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## AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER

### COMMUNICATION FROM THE PANEL

The following communication, dated 30 November 2018, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body.

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On 21 September, 3 October and 16 October 2018, Australia, China and the Russian Federation respectively have submitted requests for enhanced third party rights in this proceeding.

On 29 November 2018, the Panel issued the attached decision to the parties and third parties.

Paragraph 1(3) of the Working Procedures for the Panel proceedings in the dispute *Australia – Anti-Dumping Measures on A4 Copy Paper* provides in relevant part that "[t]he Panel will circulate preliminary rulings as appropriate." Therefore, I would be grateful if you could circulate this letter and the attached decision to the DSB.

## DECISION OF THE PANEL CONCERNING THE REQUESTS FOR ENHANCED THIRD PARTY RIGHTS

29 November 2018

1.1. At the organizational meeting held on 21 September 2018, Australia requested rights additional to those accorded in the Dispute Settlement Understanding (DSU) for third parties in this proceeding. At the request of the Panel, Australia confirmed its request in writing on 15 October 2018, referencing the communication by Canada regarding "Additional practices and procedures in the conduct of WTO disputes [on the] participation of third parties in Dispute Settlement" endorsed by several WTO Members, including Australia.<sup>1</sup> Specifically, Australia requested that third parties receive all written submissions and answers of the parties, up to the issuance of the interim report; be present for the entirety of all substantive meetings with the Panel with the appropriate constraints on third-party interventions and subject to the adopted Additional Working Procedures of the Panel Concerning Business Confidential Information; and be provided with an additional opportunity to express views on questions raised during the second substantive meeting.

1.2. On 3 October 2018, China submitted a request for enhanced third party rights including receipt of all written submissions and answers of the parties, up to the issuance of the interim report; the opportunity to submit first and second written submissions and to respond to the Panel's questions in writing; participation during the entirety of all substantive meetings with the Panel and an opportunity to make brief statements at such meetings. China argued that it was subject to the underlying anti-dumping investigation where a "particular market situation" in China's A4 paper market was alleged, with regard to which the Australian investigating authorities made a negative finding. China further argued that it exports a significant amount of the subject product to Australia. For those reasons, China considered that it would be affected by the outcome of this dispute in a manner that is markedly different from its impact on other Members. China further stressed that the dispute raises novel issues of systemic importance and, therefore, additional assistance from third parties would be helpful to the Panel.

1.3. The Panel gave an opportunity to third parties to comment on Australia's and China's requests, and a subsequent opportunity to the parties to provide comments. On 16 October 2018, Canada, the European Union, Japan, Korea, the Russian Federation, and the United States submitted comments.

1.4. In its comments, the Russian Federation requested additional third party rights similar to those indicated in China's request. The Russian Federation noted that it has a special interest in the outcome of the dispute since it challenges the provisions of the EU legislation regarding the "particular market situation" in another ongoing dispute, *EU – Cost Adjustment Methodologies II (Russia)* (DS494). The Russian Federation additionally pointed out that it has a substantial legal and significant economic interest in this dispute: the Australian investigating authorities alleged the existence of a "particular market situation" in the Russian market in previous investigations and that this dispute may affect the future practice of the Australian investigating authorities in this regard.

1.5. Indonesia objected to the requests for additional third party rights arguing that the additional participatory rights requested went beyond current accepted practice and would impose an additional burden and obligation on Indonesia in this dispute to which it does not consent. Indonesia further argued that its claim in this dispute is brought on an "as applied" basis to resolve a dispute between Indonesia and Australia arising from Australia's action in a single anti-dumping case.

1.6. Australia supported China's request for enhanced third party rights, except for the opportunity to submit second written submissions and respond to questions posed by the Panel to the parties.

1.7. The rights specified in Article 10 and paragraph 6 of Appendix 3 of the DSU guarantee third-party participation in panel proceedings. It is well established that panels have discretion to grant additional participatory rights, subject to the requirement of due process and in a manner consistent with the DSU. We recall that, in approving the granting of additional third party rights in *EC – Hormones*, the Appellate Body stated "we believe that this decision falls within the sound

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<sup>1</sup> Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes, Addendum: additional practices and procedures in the conduct of WTO disputes, participation of third parties in Dispute Settlement, JOB/DSB/1/Add.4.

discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law."<sup>2</sup> In approving the denial of additional third party rights in *US – 1916 Act*, the Appellate Body similarly stated "[a] panel's decision whether to grant 'enhanced' participatory rights to third parties is thus a matter that falls within the discretionary authority of that panel. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process."<sup>3</sup>

1.8. The Panel notes that in past cases additional third party rights have been granted over the objections of a party only in exceptional circumstances such as parallel proceedings involving the same measures<sup>4</sup>, where challenged measures had a significant economic effect on third parties<sup>5</sup>, or where certain third parties maintained similar measures that could be affected by the outcome of the case.<sup>6</sup>

1.9. The Panel has carefully considered the requests of Australia, China, and the Russian Federation, as well as the related comments of all the third parties and the respective positions of the parties. In the Panel's view, taking into account the balance between participatory rights of the disputing parties and third parties provided for in the DSU, the justifications relied upon in the requests of Australia, China, and the Russian Federation do not present compelling circumstances that would warrant granting additional participatory rights to third parties in this dispute over the objection of a disputing party.

1.10. None of the parties or third parties have alleged the existence of parallel proceedings involving the same measures as the present dispute or indicated that they maintain measures similar to the challenged one that could be affected by the outcome of the dispute. China, the Russian Federation, and Australia have equally not demonstrated the existence of significant economic effects of the contested measures on third parties or presented other similarly compelling circumstances that would suggest that granting additional third party rights is warranted.

1.11. Regarding China's argument that it was subject to the underlying anti-dumping investigation where the existence of a "particular market situation" was alleged, the Panel observes that the relevant aspects of Australia's measure imposing anti-dumping duties contested in this proceeding relate to dumping by Indonesian exporters and do not concern dumping by Chinese exporters. The contested measures therefore are not applicable to imports from China and therefore do not have the type of significant economic effect on China that has underpinned prior grants of additional third party rights. Moreover, in regard to existence of measures maintained by Australia that do impact imports of A4 copy paper from China, it is noteworthy that such measures are dissimilar to the challenged measures in this dispute insofar as the investigating authority did *not* find a "particular market situation" to exist in China. We recall additionally China's argument that it exports significant amounts of A4 paper to Australia. Since China's exports are not affected by the contested aspect of the measure, the existence of those exports is, in our view, not a sufficient reason for the granting of additional participatory rights.

1.12. China further points out that Indonesia's panel request raises "issues of novelty" such as "the particular market situation" and that such issues have systemic implications in the anti-dumping investigations by the Members, meaning that additional assistance from third parties would be helpful to the Panel's examination of the case. We note that the WTO panels are often called upon to interpret novel legal issues with implications for the WTO Membership and this consideration is not unique to the present dispute. We note as well that the DSU contains a number of options for third parties to communicate their views during the proceeding. As far as enhanced third party rights are concerned, however, an interest in the interpretation of the relevant provisions of the covered agreements does not distinguish China from any other third party or any other WTO Member. In this vein, a number of panels have concluded that significant legal or systemic interests are not a

<sup>2</sup> Appellate Body Report, *EC – Hormones*, para. 154.

<sup>3</sup> Appellate Body Report, *US – 1916 Act*, para. 150.

<sup>4</sup> Panel Report, *EC – Hormones (Canada)*, paras. 8.14-8.20; Decisions by the Arbitrators, *EC – Hormones (US)* (Article 22.6 – EC), para. 7; and *EC – Hormones (Canada)* (Article 22.6 – EC), para. 7.

<sup>5</sup> Panel Reports, *EC – Bananas III (Ecuador)*, paras. 7.6-7.9; *EC – Bananas III (Guatemala and Honduras)*, paras. 7.6-7.9; *EC – Bananas III (Mexico)*, paras. 7.6-7.9; *EC – Bananas III (US)*, paras. 7.6-7.9; *EC – Tariff Preferences*, Annex A, para. 7; and *EU – Poultry Meat (China)*, paras. 7.40-7.42.

<sup>6</sup> Panel Report, *EC – Tariff Preferences*, Annex A, para. 7.

sufficient reason for granting of additional third party rights.<sup>7</sup> We therefore consider that the above argument of China, in light of the past panel decisions, does not warrant the granting of enhanced third party rights.

1.13. The Russian Federation, in its request, makes an essentially similar argument relating to the systemic implications of this dispute for the WTO Members. For the reasons just discussed, we do not consider this to be a compelling argument on the basis of past practice. Additionally, the Russian Federation argues that it has a special interest in the outcome of the present dispute since it contests the provisions of the EU legislation regarding the "particular market situation" in another ongoing dispute, *EU – Cost Adjustment Methodologies II (Russia)* (DS494). Faced with like arguments, two recent panels have found that a similarity of legal issues in different disputes does not justify the granting of enhanced third party rights.<sup>8</sup> In fact, even where parallel proceedings involved the same contested measures and different panels composed by the same panel members, a number of panels have not considered this to be a sufficient basis for the granting of enhanced third party rights.<sup>9</sup> The Panel therefore finds that the overlap between legal issues in the two disputes does not warrant the granting of enhanced third party rights.

1.14. The Russian Federation has further submitted that, in other investigations, the Australian investigating authorities have alleged the existence of a "particular market situation" in relation to the Russian market. The Russian Federation argues that it has a "substantial legal and significant economic interest in this dispute" since the outcome of this dispute may affect the future practice of Australia in this regard. We do not see how this differentiates the Russian Federation from any other WTO Member or other third parties having a "substantial interest" in the case pursuant to Article 10.2 of the DSU: exports of any WTO Member in the future could be subject to an investigation by the Australian authorities involving the allegation of a "particular market situation". Furthermore, as Indonesia pointed out in its comments, its challenge is brought on an "as applied" basis and concerns a specific investigation. Accordingly, the Panel finds this claimed interest of the Russian Federation to be too attenuated to compel the granting of additional third party rights in this dispute.

1.15. Finally, with regard to Australia's request, we note that, apart from the reference to the policy document relating to third party participation and endorsed by some WTO Members as framework for *voluntary* expansion of third party participatory rights, Australia has not provided any specific reasons why the enhanced third party rights should be granted in this proceeding. For the reasons elaborated above, we do not consider Australia's request to warrant the granting of enhanced third party rights over the objection of Indonesia.

1.16. The Panel therefore declines the requests of Australia, China, and the Russian Federation for enhanced third party rights in this proceeding.

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<sup>7</sup> Panel Reports, *Argentina – Import Measures*, para. 1.24; *China – Rare Earths*, para. 7.9; *US – Countervailing Measures (China)*, para. 1.13; and *India – Solar Cells*, para. 7.35.

<sup>8</sup> Panel Reports, *EU – Biodiesel (Indonesia)*, Annex D-2, p. D-4; *US – Washing Machines*, para. 1.12.

<sup>9</sup> Panel Reports, *US – 1916 Act (EC)*, paras. 6.32-6.36; *US – 1916 Act (Japan)*, paras. 6.32-6.35; *US – Shrimp (Thailand)*, paras 7.1-7.4; and *US – Customs Bond Directive*, paras 7.1-7.4.