin approval procedure which, in turn, is bundled with a business unit approval procedure.²¹ The Panel found that Brazil requested approval of the veterinary health certificate for the importation of chicken meat and chicken products in 2009²² and that, in 2012, at least one Brazilian enterprise, interested in exporting chicken meat and chicken products to Indonesia, submitted the relevant SPS related information necessary to obtain business unit approval to the Indonesian authorities.²³ The Panel further found that the only information which was outstanding for the purposes of approval of the veterinary health certificate related to halal assurances, which the Panel found is not SPS related.²⁴ On that basis, the Panel concluded that Indonesia caused an undue delay in the approval of the veterinary health certificate inconsistent with Article 8 and Annex C (1)(a) of the SPS Agreement.²⁵

15. In its status report to the DSB, Indonesia reported that MoA 23/2018 stipulates that certification processes for veterinary health and halal are conducted separately and that, as a consequence, halal certification is no longer a prerequisite for veterinary health certification.

16. Indonesia, however, continues to unduly delay undertaking and completing the approval procedures of the veterinary health certificate. At this date, Brazil's application for a veterinary health certificate for the importation of chicken meat and chicken products remains at the first stage of Indonesia's approval process ("desk review"), the same stage where it has been for almost 10 years now. Indonesia has therefore failed to undertake and complete the approval procedures without undue delay.

²⁰ WT/DS484/18/Add.4.

²¹ Original Panel Report, paras. 7.501 and 7.518.

²² Original Panel Report, para. 7.504.

²³ Original Panel Report, para. 7.506.

²⁴ Original Panel Report, para. 7.527.

²⁵ Original Panel Report, para. 7.535.

Subsequent Measures

17. This request for the establishment of a panel also concerns any amendments or extensions to the measures identified above, any replacement measures, and any implementing measures, as well as any subsequent closely connected measures that are adopted by Indonesia.

III. Legal Bases

18. Brazil considers that Indonesia has failed to bring its measures into conformity with the covered agreements. The measures described in section II above fail to bring Indonesia into compliance because, *inter alia*:

- The positive list requirement continues to be inconsistent with Article XI:1 of the GATT 1994 insofar as it constitutes a prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, instituted or maintained by Indonesia on the importation of products of the territory of other Members;
- The positive list requirement is inconsistent with Article 4.2 of the Agreement on Agriculture and footnote 1 thereto insofar as it constitutes a measure of the kind which has been required to be converted into ordinary customs duties and which Indonesia is prohibited from maintaining, resorting to, or reverting to;
- The intended use requirement and its enforcement provisions continue to be inconsistent with Article III:4 of the GATT 1994 insofar as they accord products of the territories of other Members imported into the territory of Indonesia treatment less favourable than that accorded to like products of Indonesian origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use;
- The intended use requirement and its enforcement provisions are inconsistent with Article XI:1 of the GATT 1994 insofar as they constitute a prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, instituted or maintained by Indonesia on the importation of products of the territory of other Members;
- The fixed licence terms are inconsistent with Article XI:1 of the GATT 1994 insofar as they constitute a prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, instituted or maintained by Indonesia on the importation of products of the territory of other Members; and
- Indonesia's failure to undertake and complete the approval procedures for the veterinary health certificate continues to be inconsistent with Annex C(1)(a) and Article 8 of the SPS Agreement insofar as Indonesian authorities have failed to ensure that such procedures are undertaken and completed without undue delay.

19. Accordingly, Brazil requests that the DSB establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU, resorting to the original panel if possible.

20. Brazil recalls that, pursuant to paragraph 3 of the Agreed Procedures, Indonesia has agreed to accept the establishment of the panel at the first DSB meeting at which a request for the establishment of an Article 21.5 panel appears on the agenda.

21. Brazil asks that this request be placed on the agenda for the meeting of the DSB to be held on 24 June 2019.
