



14 May 2019

(19-2934)

Page: 1/3

Original: English

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

### COMMUNICATION FROM THE PANEL

The following communication, dated 13 May 2019, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body.

---

On 19 December 2018, at the third party session, the European Union made a request for the third parties to be present at the second substantive meeting of the Panel with the parties, later submitted in writing on 11 January 2019.

On 24 April 2019, 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.

**AUSTRALIA – ANTI-DUMPING MEASURES ON A4 COPY PAPER (DS529)****DECISION OF THE PANEL CONCERNING THE EUROPEAN UNION'S REQUEST FOR THIRD PARTIES TO OBSERVE THE SECOND SUBSTANTIVE MEETING OF THE PANEL***24 April 2019*

1.1. In the course of its oral statement at the third party session of the current proceeding, which took place on 19 December 2018, the European Union made a request that the third parties be allowed to observe the second substantive meeting of the Panel with the parties. On 20 December 2018, the Panel asked the European Union to submit its request in writing and "indicate what circumstances before the Panel warrant granting additional participatory rights to the third parties at this stage of the proceeding" as well as explain "how the circumstances before the Panel are different from those already considered in paragraphs 1.7-1.10 of the [Panel's] Decision concerning the requests for enhanced third party rights issued on 29 November 2018".<sup>1</sup>

1.2. In its written communication of 11 January 2019, the European Union requests the Panel to allow the presence of the third parties in the room as observers during the second substantive meeting with the parties. In case the Panel decides to pose additional questions to the third parties, the European Union contends that the third parties would be better placed to respond to any such questions having observed the exchange of arguments between the parties at the second meeting. Regarding the circumstances that have changed from those considered in the Panel's Decision of 29 November 2018, the European Union argues that the present request is limited in scope and places no additional burden on the parties and that the Panel now has the benefit of having witnessed the third party participation during the first meeting which demonstrated the breadth and depth of interest of the third parties in the issues involved and the interactive nature of their interventions, and has helped to assist the Panel in its deliberations.

1.3. In its communication of 25 January 2019, Indonesia has objected to the European Union's request. Indonesia points out that, as indicated in paragraph 1.8 of the Panel's Decision of 29 November 2018, in past cases, additional third party rights were granted over the objections of a party "only in exceptional circumstances". According to Indonesia, since the request does not demonstrate a change in the circumstances already considered by the Panel, it should be rejected. In Indonesia's view, the depth and breadth of third parties' interest in the dispute do not justify revisiting the Panel's Decision Concerning the Requests for Enhanced Third Party Rights.

1.4. In its communication of 25 January 2019, Australia supports the European Union's request and points out the active participation of third parties in the third party session. Relying on the Panel's Working Procedures which provide that the Panel may pose questions to third parties at any time, Australia argues that, should the Panel wish to ask additional questions following the second substantive meeting, the third parties would be better informed to respond to such questions having observed that meeting. Australia considers that the presence of the third parties in the room does not place any additional burden on the parties.

1.5. None of the other third parties have provided any specific comments on the substance of the request. China has indicated that if the Panel were to grant any additional rights to the European Union, China requests to be granted the same additional third party rights.

1.6. We note first that the European Union's request seeks third party presence at the second substantive meeting of the Panel with the parties – a right which is not provided for in the DSU, and which the Panel therefore regards as an additional or "enhanced" right for third parties. We recall that, according to the Appellate Body, "[a] panel's decision whether to grant 'enhanced' participatory rights to third parties ... falls within the discretionary authority of that panel. Such discretionary

---

<sup>1</sup> Panel communication to the parties (20 December 2018).

authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process."<sup>2</sup>

1.7. At the early stage of this proceeding, the Panel considered and declined requests for enhanced third party rights in this dispute. In its Decision of 29 November 2018, the Panel set out its understanding of panel practices on the issue of enhanced third party rights. Noting Indonesia's objection to the requests for enhanced third party rights, the Panel observed that:

[I]n 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, where challenged measures had a significant economic effect on third parties, or where certain third parties maintained similar measures that could be affected by the outcome of the case.<sup>3</sup>

1.8. In denying the requests, the Panel further noted that:

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.<sup>4</sup>

1.9. The Panel notes that the present request for enhanced third party rights is more limited in scope than the prior requests addressed by the Panel in its Decision of 29 November 2018, and the Panel does not understand this to be a request to reconsider that decision. While the Panel is mindful of the limited scope of the present request, granting additional rights to third parties beyond those provided for in the DSU over the objection of a party nevertheless requires an adequate justification. The Panel has taken into account the arguments presented by the European Union, Indonesia, and Australia, and has considered the full record of the dispute up to this point. The Panel also observes that in accordance with Article 10.2 of the DSU, third parties in any dispute are understood to have a "substantial interest" in the case and that the Panel's ability to ask questions of third parties at any time is a standard aspect of panel working procedures. In light of these considerations, the Panel does not find sufficient justification to distinguish this dispute from others in which the interests of third parties are fully taken into account without affording enhanced participatory rights.

1.10. For the above reasons, the Panel declines the European Union's request for third parties to be present as observers at the second substantive meeting with the parties.

---

<sup>2</sup> Appellate Body Report, *US – 1916 Act*, para. 150.

<sup>3</sup> Decision of the Panel concerning the requests for enhanced third party rights (29 November 2018), para. 1.8. (referring to 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 – Hormones (Canada)*, paras. 8.14-8.20; *EC – Tariff Preferences*, Annex A, para. 7; and *EU – Poultry Meat (China)*, paras. 7.40-7.42; Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 7; and *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 7). (fns omitted)

<sup>4</sup> Decision of the Panel concerning the requests for enhanced third party rights (29 November 2018), para. 1.8.